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IN THE SUPREME COURT OF FIJI
Probate Jurisdiction
ACTION NO. 4 OF 1979

Between:

LAXMI d/o Karmarum Pillay — Plaintiff
- and -
SUBBAIYA PILLAY & Others — Defendants

ACTION NO. 7 OF 1979

Between:

MANIRAM PILLAY — Plaintiff
- and -
LAXMI d/o Karmarum Pillay — Defendant

In action No. 4 of 1979 the plaintiff seeks a declaration that upon the correct interpretation of the last Will of Kuppusami Pillay deceased made in November 1964 (the date not having been inserted) there is a partial intestacy in so far as the will makes no provision for the effective disposition of his capital assets and that therefor the distribution of his capital assets ought to be made in accordance with the provision of the Statute of Distribution 1670(Imp.) or any other relevant law.

I would first state that the Imperial Statute referred to above has application in this instance and not the Succession, Probate and Administration Ordinance, 1970, if in fact the said will does not deal with the whole of the estate of the late Kuppusami Pillay and there is a partial intestacy.

The deceased died on the 15th June, 1970 as at which date the Fiji Ordinance was not in force. It came into force on the 2nd July, 1970.

In my view the testator did make provision for disposal of all his estate both real and personal in his last will and no partial intestacy arises.

I have found it difficult to understand how any doubt arose as to the interpretation of the will which raised any question of partial intestacy.

In her affidavit sworn on the 9th day of April, 1979 and filed in her action the plaintiff Laxmi stated she was advised that having regard to sub-clauses(b) and (c) of the said will there is a partial intestacy in so far as the will makes no provision for the effective disposition of the testator's capital assets. Sub-clauses (b) and (c) are in the following terms :-

> "(b) To pay out of the income arising from my residuary trust fund or from any part of my residuary estate for the time being remaining unconverted such sum as is reasonably required for the maintenance education preferment advancement or other benefit of my daughter Sarojni Pillay until she attains the age of 18 years or earlier if she marries. The application of the said fund shall be in the sole discretion of my said trustee.
>
> (c) To pay the balance of my said residuary fund unto my said wife Laxmi and my sons Munsamy Pillay, Manikam Pillay, Ramsamy Pillay, Subbaiya Pillay in equal shares but no beneficiary under this my will shall be entitled to demand his or her share or sell mortgage or assign his or her share except to the other beneficiary under this my will until the expiration of five years from the date of my death."

It appears to me that Laxmi's legal advisers have interpreted the words "residuary trust fund" and "residuary estate" in sub-clause (b) and "residuary fund" in sub-clause (c) as referring only to income of the estate which is why she refers to the lack of provision for disposition of the capital assets. On the other hand, since the main asset of the estate is land, in clause (c) the reference to "residuary fund" being paid to the persons

therein named is interpreted as referring only to the personal estate of the deceased with no provision being made as regards the real estate.

What has, in my view, been overlooked by Laxmi's legal advisers is the fact that there is an express provision in the will conveying all the testator's estate both real and personal to his trustee Laxmi upon the express trust to sell, call in and convert all such estate into money with power to postpone sale for as long as the trustee in her absolute discretion thinks fit.

While the estate land has not yet been sold it is the trustee's duty in due course to sell it and convert it into money. All beneficiaries are sui juris and if they all so decide the trustee could convey the land to them instead of selling it.

In sub-clause (b) when referring to "my residuary trust fund" the testator had in mind the residue of the fund created by the conversion of all his estate both real and personal into money after payment thereout of all his just debts and the costs of administration of his estate.

In referring to his "residuary estate" in sub-clause (b) the testator had in mind the residue of his estate, after payment of the debts and costs I have referred to, whether real or personal and this is clear from his reference to the part of his estate remaining unconverted.

In clause (c) however, "residuary fund" is clearly meant to be that fund which remains after conversion of all his estate into money, payment thereout of all his debts and costs and in addition after payment of the income the trustee is directed to pay in performance of the trust set up for the testator's daughter Sarojni Pillay in sub-clause (b). That residuary fund when it comes to payment to the persons named in sub-clause (b) will represent the then balance capital of the estate, which will include capital

and accumulated income if not capitalised - all real estate at that time having been converted into money or notionally treated as moneys worth if all beneficiaries accept transfer of such land in lieu of payment in money.

The misunderstanding in this instance may have arisen because a person appointed a "residuary legatee" usually only takes all the residue of the personal estate (Langley v. Thomas, 5 W.R. 219). Depending on the context of the will "residuary legatee" may be shown to be intended to mean "residuary beneficiary" as was held in Re Bailey, Barclays Bank v. James (1945) Ch.D. 191. In that case the question was whether the appointment of a residuary legatee carried with it the gift of all undisposed realty. Romer J. said at p.193 :

The general rule in such a case is in no doubt and was stated by Joyce J. in re Gibbs (1907) 1 Ch. 465, 468 as follows :

> " It is well settled that the words "residuary legatee" by themselves prima facie do not apply to real estate, though their application may be extended so as to do so when the context requires it, and when a testator directs his real estate to be sold and disposes of part of the proceeds, it may be taken, I think that the appointment of a residuary legatee will pass the test. That rule laid down in 1907 is still the rule."

In the instant case while there is no specific mention of a residuary legatee the testator clearly intended that his wife and 4 sons share the residue of his estate. In my view that was clearly the testator's intention and I so hold. There was not in my view any partial intestacy and the testator in his will effectively dealt with the whole of his estate.

I therefore decline to make the declaration sought by the plaintiff Laxmi.

(R.G. KERMODE)
JUDGE

SUVA,

May, 1980.