



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
TESTAMENTARY AND INTESTATE CIVIL JURISDICTION
PETITION NO.2808 OF 2023

Dimple Rakesh Doshi ... Petitioner

Jayshree Manmohandas Sanghavi ... Deceased

WITH
WILL NO.1146 OF 2023
IN
PETITION NO.2808 OF 2023

Mr. Rubin Vakil a/w. Mr. P. N. Vora i/b. M/s. Pramodkumar & Co. for Petitioner.

CORAM : MANISH PITALE, J.
DATE : FEBRUARY 08, 2024

ORDER :

. The present petition has been circulated before this Court in the light of a specific explanation sought by the department from the advocate for the petitioner in this petition filed for grant of letters of administration with Will annexed. The department has sought an explanation as to how the present petition is maintainable and why a probate petition has not been filed.

2. The petitioner has filed the present petition for grant of letters of administration with Will annexed in the context of Will dated 29.05.2022. It appears that according to the department, considering the contents of the said Will, the petitioner has been appointed as an executor, and therefore, she ought to have filed a probate petition. Reference is made to Section 222 of the Indian Succession Act, 1925 (hereinafter referred to as the 'Succession Act'). In order to appreciate the backdrop in which the said objection is raised by the department and explanation is called from the advocate for the petitioner, it would be

necessary to refer to the relevant portion of the subject Will.

3. The relevant portion reads as follows:-

“I hereby give, devise and bequeath my all movable and immovable property to my niece DIMPLE RAKESH DOSHI, aged about 48 years, residing at 7th Floor, Harmony Building, B-703, Nr. Pawandham, Mahavir Nagar, Kandivali (West), Mumbai - 400 067, after my death the said DIMPLE RAKESH DOSHI will be the sole and absolute owner of my movable and immovable property, the list annexed herewith and nobody shall have any right upon the said property and nobody can claim the same.

I hereby reiterate that after my death any or all property or investment being on my name be given to Dimple Rakesh Doshi and she will be the sole and absolute owner of all my movable and immovable property. Further, God Forbid in circumstances where after my death if something happens to my niece Dimple Rakesh Doshi and she no longer exist then all my aforementioned movable and immovable property shall be transferred to Rakesh Harshdrai Doshi (Husband of Dimple Doshi). In such case, he shall be the sole and absolute owner of all my property.

* * * *

Further, after my death out of the proceeds from investments made by me as mentioned in list of Movable property attached herewith (at that point in time whatever cash is fetched from such investments), except my investment in Pradhanmantri Senior Citizen Saving Scheme (Scss-2004), I wish to transfer a certain amount to below mentioned family members (**List of which is attached herewith for ease of reference**). However, possession of all such investment documents shall first be given to Dimple Rakesh Doshi as mentioned above. Later, she is authorized to sell & distribute the proceeds to list of members as mentioned below.

In case, realized cash from such investment is less in comparison of my wish to transfer a certain amount to my Niece and Nephews as per the given list then Dimple is not under any obligation to pay full amount to mentioned Family members (my Niece & Nephews). Under such a situation she shall make the payment proportionately out of available cash realized from the mentioned investments.

I wish that her husband Rakesh Harshdrai Doshi shall assist,

co-operate and help Dimple Rakesh Doshi, to implement this Will.

IN WITNESS WHEREOF I have hereunto set my hands on this 29th day of May 2022 at Mumbai.”

4. The department is proceeding on the basis that the above-quoted contents of the Will indicate that the petitioner has been appointed as the executor by necessary implication.

5. Mr. Rubin Vakil, learned counsel appearing for the petitioner submits that on a proper interpretation of the above-quoted portion of the Will and applying the relevant provisions of the Succession Act in the backdrop of relevant decisions rendered in that regard, it would be evident that in the facts and circumstances of the present case, the petitioner cannot be said to have been appointed as an executor by necessary implication. In this regard, he has referred to Section 222 of the Succession Act, as also Section 232 thereof. He submits that the subject Will clearly does not appoint an executor, and therefore, the question may arise only with regard to the status of the petitioner being an executor by necessary implication. He submits that in order to reach the aforesaid conclusion, appropriate tests would have to be applied, which can be discerned from judgements rendered by various High Courts.

6. He referred to and relied upon judgement of this Court in the case of *Mithibai Vs. Canji Kheraj*, **ILR 1901 Vol. XXVI page 571**; judgement of the Calcutta High Court in the case of *Nimai Charan Chatterjee Vs. Lakshmi Narayan Chatterjee*, **[1954] ILR 140**; judgement of the Mysore High Court in the case of *Deveeramma and others Vs. M. S. Nanjappa and others*, **AIR 1961 Mys 150**; judgement of the Kerala High Court in the case of *Ummachikannummal Mohammed Pathummal and others Vs. Bhargavan Rajan and others*,

AIR 1964 Ker 258; and judgement of Allahabad High Court in the case of *Sardar Singh Vs. Chakrapani Acharya*, [1946] ILR 398.

7. By referring to the relevant portions of the said judgements, the learned counsel appearing for the petitioner submitted that the petitioner, in the present case, cannot be said to be an executor, even if the language in the subject Will is to be stretched for reaching a conclusion regarding the status of the petitioner as an executor by necessary implication. On this basis, it is submitted that the objection / query raised by the department in the order dated 28.11.2023 is of no consequence and that the present petition, filed as a petition for grant of letters of administration with Will annexed, is clearly maintainable.

8. Having heard the learned counsel appearing for the petitioner, this Court will have to examine as to whether the department is justified in raising doubts about the maintainability of the present petition, indicating that the petitioner should have filed a probate petition.

9. The relevant portion of the order dated 28.11.2023 passed by the First Assistant Master in the testamentary petition reads as follows:-

“ According to above, deceased has appointed Dimple Rakesh Doshi as executor to implement the Will and her husband Rakesh Harshadrai Doshi as co-executor.

2. Hence, as per Section 222(2) of the Indian Succession Act, 1925, executor is appointed by necessary implication i.e. executor according to tenor. How Letters of Administration with Will is maintainable? Advocate to explain.”

10. This Court has perused the subject Will, particularly the relevant portion quoted hereinabove. Before considering the question as to whether the petitioner has been appointed as an executor by implication, it would be necessary to examine as to what test can be applied in such circumstances. There is no doubt about the fact that in the present case, the subject Will does not appoint an executor. Therefore, at the most, the

petitioner could be said to be an executor by implication.

11. In the case of **Mithibai Vs. Canji Kheraj** (*supra*), this Court considered the aforesaid aspect of the matter and identified the principle involved in such cases as follows:-

“ The principle applicable is that, unless it can be gathered from the will that the testator intended the person named to pay the debts and legacies under the will, he cannot be held to be executor.”

12. In the case of **Nimai Charan Chatterjee Vs. Lakshmi Narayan Chatterjee** (*supra*), the Calcutta High Court addressed the question as to the tests that are to be applied while determining as to whether a person can be said to be an executor by implication. The relevant portion of the said judgement reads as follows:-

“ On behalf of the objectors it is urged that Lakshmi Narayan is not appointed under the will to look after the *testator's estate as such* after his death, but to protect and manage the properties as the properties of Archana after they vest in her as the legatee.

What are the tests which are to be applied for ascertaining whether or not a person has been appointed as an executor according to the tenor of the will? Unless the court can gather from the words of the will that a person named as trustee therein is required to pay the debts of the deceased and generally to administer his estate, it will not grant him probate as executor according to the tenor thereof. In the goods of *Thomas Parnell* (1).

Even when a person is directed in a will to pay debts or funeral expenses, not out of the general estate, but out of a particular fund, such a direction will not be sufficient to constitute the person so named to be an executor according to the tenor of the will. In re *Davis* (2); In re *James Janes* (3).

In *Ameer Chand v. Mohanund Bibi* (4) reference was made to the above decisions followed by the observation:

The principle deducible from these cases is that in order to constitute one an executor according to the tenor of the will, it must appear on a reasonable construction thereof, that the

testator intended that he should collect his assets, pay his debts and funeral expenses and legacies which, in the words of Sir James Hannen in *In the goods of Adamson* (5), are the essential duties of an executor.

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Even when a person is authorised by a will to pay out the legacy, that also would not make him an executor according to the tenor. *Sardar Singh Vs. Chakrapani Acharya*.

* * * * *

There is no doubt that the will now before us cannot be so interpreted as to support the appointment of Lakshmi Narayan as an executor. The intention of the testator must be clearly stated. If there be any doubt, the court would rather grant administration of the estate with a copy of the will annexed, that strain the language for the purpose of constituting a person to be the executor according to the tenor. *Ameer Chand Vs. Mohanund Bibi.*”

13. In the aforesaid judgement of the Calcutta High Court, reliance was placed on judgement of the Allahabad High Court in the case of **Sardar Singh Vs. Chakrapani Acharya** (*supra*) to emphasize that even when a person is authorized by a Will to pay out from the legacy, that in itself would not make such person an executor by implication.

14. In the case of **Deveeramma and others Vs. M. S. Nanjappa and others** (*supra*), the Mysore High Court had an occasion to consider the aforesaid question and it was laid down that wherever a person is entitled to receive what is due to the estate and to pay what had to be paid out of its income, such a person can be said to be an executor by implication. In the said judgement, Mysore High Court acknowledged the well recognized principle as follows:-

“15. It is too long and too well settled that the Courts should always lean against regarding a person as having been appointed as executor by necessary implication. An executor by necessary implication or according to the tenor must have the right to receive for the estate what is due to it and to pay

what is due from it. That, appears to us to be the correct test to be employed to determine whether a person is an executor even according to the tenor. So tested, it is impossible to hold that the plaintiff was one.”

15. In the case of **Ummachikannummam Mohammed Pathummam and others Vs. Bhargavan Rajan and others** (*supra*), the Kerala High Court referred to Section 222 of the Succession Act and drew a distinction between a trustee and an executor, holding that the former has a power only to pay what is vested in him as trustee to the persons for whose use he holds it, but such a person has no general power to receive and pay what is due to and from the estate.

16. The principle that emerges from the above-referred judgements is clear, that even when a person is directed to make certain payments out of a particular fund but not out of the general estate, it cannot be said that such a person has been appointed as an executor by implication.

17. The above-quoted portion of the subject Will shows that, in the first place, the petitioner is bequeathed with all the movable and immovable properties of the deceased. In fact, the relevant portion says that the petitioner shall be the sole and absolute owner of all the movable and immovable properties of the deceased.

18. It is only thereafter that the Will indicates that the petitioner would have to transfer certain amounts from investments made by the deceased as mentioned in the list of movable properties attached to the Will, which is also made subject to an exception and towards the end, the Will only indicates that the husband of the petitioner shall assist her in implementing the Will. There is nothing in the subject Will showing that the petitioner has a right to receive for the estate what is due to it and to pay what is due from it.

19. It appears that the directions given towards the end of the subject Will have led to the department raising the aforesaid query on the question of maintainability of the present petition as a petition for grant of letters of administration with Will annexed. It appears that the department has indicated that since the petitioner could be said to be an executor by implication, a probate petition should have been filed. This Court finds that the department could not have raised such query / objection, for the reason that the petitioner cannot be said to be an executor even by implication. The language of the subject Will cannot be strained to hold that in the facts of the present case, the petitioner can be said to be an executor by implication. There is substance in the contention raised on behalf of the petitioner, with reference to Section 232 of the Succession Act, which when applied to the facts of the present case, shows that since the deceased had not appointed an executor in the subject Will, the legatee can be admitted to prove the Will and letters of administration with Will annexed can be granted to such a person.

20. Therefore, in the present case, the petition for grant of letters of administration with Will annexed is maintainable.

21. This Court is informed that all other objections have been removed by the petitioner. If that be so, considering the fact that the present proceeding is an uncontested proceeding, for the reason that all the persons, who could be interested in the estate of the deceased even if the deceased was to die intestate, have given their consent affidavits, the department shall proceed further to issue the grant in accordance with law.

(MANISH PITALE, J.)