

John Robert Ball Vs. Charles William Ball

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Court : Mumbai

Decided On : Feb-03-1925

Reported in : AIR1925Bom337; (1925)27BOMLR564

Judge : Taraporewala, J.

Appeal No. : O.C.J. Suit No. 3988 of 1924

Appellant : John Robert Ball

Respondent : Charles William Ball

Judgement :

Taraporewala, J.

1. In this case the estate of the deceased testator is not sufficient to pay all the legacies directed to be given by the will and the questions raised in this Originating Summons are as to whether the legacy of Rs. 15,000 under clause 2 (a) in favour of Mrs. Mary Josephine Ball should have priority over the legacies in favour of the grand-children and great-grand-children under clause 2 (6), and further whether the legacies under clause 2 (c) should rank pari passu with the legacies under clause 2 (a), or should also be paid, after the legacy under clause 2 (a) has been fully satisfied.

2. It has been argued on behalf of the plaintiff that because in clause 2 (6) the words used are 'subject to the aforesaid,' the legacy under clause 2 (b) can take effect only after the legacy under clause 2 (a) has been fully satisfied and that there being no such words in clause 2 (c), the legacy under clause 2 (c) should rank with the legacy under clause 2 (a) and that unless and until they are satisfied the legacy under clause 2 (b) cannot take effect.

3. The other view of the matter is that all the legacies under clauses 2 (a), (b) and (c) should proportionately abate in view of the insufficiency of the estate.

4. Mr. Pandia cited to me the observations of Williams on Executors at p 1096 and the case of *Lewin v. Lewin* (1752) 2 V. S 415 in support of the proposition that the words in this will clearly indicated an intention of the testator to give the legacies under clauses 2 (a) and (c) priority over the legacy under clause 2 (b). The observations at p. 1096 are elaborated at pp. 1097 and 1098, and there are subsequent cases on the point which show how the intention of the testator is to be gathered from the will. In *Lewin v. Lewin* the priority was given to one general legatee on the ground that the legacy was in favour of the wife and children and on the words of the will the testator could not have intended that the legacy in favour of the wife and children should abate along with the legacies in favour of other legatees,

5. In my opinion, that case has no bearing on the construction of the will in this case, But the cases which have a bearing and which, to my mind cover the point raised in this case, are *Blower v. Morret* (1752) 2 V S. 420; *In re Schweder's Estate: Oppenheim v. Schweder* [1891] 3 Ch. 44 and *In re Harris Harris v. Harris* [1912] 2 Ch. 241. These cases clearly show that the intention of the testator to give priority to a particular general legatee cannot be gathered from a mere use of the words that a particular legacy is to be given immediately or that a particular legacy is to be given first and another legacy in the second place, and after the payment of these legacies a third legacy is to be given.

6. The question is elaborately discussed by Mr. Justice War-rington in *In re Harris* and there he cites with approval a passage in the judgment of Knight Bruce V.C. in *Thwaitea v. Foreman*, (p.414) (1844) 1 Coll. 409 which is as follows:-

Prima facie, all bequests stand on an equal footing, and it lies upon those who assert the contrary, to prove it. It is not sufficient that the words of the will should leave the question in doubt. They must positively and clearly establish, that it was the intention of the testator that the bequests should not stand upon an equal footing. Now, in considering whether such was the intention of this testator, we must recollect that words that are merely introductory can not, generally, by themselves be held to direct any order of payment; we should also bear in mind an apposite observation of Sir John Leach, (I think contained in *Beeaton v. Jiooth* 1819 4 Madd. 161 that, unless the testator tells you himself, that he believes his assets to be insufficient, you must attribute to him the notion that he has assets sufficient to satisfy all the bequest that he makes; and, if you attribute that notion to him, you cannot well infer that he intended to make provision for an order of payment applicable only to the case of the assets being insufficient.

7. Mr. Justice Warrington on these observations goes on to hold in *In re Harris* that although the testator in that case has used the words that certain legacy should be paid in the first place and another legacy in the next place, and that afterwards or after payment of the earlier legacies, certain further legacies should be paid, those words were not capable of the construction that the testator thought that his estate would be insufficient and in that case certain legacy, which was asked to be paid first, should have priority over subsequent legacies.

8. The words in this will, to my mind, are in no way stronger than the words in *In re Harris*. If anything, they are weaker. The words 'subject to the aforesaid' do not indicate the intention of the testator that the legacy in favour of Mrs. Mary Josephine Ball should be paid first. The legacy under clause 2 (6) is in favour of grand-children and great-grand-children. It is inconceivable that the testator should have intended that his companion and friend Mrs. Mary Josephine Ball and her sons should get the legacy in the first place and only after they had been paid, the legacies in favour of his own kith and kin- his own grand and great-grand-children- should be paid. It is further clear from the will that there was no such intention on the part of the testator as shown by Sub-clause (e) of clause 2, where the testator specifically mentions that after satisfaction of the above legacies if anything remains as residuary estate, the same should be divided equally among his

grandchildren and great-grand-children. It clearly indicates that the testator considered that the estate would be sufficient to pay the said legacies and that there might be a surplus, and therefore he tried to provide for the disposition of such surplus.

9. The first question is not correctly put. The legacies other than the legacies in favour of Mrs. Mary Josephine Ball are legacies given by clause 2, Sub-clause (b) and Sub-clause (c).

10. I, therefore, answer the questions as follows :-

Q. 1. Whether the legacy of Rs. 15,000 in favour of Mrs. Mary Josephine Ball given by clause 2, Sub-clause (a), of the said will has priority over the other legacies given by clause 2, sub Clause (a), clauses 1, 2, 3 and 4 of the said will ?

A. In the negative.

Q. 2. Whether the said legacy of Rs. 15,000 in favour of Mrs. Mary Josephine Ball is liable to rank *pari passu* with the said abovementioned legacies and to abate proportionately with them having regard to the estate ?

A. In the affirmative,

Q. 3. Whether the said legacy of Rs. 15,000 in favour of Mrs. Mary Josephine Ball has priority over the legacies given by clause 2, Sub-clause (c), of the said will ?

A. In the negative.

Q. 4. Whether the said legacy of Rs. 15,000 in favour of Mrs. Mary Josephine Ball is liable to rank *pari pawn* with the said abovementioned legacies and to abate proportionately with these having regard to the estate ?

A. In the affirmative.

11. Costs to come out of the estate.