

**Bayabai Vs. Bayabai**

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**SooperKanoon Citation :** [sooperkanoon.com/332889](http://sooperkanoon.com/332889)

**Court :** Mumbai

**Decided On :** Jul-07-1942

**Reported in :** AIR1942Bom328(2); (1942)44BOMLR792

**Judge :** Chagla, J.

**Appeal No. :** O.C.J. Suit No. 151 of 1942

**Appellant :** Bayabai

**Respondent :** Bayabai

**Judgement :**

**Chagla, J.**

1. The plaintiff is the daughter of one Esmail Ahmed by his divorced wife Hawabai. Esmail Ahmed died on December 3, 1941. Defendant No. 1 was the second wife of Esmail Ahmed, and defendant No. 2 is the son of Esmail Ahmed by defendant No. 1. The plaintiff has filed this suit on the allegation that Esmail Ahmed died intestate leaving property, and the plaintiff and the two defendants are the only heirs of the deceased according to Mahomedan law.

2. In their written statement the defendant set up a will made by the deceased on October 7, 1933. Under this will excepting a bequest in favour of the plaintiff of Rs. 500 for marriage expenses, the plaintiff is not benefited at all. The testator directs

under the will that a sum not exceeding Rs. 1,000 should be spent for his funeral and other obsequial ceremonies. He also directs that a sum of Rs. 500 be paid to Fatmabai, daughter of defendant No. 1 by her predeceased husband. The testator also directs the payment of Rs. 25 per month to his brother Haroon Ahmed. He then directs that a sum of Rs. 45 per month should be paid to defendant No. 1 during her natural life, and if she re-married, then a sum of Rs. 20 per month should be given to her. Subject to these dispositions, the whole of the property is bequeathed to his son, defendant No. 2.

3. I might point out that Fatmabai was married during the lifetime of the testator, and Maroon Ahmed, his brother, also died in the lifetime of the testator. Therefore the only bequests which are capable of being carried out are the bequests in favour of the plaintiff and the defendants.

4. The testator had appointed defendant No. 1 his wife, his brother Haroon Ahmed, Hasham Abubaker and Ebrahim Ismail Kapasia as the executrix and executors of his will. The defendants say in their written statement that Ebrahim Ismail Kapasia is dead. Haroon Ahmed, as I have already stated, is dead, and defendant No. 1 cannot ascertain the whereabouts of Hasham Abubaker and does not know who he is.

5. As the will was set up by the written statement, the plaintiff's contention before me was that the bequests made under the will were invalid in law. I directed the plaintiff to amend her plaint and make the submission to that effect. In the amended plaint the plaintiff now contends that notwithstanding the will there was an intestacy so far as the claim of the plaintiff as an heir of the deceased was concerned. The execution of the will is not disputed by the plaintiff nor really is its validity. All that is contended is that the bequests made under the will are not in accordance with Mahomedan law, and no effect can be given to them, and as practically the whole of the estate is the subject-matter of these bequests, the estate should be distributed among the heirs as if the deceased had died intestate.

6. The deceased was a Cutchi Memon. Prior to the passing of Act XLVI of 1920, a Cutchi Memon was governed by Hindu law in matters of succession and inheritance. He had full testamentary capacity and could dispose of the whole of

his property in any manner he liked. By Act XLVI of 1920 a Cutchi Memon was given the power to make a declaration in the prescribed form, and on that declaration being made, he himself and all his minor children and their descendants would be governed in matters of succession and inheritance by Mahomedan law. It is common ground that no such declaration was made by the deceased under this Act. In 1937 the Legislature passed another Act known as the Shariat Act (XXVI of 1937). This Act was made applicable to all the Muslims in British India, and Section 2 provided that notwithstanding any custom or usage to the contrary, in all questions regarding intestate succession and other questions which are mentioned in that section the rule of decision in cases where the parties were Muslims should be the Muslim personal law (Shariat). Section 3 of the Act then authorises any Muslim by a declaration to be made as prescribed in that section to have the Muslim law applied to him and his minor children and their descendants even in matters relating to adoption, wills and legacies. Therefore, on the passing of the Shariat Act, the position with regard to Cutchi Memons was this; that even if a Cutchi Memon had not made a declaration under Act XLVI of 1920, in all questions relating to intestate successions, he was governed by Mahomedan law. He could also be governed by Mahomedan law in questions of testate succession provided he made a declaration under Section 3 of the Shariat Act. It is again common ground that no declaration was made by the deceased under Section 3 of this Act.

7. The Legislature passed a further Act made applicable to all Cutchi Memons, being the Cutchi Memons Act (X of 1938). Section 2 of that Act provides that, subject to the provisions of Section 3, all Cutchi Memons shall, in matters of succession and inheritance, be governed by the Mahomedan law Section 3 provides:

Nothing in this Act shall affect any right or liability acquired or incurred before its commencement, or any legal proceeding or remedy in respect of any such right or liability ; and any such legal proceeding or remedy may be continued or enforced as if this Act had not been passed.

8. Section 4 repeals Act XLVI of 1920.

9. Mr. Haindaday's contention is that on the passing of this Act all Cutchi Memons came to be governed by Mahomedan law even in questions of testate succession, and that henceforward no declaration was necessary to be made by a Cutchi Memon. Mr. Banaji, on the other hand, contends that as the will was made by the testator in 1933, the Act does not apply to this particular will, and that all wills made prior to the passing of the Act are saved under Section 3. His contention is that a Cutchi Memon had the right to make a will and dispose of the whole of the property before Act X of 1938 was passed, and that being a right which he had before this statutory enactment, it has been saved by Section 3.

10. It is clear that the right which is intended to be saved by Section 3 is a right which was acquired before the passing of the Act, and the question is whether on the testator executing this will any right was acquired either by him or by any one else. I can well imagine a case where a will is made for consideration which would thereby become irrevocable and a right may be acquired by a person in whose favour the will is made. In such a case that person will certainly acquire a right which cannot be affected retrospectively by the statute. But the Act having been intended to take away the power of a Cutchi Memon to will away the whole of his property, it cannot possibly be suggested that by the very next section that power was restored to him provided he had made his will before the passing of the Act. The logical effect of Mr. Banaji's contention would be that not only all wills made before the passing of the Act would be saved, but even those made after it--or, in other words, the Act would never come into force at all. Because the right of a Cutchi Memon to make a will disposing of the whole of his property existed long before the passing of the Act--and if that right was intended to be saved by Section 3, then it makes no difference whether the will was made before or after the Act was placed on the statute-book. No Court would construe a section in a manner which would result in such an absurdity as this.

11. The further question is whether any right is acquired by the legatees under the will. Now it is clear that a will speaks from the death of a testator, and the only right that a legatee can have under the will is at the death of the testator. Mr. Banaji has tried to argue that the legatees had some sort of right which Mr. Banaji was not in a position to define as soon as the will was made in their favour. He suggested

that the legatees had the right to receive the bequest if the testator did not revoke the will. That is merely a pious hope--at most an expectation. The right contemplated by Section 3 is a legal right, and it is clear that the legatees under the will of the deceased had no legal right to prevent the deceased from revoking the will, or altering it in any manner he liked. When the testator made the will, he had the power to do so. The will being revocable, on the passing of the Act, his power to make the will of the sort that he had made was taken away from him, and he could then only make a will which was in accordance with Mahomedan law. I, therefore, hold that Act X of 1938 applies not only to wills made after the passing of the Act but also to those made before it was passed.

12. The question then is whether the will made by the deceased was in accordance with Mahomedan law, as I have already held that after the passing of the Cutchi Memons Act of 1938, the will of every Cutchi Memon has to be construed and looked at from the point of view of Mahomedan law. Under Sunni Mahomedan law, by which the parties are governed, there is a two-fold restriction on the testamentary capacity of a testator. He cannot dispose more than one-third of his property, and even with regard to that one-third he cannot bequeath it to his heirs. In this case the deceased has purported to dispose of the whole of his estate, and all the effective bequests made by him are in favour of his heirs. These bequests could have been validated by the consent of the heirs, after the death of the testator. Not only have all the heirs not consented to the bequests, but one of the heirs has actually filed a suit claiming her share in the property on the basis of intestacy. I, therefore, hold that the bequests under the will in favour of the plaintiff and the defendants are void and there is intestacy to the extent of the property covered by those bequests.

13. There will be a reference to the Commissioner to ascertain what the estate of the deceased was and what are the shares of the parties in that estate. The Commissioner will take all the necessary accounts for the purpose. Costs and further directions reserved.