## APPELLATE CIVIL.

*Before Sir Stanley Batchelor, Kt., Ag. Chief Justice and Mr. Justice Shah.*

1916.
*August* 30.

ROSE D'SOUZA WIDOW OF THE LATE PASKOL D'SOUZA AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS *v.* JOSEPH JOAQUIM SERPES AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

*Will, construction of—Absolute words and limiting words occurring in one and the same sentence—Intention of the testator.*

A testator made the following provision in his will: "I appoint by this testament my brother Joaquim Serpes as my only and universal heir of all the immoveable property which I possess, and which may hereafter in any manner belong to me, with the strict obligation to him not to sell, exchange, or hypothecate it, but only to enjoy the usufruct thereof, and at his death to pass over the same to his male children preserving the same as a patrimony of the house." The question being raised whether upon a proper construction of the will Joaquim was merely a life tenant or whether he took absolutely,

*Held*, that Joaquim was a mere life tenant.

FIRST appeal against the decision of V. G. Kaduskar, First Class Subordinate Judge of Thana in suit No. 250 of 1914.

The property in suit originally belonged to one Joseph. He left a will appointing his brother Joaquim, father of the plaintiffs and defendant No. 1, as the sole and universal heir. The relevant passage in the will will be found quoted in the judgments of the lower Court and High Court.

Joaquim enjoyed the property as directed by the will and died possessed of the same.

The plaintiffs as the daughters of Joaquim sued to recover their share in the property left by their father.

The defendant No. 1, son of Joaquim, urged that the father had only a life interest in the property under the

* First Appeal No. 226 of 1915.

will and the donee was himself the male child of Joaquim ; that therefore, the plaintiffs can have no share in the property left by the will.

The Subordinate Judge delivered the following judgment :—

"The property belonged to the uncle of the plaintiffs. He died long ago leaving a widow and brother and the daughters of the brother. He left a will behind appointing his brother, the father of the plaintiffs and the defendant No. 1, as the sole heir and universal (S. O.) under his will a certified copy of which from the District Court has been produced in the case with its translation both prepared by the District Court and by the High Court translator. The translations are in the case. They agree with each other except in the translation of the Portuguese expression *filhos mascolinos*. The plaintiffs' counsel showed unwillingness to admit the will, but the record of the District Court (Exhibit 25) clearly shows that there were probate proceedings in the District Court and although the original will is not forthcoming the official translation of the same can best be taken as the true copy of the said will of the deceased uncle of the plaintiffs and the defendant. It was attempted in argument to dispute the original ownership of the deceased to the property but the correspondence that passed between the parties prior to the suit falsifies that attempt. The will also establishes the fact that the property in suit did belong to the deceased. The will is more than 30 years old and the Court is justified in presuming the genuineness of the same. After these points were cleared up in argument as my notes would show counsel on both sides addressed to the Court as to the effect of the will so far as the position of plaintiffs' father was concerned under the will. The learned counsel Mr. Coyaji argued with his usual thoroughness the aspect of the case and urged that the deceased father of the plaintiffs only received a life interest and that the real beneficiary under the will are the male children of the deceased Joaquim. While on the other hand on plaintiffs' behalf it is urged that Joaquim was the direct object of the gift and on this point both sides offered elaborate arguments. They have cited in the course of the arguments a number of authorities to enable the Court to interpret the particular portion of the will.

The integral portion of the will bearing on the disputed point is as follows : I cull the same from the High Court translation put in the case as the more authentic. 'I appoint by this will (testament) my brother Joaquim Serpes as my only and universal heir of all the immoveable property I possess and (which) in whatever manner may (hereafter) belong to me with the strict obligation (for him) not to sell, exchange or hypothecate (the same) but only to enjoy the usufruct (thereof) and at his death to pass over the same to his male children (sons) preserving (the same) as a patrimony of the house.'

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The sole question is to interpret this clause and to find what interest had been conferred on Joaquim, the father of the plaintiffs. Several rulings had been quoted showing how wills involved in those cases were interpreted. Thus after all the whole and sole question to be decided in cases of this kind is to focus your mind on the particular will and determine with reference to the language used the real intention of the testator. The clause referred to describes at the outset his brother as his sole and universal heir. But this is immediately followed by the provision strict and unequivocal that he is not to alienate property under any circumstances but only to enjoy the usufruct of the property and then again to pass it on to his sons as the patrimony of the house. The first clause taking away all power of alienation from the brother allowing him only the usufruct thereof is enough to show that there is no absolute gift to the brother. He is merely given the usufruct of the property. The expression that he should pass it on to his sons at his death appears to me only as an indication as to how the property should devolve at the death of the brother. That expression cannot be urged as indicating that the brother was given any power of disposition. If the brother were the absolute donee, the expression as the patrimony of the house would not have been used. There is nothing in the will extending the limited position conferred on the brother as contained in the above clause and taking a commonsense view of the clause, I am more inclined to find that the brother Joaquim had only a life interest of a very limited nature undescendible to his heirs as such except under the terms of the will. In this view of the will I feel that I may not refer to the several rulings quoted and the sections of the Succession Act though I would have very much wished only if it be for the satisfaction of the parties who had engaged lawyers from Bombay to argue their case.

The absolute gift is intended to be for the male children of the deceased. Joaquim, one of the sons of Joaquim, was born at the time of the will and the gift, therefore, holds goods in favour of *filhos mascolinos*. I would, therefore, find that the plaintiffs being the female children of the deceased Joaquim cannot have any inheritable interest in the property as the daughters of their father."

The plaintiffs appealed to the High Court.

*The Advocate General* with *Soloman Moses* for the appellants.

*Strangman* and *Coyajee* with *K. A. Padhye* for the respondents.

BATCHELOR, Ag. C. J.:—The state of facts in which this appeal is brought is described in the judgment of the lower Court and need not be recapitulated. Only

three points are taken on behalf of the appellants, who are the original plaintiffs, and of these three points only one is, I think, such as to occasion any difficulty.

The first objection raised for the appellants was that probate of the will of Joseph had not been established. But that objection is, in my opinion, disposed of by Exhibit 25, an extract from a vernacular register for the year 1877. That extract shows that application for probate was made to the Court, and that the Court granted what is translated from the vernacular as a "certificate." Seeing that the application was for probate, and that the English word "certificate" is habitually used in the vernacular languages as equivalent to "probate," I have no doubt that the probate of Joseph's will in this case is sufficiently proved.

As to the second point that the property in suit was not identified as the property referred to in the will of Joseph, the answer is that that point cannot be taken now. No issue was raised upon it in the trial Court, and, so far as the record shows, it appears that until the evidence in the case was completed, the defendants had no notice that they would have to meet any such objection.

The third point is, as I have said, more serious and requires more consideration. It turns upon the construction of a passage occurring in the will of Joseph. The question to be determined is whether upon a proper construction of this will Joaquim was merely a life tenant or whether he took absolutely. The relevant passage in the will is in these words:—

"I appoint by this testament my brother Joaquim Serpes as my only and universal heir of all the immoveable property which I possess, and which may hereafter in any manner belong to me, with the strict obligation to him not to sell, exchange, or hypothecate it, but only to enjoy the usufruct thereof, and at his death to pass over the same to his male children, preserving the same as a patrimony of the house."

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It is urged by the learned Advocate General on behalf of the appellants that the earlier words in this passage, constituting Joaquim the only and universal heir, are words of absolute grant, and are not to be cut down by the subsequent words which are merely repugnant to the grant already made. That no doubt is a good argument if the earlier words are words of such power or even of such magic that when once they have been uttered by a testator, it is impossible to look any further for the manifestation of his intentions. But the rule is to have regard to the whole will in order to see what the testator's intentions were, and, in *Hunooman-persaud Panday* v. *Mussumat Babooee Munraj Koonweree*, [1] the Courts in India have been particularly cautioned that in dealing with deeds and contracts of the peoples of India, they are to have regard not so much to the form of expression or the literal sense as to the real meaning of the parties which the transaction discloses. It is of course none the less the fact that the intentions must be gathered from the words used, and cannot be supplied by the Court independently of the words used. Now it appears to me important to notice first of all that, though this will must be interpreted by the principles of English law, it is drawn in the Portuguese language, and clearly without any reference to English legal notions. This is apparent, as I think, on the face of the document, and in one part of it finds expression by the testator himself who says "I beg Her Majesty's Court to cause this my testament to be made valid in the best manner and form that the law requires;" in other words, it seems to me that this Portuguese gentleman, writing in his own language, without any knowlege of the doctrines of English law, expressly invokes the aid of the Court to validate that which, by the language he has used, shall appear to the

[1] (1856) 6 Moo. I. A. 393.

Court to have been his wish and intention. Now reading as a whole the sentence in which the disputed words occur, I have never been able to doubt what the wish and intention of this gentleman were; and seeing that both the apparently absolute words and the limiting words occur in one and the same sentence, I think it would be unreasonable to tie down the testator to the earlier words as if he had never given any further explanation of the intention which at that moment was in his mind. In my opinion he has in this one sentence supplied his own dictionary, and the fairest way in which the whole sentence can be read is to read it as if the words were "I appoint my brother as my only and universal heir of all the immoveable property, and by that I mean that he is not to sell or exchange it, but only to enjoy a life estate." I may observe that the word translated "obligation" represents in the Portuguese the same original Latin word, and it is not, in my opinion, possible to contend that the testator, after having given an absolute estate, was merely adding a prayer or request that the beneficiary should act towards it in a certain manner.

For these reasons, construing this particular will from the language employed in it, and doing my best from that language to ascertain and carry out what appears to me to have been the clear intention of the testator, I am of opinion that the lower Court's view upon this point was right. The appeal, therefore, fails and should be dismissed with costs.

SHAH, J.:—I am of the same opinion.

*Decree confirmed.*

J. G. R.