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SUPREME COURT

A

JANE PETERS

v.

HECTOR MAULL

B

and

JACK MAULL

and

CHARLES MAULL

C

[SUPREME COURT—Cullinan, J. 5 December 1986]

Civil Jurisdiction

D

Fiji National Provident Fund—No nomination of person to be recipient—member dying testate—sum to be dealt in accordance with the law of testacy.

*H. Patel for the Applicant
Third Respondent—In Person*

E

Jane Peters (plaintiff) sued Hector Maull, Jack Maull and Charles Maull (respondents) being the the brothers of the deceased who had been a member of the Fiji National Provident Fund (the Fund).

The plaintiff/respondents and the deceased were respectively sister and brothers.

The deceased died leaving a will which stated, inter alia—

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“I appoint my sister Jane Peters of Lautoka to be the executrix and trustee of this my will and of my estate I give devise and bequeath all my real and personal property whatsoever and wheresoever unto my sister Jane Peters absolutely.”

G

The plaintiff has been granted probate of the will at his death: there was a sum of money standing to his credit in the Fund. He did not nominate any person under the provisions of s.34 of the Fiji National Provident Fund Act (Cap. 219) (the Act) to be entitled to the sum. The sum was therefore paid into Court and thence to the Public Trustee. The issue for the Court was to the entitlement of the plaintiff to the sum. The relevant sections of the Act were s.35 and s.43:

H

"S.35.—(1) If, at the time of the death of any member of the Fund, there is no person nominated under the provisions of section 34, the amount standing to the member's credit in the Fund shall be paid into Court for disposal in accordance with the law for the time being in force. A

(2) If any person nominated, other than a widow, shall be under the age of 18 years at the time of payment of the amount payable out of the Fund, his portion of the amount payable shall be paid to the Public Trustee for the benefit of such nominated person." B

"S.43.—(1) Notwithstanding the provisions of any other written law but subject to the provisions of subsection (2), no contribution to the Fund, nor any amount standing to the credit of a member in the Fund nor interest on any such contribution or amount, nor withdrawals made by the authority of the Board from the Fund in accordance with sections 34, 31, 32 and 35, nor the rights of any member of the Fund acquired under this Act, nor the right to receive any annuity under any order made under the provisions of paragraph (b) of section 64, shall be assignable or transferable or liable to be attached, sequestrated or levied upon for or in respect of any debt or claim whatsoever. C

(2) Notwithstanding the provision of any other written law, all moneys paid out of the Fund on the death of any member of the Fund shall be deemed to be impressed with a trust in favour of the person nominated under the provisions of section 34 by the deceased member or, if no such person has been nominated, the person or persons determined by the Court in accordance with the provisions of subsection (1) of section 35 to be entitled thereto and shall be deemed not to form part of the deceased member's estate nor to be subject to his debts." D E

For the plaintiff it was argued that the Court should distribute the sum according to the law of testacy; that there was no form of any partial intestacy under the will and that its terms are all encompassing.

The learned trial Judge referred to *Re Narendra Prasad (s/o Bhagwan Prasad)* F.N.P.F. No. 47/1982 and *M. v. Attorney-General* F.N.P.F. No. 49/1985. Both were cases of intestacy. In the latter case the Court said— F

"I respectfully agree with the interpretation placed upon sections 35 and 43 by Kermode J: I do not see however that it is necessary to consider the reference to estate duty, as the legislation involved is different from that subsequently considered in this judgment. Dr Singh submits that the words in section 35(1), 'disposal in accordance with the law for the time being in force' can only mean that the money paid into Court under that section must be distributed as part of the estate. I agree with that submission. As I see it, those words can only refer to distribution in accordance with the law applicable to testacy or intestacy." G H

A *Held:* The sum of money held by the Public Trustee was to be paid to the solicitors for the applicant.

Cases Referred to:

- (1) *Re Narendra Prasad (s/o Bhagwan Prasad)* F.N.P.F. No. 47/1982.
 (2) *M. v. Attorney-General* F.N.P.F. No. 49/1985.

B CULLINAN, Mr Justice

Order

C The deceased was a member of the Fiji National Provident Fund (which I shall refer as "the Fund"). At his death there was a sum of money standing to his credit in the Fund. The deceased did not nominate any person under the provisions of section 34 of the Fiji National Provident Fund Act Cap. 219 (which I shall refer as "the Act"). The sum of money was therefore paid into Court and thereafter to the Public Trustee. The deceased died testate. The operative part of the will reads as follows:

"I appoint my sister Jane Peters of Lautoka to be the executrix and trustee of this my will and of my estate I give devise and bequeath all my real and personal property whatsoever and wheresoever unto my sister Jane Peters absolutely."

D It will be seen that the applicant was appointed sole executrix and sole beneficiary under the will. She has been granted probate thereof by way of grant in common form. The three respondents, the brothers of the deceased, make no claim to the sum of money now held by the Public Trustee.

E The interpretation of the provisions of section 35 and 43 of the Act arises. Those provisions were considered by Kermode J. (as he then was) in the case of *Re Narendra Prasad (s/o Bhagwan Prasad)* (1); I had occasion to also consider them in *M v. Attorney-General* (2).

In the case of *Prasad* (1) Kermode J. after considering the provisions of section 43(2) in particular observed:

F "By virtue of that subsection on the death of a member the money is deemed to be impressed with a trust in favour of the person nominated or the person whom the Court determines is entitled to it in the absence of any nomination. The fund is deemed also not to form part of the deceased member's estate.

No problems arise where there has been a nomination but who is entitled to the fund by law if there is no nomination if the fund is deemed by law not to be part of the deceased member's estate?

G One answer to that query in interpreting the subsection might be to hold that the section is designed to protect the fund from creditors and exempts it from estate and succession duties but that it remains nevertheless in fact, and in law, the property of the deceased's estate for any other purpose.

H If that is the correct legal position then the person or persons entitled to the fund might be determined by the provisions of the deceased's will or the law of intestacy.

Such an interpretation makes sense in my view but the question will have to be argued and a ruling made by the Court. Since I have heard no argument in respect of the present application I refrain from making any ruling."

In the case of *M v. Attorney-General* (2) I observed at p.6 with reference to *Prasad* (1). A

"I respectfully agree with the interpretation placed upon sections 35 and 43 by Kermode J: I do not see however that it is necessary to consider the reference to estate duty, as the legislation involved is different from that subsequently considered in this judgment. Dr Singh submits that the words in section 35(1), 'disposal in accordance with the law for the time being in force' can only mean that the money paid into court under that section must be distributed as part of the estate. I agree with that submission. As I see it, those words can only refer to distribution in accordance with the law applicable to testacy or intestacy, as the case may be: if a deceased dies testate then the money paid into court must be distributed in accordance with the will (bearing in mind the rules of construction applicable thereto—see e.g. Part VII of the Wills Act, Cap. 59, and Parts II, III, & IV of the Property Law Act, Cap. 130); if the deceased dies intestate, the money must be distributed as in the case of any intestacy, that is, in accordance with the provisions of section 6 of the Succession, Probate and Administration Act Cap. 60." B C

The cases of *Prasad* (1) and *M v. Attorney-General* (2) were cases of intestacy, so that as far as this case is concerned those observations were really obiter. I have had the advantage of learned submissions this morning from Mr Patel. Mr Patel adopts the above views expressed in those two cases. He submits that the Court must in this case distribute according to the law of testacy. In this respect he submits that there is no form of any partial intestacy arising from the will and the terms thereof are all encompassing. D

I agree with those submissions. I find that I am unchanged in my view since the case of *M v. Attorney-General* (2). Accordingly I order that the sum of money now held by the Public Trustee be paid out direct to the Solicitors for the applicant. E

Order in favour of the applicant.