ORIGINAL CIVIL

Before Mr. Justice Tendolkar.

ALEXIUS JACOB REBELLO, PLAINTIFF *v.* DR. ALFRED CAMILLO REBELLO AND OTHERS, DEFENDANTS.* 1951 *March* 13

Indian Succession Act (XXXIX of 1925), ss. 105, 108—Bequest to a dignitary of the Church—Whether it is a bequest for a religious or charitable use—Applicability of s. 118 of the Indian Succession Act—Meaning of the words "not specifically hereby assigned"—Gift of a particular residue—Lapsed legacy automatically falling in the residue —Interpretation of s. 105 (1) of the Indian Succession Act.

One Francis Anthony Cyril Rebello died at Bandra on November 20, 1934, leaving a will dated December 21, 1923, by which he appointed his cousin Alexius Joseph Rebello as his sole executor and residuary legatee. The said Alexius Joseph Rebello predeceased the testator.

By cl. (*d*) of the will, the testator directed that the property therein mentioned should be handed over and conveyed "to the Bishop of Damaun Dom Sebastiao Jose Pereira or such other dignitary of the Church as for the time being may be occupying the position and performing the duties of the Bishop of Damaun for his own use."

The clause then proceeded to say that the property should be handed over and conveyed to the Bishop "on condition and with the obligations attached thereto that the said Bishop of Damaun or other dignitary aforesaid shall pay a sum of Rs. 60,000, sixty thousand in equal shares" to three named individuals all of whom had predeceased the testator. The clause finally provided that "the said sum of Rs. 60,000 shall be charged upon the said property in the hands of the Bishop of Damaun or other dignitary aforesaid."

Held, that the bequest was not to the individual who occupied the position of the Bishop of Damaun but to a dignitary of the Church; that the Church dignitary occupying the position and performing the duties of the Bishop of Damaun was a minister for religion and the bequest was a bequest for a religious use within the meaning of s. 118 of the Indian Succession Act read with the illustrations.

* O. C. J. Suit No. 2185 of 1946.

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Held, that on a true interpretation of the clause, the bequest to the Bishop of Damaun was not a conditional bequest but one subject to a charge in favour of the three individuals for Rs. 60,000.

Held, further, that under s. 118 it is not necessary that the bequest should be a bequest exclusively for charitable or religious uses. A bequest attracts s. 118 to the extent that it is for religious or charitable uses.

By cl. (*s*) of the said will, the testator gave a legacy which lapsed by reason of the fact that the legatee predeceased the testator.

By cl. (*w*) the testator provided as follows:—

"To convey and assign all my shares and lands in the co-operative societies *not specifically hereby assigned,* to my nephew Alexcus Jacob son of Peter for his own use".

Held, that under s. 105 of the Indian Succession Act where a legacy lapses by reason of the legatee predeceasing the testator, it automatically forms part of the residue of the testator's property; it is not necessary to find any words in the will indicating the testator's intention or desire that it should fall in the residue. If there is a residuary devise and the legatee predeceases the testator, the lapsed legacy automatically falls into the residue unless the will discloses a contrary intention. The existence of a general residuary clause does not by itself show such a contrary intention.

Held, on construction of the will before the Court that the words 'not specifically hereby assigned' were equivalent to the words 'disposed of', which have always been understood in interpretation of wills to mean 'effectively disposed of'.

Held, therefore, that under cl. (*w*) the legatee got only a particular residue of all shares and lands in the Co-operative Societies which had not been effectively disposed of and this residue would include the lapsed legacy under cl. (*s*) of the will in the absence of an intention to the contrary.

De Trafford v. *Tempest*[1]; *Springett* v. *Jenings*[2] *Mason,* In re: *Ogden* v. *Mason*[3]; *Patching* v. *Barnett*[4] and *Champney* v. *Davy,*[5] referred to.

This was an administration suit filed by the plaintiff Alexius Jacob Rebello for the administration of the estate of his

[1] (1856) 21 Beav. 564.
[2] (1871) 6 Ch. App. 333.
[3] [1901] 1 Ch. 619.
[4] (1880) 43 L. T. 50.
[5] (1879) 11 Ch. D. 949.

uncle, Francis Anthony Cyril Rebello claiming certain legacy under his will.

Another cousin of the deceased by name Alexius Joseph Rebello was appointed the sole executor of the will and the sole residuary legatee. The said Alexius Joseph Rebello predeceased the testator on September 3, 1937, the first defendant Dr. Alfred Camillo Rebello, obtained letters of administration with the will annexed to the estate of the deceased Francis Anthony Cyril Rebello from the District Court of Thana.

Defendant No. 25 was D'Jose Da Costa Nunes, archbishop of Goa and Damaun and known as the Patriarch of the East Indies. He claimed that he was the person who was entitled to the legacy given under cl. (*d*) of the will.

M. P. Laud, with *J. M. Thakore,* for the plaintiff.

N. A. Mody, with *K. T. Desai,* for defendant No. 1.

R. L. Dalal, with *N. M. Shah,* for defendant No. 18.

R. M. Kantawalla, with *K. H. Bhabha,* for defendant No. 25.

Dahir G. A. L., for defendant No. 5.

TENDOLKAR J. This is a suit for the administration of the estate of one Francis Anthony Cyril Rebello, who died at Bandra on or about November 20, 1934, leaving a will dated December 21, 1923, by which he appointed his cousin Alexius Josheph Rebello as his sole executor and residuary legatee. The said Alexius Josheph Rebello predeceased the said testator; and on September 3, 1937, defendant No. 1 was granted letters of administration with the will annexed of the estate of the deceased Francis Anthony Cyril Rebello by the District Judge, Thana.

Apart from the question of ascertaining the estate left by the deceased, which is always a matter for the Commissioner of this Court to determine, certain questions of law have been raised before me. One of them relates to the interpretation of cl. (*w*) of the will and another to a legacy under cl. (*d*) of the will to the Bishop of Damaun.

One D. Jose Da Costa Nunes, Archbishop of Goa and Damaun, who is known as the Patriarch of the East Indies, was made a party defendant at his own instance, and he is defendant No. 25. He claims that he is entitled to the legacy given under cl. (*d*) of the will. The other parties to the litigation do not

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admit that defendant No. 25 is the Bishop of Damaun, who is the legatee under cl. (*d*), and put defendant No. 25 to strict proof of that fact. They further allege that in any event the bequest is bad, firstly, because, the will was not registered as required by s. 118 of the Indian Succession Act, and, secondly, because the bequest is subject to an impossible condition and is, therefore, void under s. 126 of the Indian Succession Act.

For the purpose of determining whether either of these two contentions is well founded, it is necessary to ascertain who is the legatee under this sub-clause and what the nature of the bequest to him is. Sub-clause (*d*) directs that the property therein mentioned shall be handed over and conveyed

> "to the Bishop of Damaun Dom Sebastiao Jose Pereira or such other dignitary of the Church as for the time being may be occupying the position and performing the duties of Bishop of Damaun for his own use."

It is, therefore, apparent that the bequest is not to the individual who occupied the position of the Bishop of Damaun but to a dignitary of the Church. Then the clause proceeds to say that the property shall be handed over and conveyed to the Bishop

> "on condition and with the obligation attached thereto that the said Bishop of Damaun or other dignitary aforesaid shall pay a sum of Rs. (60,000) sixty thousand in equal shares"

to three named individuals, all of whom predeceased the testator. The clause then provides for alternative modes of payment and finally it provides

> "the said sum of rupees (60,000) sixty thousand shall be charged upon the said property in the hands of the Bishop of Damaun or other the dignitary aforesaid."

Now, it is well-settled that words expressing a condition may sometimes be treated as words creating a charge on the property bequeathed. See Halsbury, Vol. XXXIV, para. 412, p. 363. In the case of this particular bequest, since a charge is in terms created on the property bequeathed to the Bishop of Damaun, although the bequest is expressed to be on condition of payment of Rs. 60,000, I must hold that upon a true interpretation of the clause the bequest is subject to a charge, in favour of the three individuals mentioned, for Rs. 60,000. The question then is whether this bequest is a bequest which attracts the application of s. 118 of the Succession Act. That section provides that no person, who has a nephew or a niece or any nearer relative, shall bequeath any property to religious

or charitable uses except by a will executed not less than 12 months before his death and deposited within six months from its execution in some place provided by law for the safe custody of wills. The testator in this case had relative mentioned in this section; and if this bequest is to a religious or charitable use, it must fail by reason of the fact that the will was not deposited for safe custody within six months of its execution. The only question, therefore, to consider is whether this is a bequest for a religious or charitable uses.

Now, what is urged by Mr. Bhabha on behalf of defendant No. 25 is that in order that the application of s. 118 should be attracted, the bequest must be exclusively for religious or charitable uses in respect of an entire property. In other words, if a property is bequeathed in part for religious or charitable uses and in part for other uses, according to Mr. Bhabha's contention, the whole of the bequest, including the bequest for religious or charitable uses, is good despite the fact that the will may have been executed less than 12 months prior to the death of the testator and may not have been deposited as required by the section. I find myself entirely unable to accept this contention. There are no words in s. 118 to indicate that the bequest must be the bequest of an entire property exclusively for charitable or religious uses. The plain language of the section, to my mind, is that to the extent to which the bequest is for religious or charitable uses, the application of the section is attracted despite the fact that the bequest may be of a part of property or some interest in such property. Mr. Bhabha's contention is that since the bequest is subject to a charge for Rs. 60,000, as I have held it is, it is not a bequest of the entire property to the Bishop of Damaun and is, therefore, not covered by the section. On the interpretation which I have put upon the section, this contention is untenable. In so far as there is any bequest to religious or charitable uses, to that extent the bequest is bad. It may be that the charge may not be affected by this bequest becoming bad, but I have not to determine that question in the present proceedings, because the persons in whose favour the charge was created died during the lifetime of the testator.

The next question is whether a bequest to a Church dignitary, as I have held this bequest to be, is a bequest to a religious or charitable use. There are appended to s. 118 a number of illustrations of bequests which are void; and one of them is a bequest "for the benefit of ministers of religion." The Church

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dignitary, occupying the position and performing the duties of the Bishop of Damaun, is obviously a minister for religion, and a bequest to him is a bequest for religious use and attracts the provisions of s. 118 of the Succession Act. That being so, the will not having been deposited as required by the said section, the bequest is void. This renders it unnecessary for me to consider whether the bequest is also void by reason of s. 126 of the Succession Act. That section provides that a bequest upon an impossible condition is void. Mr. Bhabha wished to urge that the impossibility of a condition should be determined as on the date of the testator's will and not as of a subsequent date. That contention it is not necessary for me to consider or dispose of, because, my holding that the bequest is not subject to a condition but only creates a charge would, in any event, take it out of the scope of s. 126.

That brings me to the other question of interpretation raised before me. The testator held certain shares in co-operative housing societies and also had lands in such societies. He assigned and conveyed some of these shares and lands to certain individuals by cls. (*m*), (*n*) and (*s*), and then by cl. (*w*) he provided as follows:—

"*To convey* and assign all my shares and lands in the Co-operative Societies not specifically hereby assigned, to my nephew Alexius Jacob son of Peter for his own use."

Now, the legacy under cl. (*s*) of the will lapsed by reason of the fact that the legatee predeceased the testator; and the question that has been raised is whether this legacy, that has lapsed, goes to the nephew Alexius under cl. (*w*) of the will or falls in the general residue, there being, as I have already stated, a general residuary legatee, namely Alexius Joseph Rebello. Of course the said gentleman also predeceased the testator, and if the legacy which had lapsed fell into the general residue, the testator would be held to have died intestate in respect of this property.

Now, s. 105, sub-s. (*1*), of the Succession Act, provides as follows:—

"If the legatee does not survive the testator, the legacy cannot take effect, but shall lapse and form part of the residue of the testator's property unless it appears by the will that the testator intended that it should go to some other person."

This section provides that normally where a legatee predeceases a testator, the legacy lapses and forms part of the residue of the testator's property. This general proposition is

made subject to a contrary intention appearing from the will itself. Therefore, what I have to determine is whether in cl. (*w*) of the will, there is a residuary bequest of all shares and lands in co-operative societies to the nephew Alexius Jacob; and if there is, whether the will discloses any intention that the legacy that has lapsed should not form part of the residue of the testator's property, viz., shares and lands. Now, the question raised is a somewhat ticklish one because the actual words used namely "not specifically hereby assigned" have not come up for interpretation before any Courts in a similar clause either in this country or in England.

A number of English decisions have been cited at the bar; but before I refer to them, it would be appropriate to state that prior to the Wills Act in England, there were great differences between personal estate and real estate; and while words such as a residue or similar words used in connection with personal estate were interpreted as including everything that had not been effectively bequeathed by the testator, when they were used in relation to real estate, there could be no residue, for under the law as then understood every gift of real estate had to be a specific gift. The position, however, was altered by the Wills Act. Section 25 of the Wills Act in terms is very similar to s. 151 of the Indian Succession Act. Keeping in mind this state of the law in England, I will now turn to the cases that have been relied upon before me.

The first of these cases is the case of *De Trafford* v. *Tempest*.[1] The testator left his widow certain chattels and afterwards bequeathed to his son all his household and other furniture etc. (p. 564):—

> "Not hereinbefore otherwise disposed of.....which at the time of his decease might happen to be at, in or about his said capital mansion, messuage or dwelling house at Trafford Park."

The Master of the Rolls held that the testator's wife having died during his lifetime, the son took the chattels that were bequeathed to the wife. The son was held to be a legatee of a particular residue of all the chattels at Trafford Hall not otherwise sufficiently disposed of, the words "disposed of" in the will having been construed as sufficiently disposed of, which is the same thing as effectively disposed of.

The next case relied upon is that of *Springett* v. *Jenings*.[2] A testatrix gave certain lands in the parish of H to A, B and C,

[1] (1856) 21 Beav. 564.

[2] (1871) 6 Ch. App. 333.

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and devised to the plaintiff "the rest of my freehold hereditaments in the parish of H." The bequest in favour of A, B, and C was held to be void as made on a secret trust for charity. It was held that the lands comprised in the bequest to A, B and C did not go to the plaintiff but were undisposed of and went as on intestacy. Sir W. M. James, Lord Justice, held on an interpretation of the words that the gift of the rest of the land in the Parish of H was not a residuary devise but was the devise of specific property in the Parish of H excluding the property bequeathed to A, B and C. Sir George Mellish, Lord Justice, also came to the same conclusion on a question of interpretation of the will. The Lord Justice observed (p. 336):

"It appears to me there are two questions in this case; first, whether, from the language of the testator, you can infer an intention that if the previous devise did not take effect on account of the secret trust, or from any other reason, these lands should pass to the appellant. I am of the opinion that no such intention can be naturally inferred. First of all there is a specific devise of these lands to the *Pipers*, not expressing any trust, but, as has been found, on a secret trust for charitable purposes. Then the testatrix devises to the Appellant 'the rest of my freehold hereditaments situated in the Parish of *Hawkhurst*.' Now, as a matter of construction, it is impossible to infer from those words that she had any intention to pass to the Appellant these particular lands which she had before devised to the *Pipers*. This appears to me to distinguish the case from those which have been cited respecting what is called a particular residue of personal property, for every one of those cases appears to me to have gone upon this, that from the language of the testator it was to be inferred that he intended the particular property, if the gift of it failed, to pass under the bequest of the particular residue of that description of property."

Then the learned Law Lord referred to certain cases and addressed himself to the next question as to whether the lands passed to the appellant under s. 25 of the Wills Act. He observed (p. 338):

"Now, in order that a residuary gift may, under the 25th section of the *Wills Act*, include lapsed and void devises, without the will expressing any intention to that effect, I am of opinion that the devise must be a real residuary devise; that is to say, so worded as to apply to all land that is not otherwise disposed of. When a testator has made a gift of that kind, then the Act, in substance, says it will be presumed from the universality of the gift that, unless he expresses the contrary, he intends it to pass what was specifically devised, if from any cause the specific devise fails; and I must say that the section appears to me to assume that there can be only one residuary devise in the will, for it says, 'shall be included in the residuary devise (if any) contained in such will'. That appears to me to shew that the Legislature intended the section to apply only where there was what may be called an universal residuary devise; that is to say, a devise of all the residue of the testator's lands."

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Now, of course, the words that were actually construed in this case are very near the words that I have to construe in the will before me; and if this case is treated as good law, under the law prevailing in India, I would have to hold that the devise under cl. (*w*) was only of specific shares and lands excluding the shares and lands that had been attempted to be bequeathed in the previous clauses. But in so far as this case provides any guidance for the interpretation of the will, it proceeds to determine that from the language of the will it could not be said that the testator intended that if the previous devise did not take effect the lands should pass to the appellant. Now, as I read s. 105 of the Indian Succession Act, such an approach is neither permissible nor relevant. It is no doubt true that in considering a will the Court has to place itself in the armchair of the testator and try and give effect to the testator's intention in so far as it may be gathered from the words used in the will; but this is subject to any statutory enactment as regards the interpretation of wills. As I read s. 105 of the Succession Act, where a legacy lapses by reason of the legatee predeceasing the testator, it automatically forms part of the residue of the testator's property; and it is not necessary to find any words in the will which would indicate that the testator desired or intended that it should fall within the residue. Of course, if the will indicates that the testator intended that the legacy should not lapse or should not fall in the residue, the case is taken out of the scope of s. 105. Therefore, it is in my opinion irrelevant under s. 105, sub-s. (*1*), of the Succession Act, to try and find out whether the testator intended that the lapsed legacy should fall into the residue. So long as the will does not disclose a contrary intention, it must by reason of s. 105 fall into the residue. With regard to the other principle that Lord Justice Mellish determined, namely, that the residue referred to in s. 25 of the Wills Act, which corresponds to s. 105 of the Indian Succession Act, must be what may be shortly described as an universal residue, this view has not been upheld by subsequent decisions of English Courts; and as I will point out later on, it is now well-recognised that there can be a general residue and a particular residue under the same will. Universality is not an essential ingredient of a residuary devise.

The next case relied upon is the case of *Mason, In re: Ogden* v. *Mason.*[1] A testator who possessed several freehold houses at Wimbledon and two freehold houses at Kingston-on-Thames,

[1] [1901] 1 Ch. 619.

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devised one of the houses at Wimbledon to his son in fee; and he devised "all other my freehold messuages and tenements at Wimbledon aforesaid and elsewhere" to other legatees. The device to the son became void by reason of the fact that he attested the will. It was held that the devise in favour of the other persons was a good residuary devise under s. 25 of the Wills Act and that it included the house, the devise of which in favour of the son had failed. Lord Justice Rigby at p. 626 observed:—

"The gift of the residue simpliciter did not create at rue residue, but the gift of that which remained of the fund was as specific as the gift of the first described position. It was no doubt within the power of a testator to express himself in such language as to shew that his intention was that the gift of what he called residue should comprise the specifically appointed part of the fund, if the gift of it failed for any reason, and there are numerous cases in which that took place. But words had to be pointed out which proved that intention; whereas in the case of a true residue no such words were necessary: the word 'residue' of itself produced the result. There are many cases of this kind not necessarily confined to powers of appointment, but extending to a testator's own property. For instance in *De Trafford* v. *Tempest* a testator gave to his wife certain chattles 'which at the time of his decease might be at or in or about his capital mansion,' and then bequeathed to his son all his household and other furniture, plate, and chattles 'not hereinbefore otherwise disposed' of which at the time of his decease might be at, in, or about his capital mansion. He did not say "not hereinbefore mentioned," but "not hereinbefore disposed of," which must of course mean, and has always been taken to mean in a similar context, "not hereinbefore effectually disposed of", making his intention clear that, if the gift to his wife should fail, those chattels which he had attempted to give to her were to be included in the gift to his son."

The learned Law Lord then referred to the case of *Springett* v. *Jenings*[1] and at p. 629 observed as follows:—

".....If the present case were substantially the same as *Springett* v. *Jenings*,[1] we should certainly be bound to follow that decision. Mellish L. J., however, while professing to agree with James L. J. made some observations upon s. 25 of the Wills Act. Those observations were absolutely unnecessary for the decision of that case, and if they in any way differed in principle from my own conclusion I should be obliged to say that they were obiter dicta. But I need not do that, for I think that, upon a fair interpretation of what Mellish L. J. said, he must be considered as intending to confine his observations to cases of the same natures as that which was then before him, and not to extend them to cases of an entirely different character. He said that s. 25 appeared to him ' to assume that there can be only one residuary devise in the will', and, no doubt, in a very substantial sense that must be so. He was dealing with specific gifts, and he held that you cannot make a residuary

[1] (1871) 6 Ch. App. 333.

gift out of a number of specific gifts, although those specific gifts may in fact together amount to a devise of everything which the testator had. Mellish L. J. said he thought that s. 25 was intended 'to apply only where there was what may be called an universal residuary devise; that is to say, a devise of all the residue of the testator's lands'. There must be some quality of universality about it. Now, that is just what, as I have already pointed out, was requisite to constitute a residuary gift of personality. If the gift was in its nature confined to a particular class of personality it could not be residuary, because a residuary gift must have generality. That, as I apprehend, is what was meant by the use of the word "universal" in the judgment of Mellish L. J. I do not think he meant that which has been attributed to him, but, if he did, I think he was going outside the case before him, and, without perhaps sufficient argument, stating his view of s. 25 in a way which does not bind this Court."

Then the learned Law Lord turned to s. 25 and observed (p. 630):—

".....I am clearly of opinion, and for the purpose of this judgment I hold, that a gift in these terms, 'All the residue of my real estate I give, as to freeholds to A and as to copyholds to B...' would be a perfect residuary gift within the meaning of s. 25."

And again at p. 631:—

"I read 'the words the residuary devise (if any)' in s. 25 as meaning any residuary devise which may be applicable to the facts of the case."

This decision was confirmed by the House of Lards in *Mason* v. *Ogden.*[1]

The cases relied upon for a contary construction of the clause before me, apart from *Springett* v. *Jenings*,[2] which is already referred to, is the case of *Patching* v. *Barnett.*[3] The relevant facts are that a testator gave four specific pictures to the National Gallery, and gave the rest of his pictures and all other articles of ornament and vertu "not therein specifically bequeathed" to his wife; and gave the residue of his personal estate "not therein specifically bequeathed" on certain trusts. The National Gallery refused to have the pictures. Mellins V. C. held that they did not go to the devisee. The learned Judge observed:—

"This is a mere question of intention. The testator conceived that he had made an effective gift of these four pictures and of the bust, and then he says, 'All the other things of the same description I give to my wife, but I do not give her anything herein or by my codicil specifically bequeathed.' Now are these pictures specifically bequeathed? They are expressly and specifically named; they are given to the National Gallery.

[1] (1903) A. C. 1.
[2] (1871) 6 Ch. App. 333.
[3] (1880) 43 L. T. 50.

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Supposing the testator had said, "I give all the others except those four pictures" using the very same words and repeating the description of them; who would have said then that they would pass to the wife? In my opinion it is just the same as if he had said, "I bequeath all the pictures except those which I give to the National Gallery or which are herein specifically bequeathed," or as if he had said, 'everything but those I have specifically bequeathed my wife is to take; she is not to take those which are specifically bequeathed.' Now are they specifically bequeathed or not? They are. Nobody can doubt that. It never could have entered the testator's mind that the National Gallery would refuse to accept these pictures. I have no doubt he considered them to be of the highest value, and I understand it is admitted on all hands that they are valuable; they have been refused by the National Gallery only because they have already some specimens in the gallery by the same masters. An event has happened which the testator never could have contemplated. What he would have said if he had been told that the National Gallery would not receive these pictures is of course a matter of conjecture only; but that he did not intend to give them to his wife, is, I think, sufficiently indicated by the words to which I have referred. Now, with regard to those words which have been referred to, if any cases have any application they are those which have been cited by Mr. Glasse, which are also mentioned in Jarman on Wills. It is, after all, a question of intention. If a testator makes a residuary gift which shows that he does not intend to exclude anything except for the benefit of the person to whom it is given, then the residuary gift will be effectual, and it will carry everything that is not otherwise disposed of, but you cannot include in the residuary gift that which is excepted. A man may make a devise of his residuary estate excepting that in a particular district; he may except that estate which he has given to John Smith, or he may except those things which are in a particular dwelling house. and if he excepts those, who shall say that they pass by the residuary bequest although he thought he had given them specifically? Here it is a gift to the wife of a residue of a particular class; she is to have all that is not otherwise disposed of, but in my opinion these pictures are otherwise disposed of."

Having held this, the learned Judge in dealing with the second residuary bequest, which was in identical terms on certain trusts came to a different conclusion. The learned Judge observed at p. 56:—

"It may seem at first sight rather an inconsistent thing to say that the same words in one part of the will should have one operation, and that they would have another operation in a different part of the will; but I think the inconsistency vanishes when you look at the object of the testator. The testator bequeathed certain pictures to the National Gallery; he then bequeathed a Greek bronze head of Socrates to the British Museum; and he then gave and bequeathed all the rest, residue, and remainder of the pictures, prints, drawings, books, and so forth, which were not by his will or by any codicil specifically bequeathed, unto his wife absolutely. I have decided that the four pictures given to the National Gallery were excepted from that bequest, just as if the testator had said "except the pictures hereinbefore named; "but when

the testator comes to dispose of his residuary estate, he meant (I must presume in this case as in every other case where a testator has residuary estate) to dispose of all his property which he had not otherwise disposed of. Now, I must look at all the events which have happened and the circumstances which have occurred. This is similar to the case of a specific bequest of pictures or other articles to a legatee who dies in the lifetime of the testator. The result is that they are not excepted under the words, "not herein specifically bequeathed;" in point of fact they cannot be, because there is no legatee to take them if the legatee dies in the lifetime of the testator; it is like the case of an executor or trustee renouncing or absolutely disclaiming; the result is just the same, because if a man appoints three trustees or executors, and one of them disclaims or renounces, it is just the same as if the disclaiming or renouncing one dies in the lifetime of the testator; if a legatee totally disclaims the result is that there is no bequest, because there cannot be any bequest unless the gift is accepted."

Now, of course as the learned Judge himself realised it is difficult to reconcile the decision in the case of the residue in favour of the wife with the decision in the case of the residue on certain trusts where exactly identical words were used. The intention of the testator in a matter of this kind must at all times remain a matter for speculation. What the testator may have done if he had contemplated the possibility of a legacy lapsing is at best a matter for conjecture. But, as I have said before, under s. 105 of the Succession Act, the Court is not required to make any conjecture. It is not necessary under that section to hold that a testator intended that a legacy that had lapsed should fall into the residue. If there is a residuary devise and the legatee predeceases the testator, the lapsed legacy automatically falls into the residuary devise unless the will discloses a contrary intention. Whether or not there is a good residuary devise is no doubt a matter of construction, depending upon the words used in the will. The cases that I have so far dealt with deal with the words "disposed of" and "bequeathed" or merely the words "the rest". There is no case in which the words "not specifically assigned" have been interpreted. I find in *Ogden* v. *Mason*,[1] to which I have already referred, that the words "disposed of" have been distinguished from the word "mentioned" indicating that if the words of a bequest were "properties not hereinbefore mentioned", there would not be a true residue, but a particular specific bequest. Now looking to the will before me, the executor has in cls. (*m*) and (*n*) used the words "assign and convey" and in cl. (*s*) only the word "convey" in relation to the shares and lands in Co-operative societies, and therefore when he uses the words

[1] (1903) A. C. 1.

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"convey and assign" in cl. (*w*), I cannot interpret them as merely "mentioned" in the previous parts of the will. In my opinion they are equivalent to the words "disposed of" which have been always understood in the interpretation of wills to mean effectively disposed of. I am, therefore, of opinion that what Alexius Joseph Rebello gets under cl. (*w*) is a particular residue of all shares and lands in the Co-operative Societies which have not been effectively disposed of and such a residue shall include any bequest that has lapsed by reason of the legatee having predeceased the testator. Of course I cannot arrive at this conclusion without considering whether the will discloses an intention that the legacy in favour of the legatees who have predeceased the testator should not lapse or fall into the residue. It has been urged that there is in this will a general residuary clause and that clause provides that the residuary legatee shall be entitled to the whole of the estate of the testator in respect of which he may die intestate because of any rule of law or equity making any bequest hereby given void or because any bequest hereby given is not accepted or because of any other reason and that this residuary clause discloses an intention that the legacy to a predeceased legatee should fall into the general residue and not into the particular residue. Now, as a matter of construction, it has been held the existence of a general residuary clause is by itself not sufficient to affect the construction of a particular residuary clause. See *Champney* v. *Davy*.[1] The observations of Hall V. C. at p. 958 are:—

> "I do not think there is any sound distinction between cases of lapsed and cases of invalid disposition, whether the disposition be under a power of appointment, special or general, or in exercise of ownership; nor do I think that the construction of a particular residuary gift is affected by the presence or absence of a general residuary gift."

I have, therefore, no hesitation in holding that there is no such intention as would take the case out of the operation of s. 105 of the Succession Act.

It has been agreed between the parties that if upon a reference to the Commissioner, it is found that the deceased left less than 20 shares in the Salsette Catholic Co-operative Society, Limited, the plaintiff and George Rebello would be entitled to an equal moiety of such shares by reason of cls. (*m*) and (*w*) of the will. I refer the suit to the Commissioner to ascertain the

[1] (1879) 11 Ch. D. 949.

properties left by the deceased which are the subject-matter of issues Nos. 5 and 6, raised on behalf of defendant No. 1.

Defendant No. 25 shall bear and pay his own costs. Costs of all other parties out of the estate, those of defendant No. 1 as between attorney and client.

Attorneys for plaintiff: *Little & Co.*

Attorneys for defendant No. 1: *Pereira, Fazalbhoy & Co.*

Attorneys for defendant No. 18: *Daphtary, Fereira & Co.*

Attorneys for defendant No. 25: *Doshi & Co.*

Order accordingly.

A. J. P.

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ORIGINAL CIVIL

Before Mr. Justice Tendolkar.

THE MUNICIPAL CORPORATION OF GREATER BOMBAY AND ANOTHER, PETITIONERS *v.* K. C. SEN AND OTHERS, RESPONDENTS.*

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Bombay Industrial Relations Act (Bom. Act XI of 1946), s. 35, sch. 1 items 6, 10, 11 and 12—Jurisdiction of the Industrial Court to settle standing orders—Bombay Industrial Disputes (Appellate Tribunal) Act (XLVIII of 1950), s. 7—Adequate and Specific legal remedy by way of appeal available—Whether acting without jurisdiction or in excess of jurisdiction would be in violation of fundamental principles of justice—Petition for a writ of certiorari *not maintainable.*

Under s. 35 (*1*) of the Bombay Industrial Relations Act, the standing orders 'shall regulate the relations between the employer and the employee 'with regard to the industrial matters mentioned in sch. I'. The words "with regard to" in s. 35 are words of the widest significance; they are equivalent to the words "with respect to" in s. 100 of the Government of India Act, 1935, which have been held to be words of the widest import.

The model standing orders made by the Central Government under the provisions of s. 3 (*2*) of the Industrial Employment (Standing Orders) Act, 1946, or model standing orders under the Bombay Act, are not helpful in determining the scope of the standing orders under the Bombay Industrial Relations Act. Whatever may be the meaning of the words 'standing orders' in common parlance, the standing orders

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* Misc. Appn. No. 24 of 1951.