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REPORTABLE

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
TESTAMENTARY AND INTESTATE JURISDICTION
TESTAMENTARY PETITION NO. 135 OF 1990

Mohamed Obedulla Chinoy & Ors …Petitioners
And
Rasubhai Suleman Chinoy …Deceased

Mr Jai Munim, *i/b Bachubhai Munim & Co., for the Petitioners.*

CORAM: G.S. PATEL, J
DATED: 10th March 2021

PC:-

1. This is an uncontested Petition for Letters of Administration with Will annexed. The frst oddity about the matter, and it is truly inexplicable, apart from being a tragic and terrible commentary on our justice delivery system, is that, though uncontested, the matter has been pending in this Court for the last *thirty one years*. There is indeed a question of law involved. But the answer to it is neither complex nor new. Indeed, that answer is even older than the Petition: the solution is from *1905*. It is an answer that the Petition could have received very much earlier. I have deliberately chosen to preface this order with these comments, for, during three decades

since the Petition was fled, two of the four Petitioners have passed on, and the remaining two are well into their eighties.

2. Their wait ends today.

3. The matter is listed on account of an objection taken by the Registry. I cannot fault the Registry in taking the objection that it does. The objection raises a question of law. It is that question of law that is now to be answered.

4. The Will in question is of one Rasubai Suleman Chinoy. She died in Mumbai on 10th October 1989. She is said to have made a Will in Urdu. An English translation is provided. The Will is said to have executed in Mumbai on 20th December 1980. Rasubai appointed no Executors under the Will. The Petitioners are four of her fve children. The ffth is a son, one Shahjehan Chinoy. He lives in Karachi, Pakistan. Thus, there is no question of service of a citation on him.

5. At this stage, two aspects are important. Paragraph 9 of the Petition says that Rasubai was governed by Sunni Hanaf Mahomedan law. The Will in question does not contain an attestation. It does not have, in other words, the signatures of any witnesses. Second, what the Will appears to do (and I have perforce to take this from English translation) is to say that the inheritance that Rasubai said she received from her paternal aunt, Khetubai, along with the income was to be returned to Khetubai's charity trust after drawing up the accounts until the date of the return. The entire

bequest, as it were, is thus to a charity. None of the four Petitioners have claimed any part of it.

6. The Registry's objection is precisely that the Will lacks attestation and, therefore, does not conform to the requirements of Section 63 of the Indian Succession Act 1925. The Registry has expressed a doubt about the validity of such a Will.

7. The objection is understandable. But what is to be decided is: (i) whether Part VI of the Indian Succession Act 1925 in fact applies to a person of this religious denomination, i.e. a Sunni Hanaf Mahomedan; and (ii) whether under the law governing Sunni Hanaf Mahomedans, there is any requirement of the attestation of a Will at all.

8. Before I turn to these questions, one administrative direction is immediately necessary. Petitioner No. 4 has passed away. I will permit the deletion of his name without need of re-verifcation. That amendment is to be carried out in Court at once.

9. Our point of departure in this discussion must frst be Section 57 of the Indian Succession Act 1925. The wording of this Section makes it abundantly clear that the provisions of that Part as are set out in Schedule III only apply to a Hindu, Buddhist, Sikh or Jaina (and then there are the other requirements of where the Will is made and to what it pertains; we are not concerned with those provisions). Now Schedule III includes various sections in Part VI. One of those is Section 63. Thus, Section 63 only applies to the Will

of those classes of persons mentioned in Section 57, i.e. a Hindu, Buddhist, Sikh or Jaina. It does not apply to Mahomedan. For completeness, one must look at Section 213 of the Indian Succession Act. This puts the matter beyond all controversy. It tells us when a right as an Executor or legatee is established. Sub-clause (i) says that no such right can be established in any Court unless a Court of competent jurisdiction has granted probate or Letters of Administration with Will annexed. But sub-clause (ii) then makes it abundantly clear that this is not a requirement demanded of Wills of a Mahomedan.

10. This brief discussion tells us two things. First, that the rigour of Section 63 does not apply to Wills made by Mahomedan. Section 63 is the provision of the Indian Succession Act 1925 that requires attestation of a Will by at least two witnesses. This requirement is thus inapplicable to a Will made by a Mahomedan. Section 213 then tells us that such a Will does not compulsorily require probate.

11. The question then is about the personal law that would govern such persons. There is no doubt that the Testator and the parties are Cutchi Memon. The Cutchi Memons Act of 1938, effective from 1st November 1938, in terms states that all Cutchi Memons shall in matters of succession be governed by Mahomedan law. Mulla's commentary on the principles of Mahomedan law, 20th Edition, tells us that the Hanafs are one of the four sub-sects of Sunnis; and that the Sunni Mahomedans of India belong particularly to the Hanaf school. This treatise also tells us that Mahomedans are divided into two principal sects, the Sunnis and Shias. The Cutchi Memons of Bombay and the Halai Memon

belong to the Sunni sect. Therefore, that Rasubai, a Cutchi Memon, was covered by the law applicable to the Sunni Hanaf Mahomedan sub-sect is not one that admits of the slightest dispute.

12. Mulla's treatise in Paragraph 116 then tells us that a Will or 'Vassiyaat' may be made either verbally or in writing. Mahomedan law does not demand that a Will take a written form. It does not demand any particular form at all. The commentary says that even a verbal declaration is sufcient. What is necessary is to ascertain the intention of the Testator.

13. This precise question was before Mr Justice Badruddin Tyabji over a century ago on 22nd June 1905. The question before him was whether a written Will by Cutchi Memon, regulated by Mahomedan law, was valid though not attested. As we can immediately see, this squarely and directly addresses the point raised by the Registry.

14. The case in question was *In re Aba Satar Haji Aboobuker*.[1] It is a compact judgment, just over a page long. Its facts very closely parallel those in the present case. Probate was sought of the Will of one Aba Satar Haji Aboobuker. There were several petitioners. There was no opposition to the Will. There, as here, the Registrar to whom an application for probate was fled, felt some difculty in granting the application because the Will was not attested. The Registrar had some doubt whether such a Will of a Mahomedan, being unattested, can be validly proved and probate can be granted.

1 (1905) 7 Bom LR 558.

15. At this stage perhaps I should enter only one solitary comment: nothing changes — even after 150 years.

16. Before Mr Justice Tyabji it was argued that Mahomedan law did not require attestation of a Will. Out of courtesy to the Registry (again, as here today) the Court felt that it should look into it personally to see how matter stood. That testator was also a Cutchi Memon as is the Testator in the case before me. At that time, however, Cutchi Memons were governed by Hindu law. The change that has happened in the time since is the Cutchi Memons Act of 1938 that says they are now governed by Mahomedan law.

17. In *Bayabai v Bayabai*,[2] a learned single Judge of this Court 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.

18. As Mr Justice Tyabji put it in *Aba Satar*, the pure question was to whether under Mahomedan law (and Cutchi Memons were accepted to be so) attestation was necessary of a Will. This is what Mr Justice Tyabji then said:

> "To my mind there is nothing in the Mahomedan law which requires attestation of Wills. However, I have looked into the Law Books to satisfy myself, and I am confrmed in my original idea that the Mahomedan law does not require any attestation in regard to written wills. A document, which is the Will of a Mahomedan gentleman, requires to be proved by our Anglo-Indian Law of Evidence in the same

2 AIR (29) 1942 Bom 328 (2).

way as any other document; but it does not require to be attested, so far as Mahomedan law is concerned.

The next question is whether there are any legislative enactments to make it compulsory on Mahomedans to have their Wills attested. **The Succession Act does not apply to Mahomedans.** The Hindu Wills Act also does not apply to them. And as regards the Probate and Administration Act, there is nothing in it which requires attestation of Mahomedan Wills. These are the only enactments which would throw any light in the matter. **Therefore, there is nothing which makes it compulsory on Mahomedans to attest their Wills.**

That being so, Probate should go of this Will.

As I said before, I took time not because I felt any doubt but out of respect to the Registrar, who felt doubt as to whether Probate could be granted.

Costs out of the estate."

(*Emphasis added*)

19. I am entirely bound by this decision. Even otherwise, I am in the most respectful agreement with it. And I must express my admiration for the approach adopted — especially the concluding paragraph where Mr Justice Tyabji observed that he had not the slightest doubt as to the position of law but took the matter in hand out of respect to the Registrar, who found himself in some level of

doubt. That is an approach that I believe I must follow. It is one to be emulated.[3]

20. There is one other decision, almost as old. This is dated 22nd August 1916. It is decision of Mr Justice Marten in *Sarabai Amibai v Mahomed Cassum Hajiman Mahomed.*[4] I refer to this only because Marten J referred to Mr Justice Tyabji's decision *In re Abu Sattar*. But the question in *Sarabai Amibai* was entirely different — whether the document was in fact a testamentary disposition at all or was merely an instruction to draw up a testamentary disposition. The judgment in *Sarabai Amibai* need not, therefore, detain us. If anything, it re-afrms the position and the law stated by Mr Justice Tyabji.

21. *Aba Satar*, *Bayabai* and *Sarabai Amibai* were all considered by a learned single Judge of the Himachal Pradesh High Court in *Niaz Deen & Ors v Bir Deen & Anr*.[5] Though the facts there were different, I believe I must note it because it is a far more recent decision; and it tells us that the position in law has not changed since *Aba Satar*.

22. The question of law is thus decided. The objection of the Registry is answered. The Will, being of a Cutchi Memon, governed by Mahomedan law, does not require attestation.

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3 The 1905 *Aba Satar* decision was very shortly before Mr Justice Tyabji's sudden passing in England in 1906. Mr Justice Tyabji was the frst Indian barrister judge of this Court; and the frst Indian Barrister to practice on our Original Side.

4(1919) 21 Bom LR 49 : AIR 1919 Bom 80.

52015 SCC OnLine HP 3626.

23. The matter will now proceed to the grant of probate.

24. Ms Chandan Bhatt, who holds charge of the Testamentary Department, confrms that she will be issue probate by 19th March 2021.

25. Unfortunately, this may have come a little too late. Certain other directions are now necessary for the preservation of the estate, which must be the primary objective of every probate Court. The estate includes a large immovable property at Dontad Street, near Masjid Bunder. It stands in the name of Rasubai. There is an amount of Rs. 2,37,618/- as property tax that is due to the Municipal Corporation of Greater Mumbai. The Petitioners have not been able to pay this because the Zoroastrian Bank at Tardeo Branch, where the estate account is held, has been frozen or not allowed to be operated for want of probate. Mr Munim tells me that the amount due to the MCGM must be paid by the end of this week, 12th March 2021.

26. The frst direction is, therefore, to Ms Rukshana Panthaky, who is handling the estate's account in Zoroastrian Bank, Tardeo Branch to allow the Petitioners to draw on that account to obtain an instrument in favour of the MCGM for payment of the property tax. A copy of this order is to be provided to Ms Panthaky. The original probate itself will be ready by 19th March 2021 and immediately thereafter the Petitioners' attorneys will have to arrange to provide a notarized or authenticated copy sent to Ms Panthaky for her

records; after which the account can be fully operated without restrictions.

27. The second direction is to the Associate to request Mr Sagar Patil, standing counsel for the MCGM, to attend the Court tomorrow, 11th March 2021. I will list the matter itself tomorrow. I propose to request Mr Sagar Patil for his assistance and intervention in instructing or requesting the MCGM not to proceed forcibly against the Dontad Street property. This is on the basis that between Friday, 12th March 2021 and Wednesday, 24th March 2021, all property tax arrears of the MCGM will be paid up in full in regard to this property. This protects the interests of all concerned — the MCGM, the Zoroastrian Bank and the Petitioners. None should then have any cause for complaint.

28. The Petition is actually disposed of in these terms. I will, however, for the purposes of second direction, have the matter listed tomorrow, 11th March 2021 for directions.

29. This order will be digitally signed by the Private Secretary of this Court. All concerned will act on production of a digitally signed copy of this order.

(G. S. PATEL, J)