

(1944) 08 BOM CK 0003
In the Bombay High Court
Case No : O.C.J. Suit No. 581 of 1944

Ardeshir Dadabhoy Baria

APPELLANT

Vs

Dadabhoy Rustomjee Baria

RESPONDENT

Date of Decision : 24-08-1944

Acts Referred:

Succession Act, 1925 — Section 114(3)
Transfer of Property Act, 1882 — Section 13, 15

Citation : AIR 1945 Bom 395 : (1945) 47 BOMLR 287

Hon'ble Judges : Blagden, J

Bench : Single Bench

Judgement

Blagden, J.—This was an originating summons having the principal object of determining the validity or otherwise of certain trusts in favour of persons unborn at the date of the creation thereof.

2. The facts are not in dispute and so far as material they are as follows:

On October 30, 1922, Dadabhai Dajibhai Baria (hereinafter called "the settlor") had two sons Ardeshir and Rustomji (plaintiffs Nos. 1 and 2), a grandson by Ardeshir called Rohinton born on September 10, 1917, and no other male issue.

By an indenture of that date (hereinafter called "the settlement") he conveyed certain property of which, it was recited, he was the full owner (and there is no evidence or allegation that he was anything less) to himself and plaintiffs Nos. 1 and 2 as trustees upon the following trusts:

1. To collect the income thereof.
2. To pay outgoings including insurance premia.
3. To pay for repairs.
4. To pay during the settlor's life one-third of the net residue of the trust income to the settlor, one-third to plaintiff No. 1 and one-third to plaintiff No. 2, provided

that if either or both of the two latter should predecease the settlor, his or their share of income should be paid to the settlor. It is observable that so far the settlor had made no final disposition of the corpus of which (had the settlement stopped at this point) there would have been a resulting trust to the settlor at the latter's death. Actually, however, the settlement proceeded to declare the following further trusts to take effect on and after the death of the settlor, viz. upon trust:

5. To divide the trust properties into two equal parts.

6. As to one such part, called "Ardeshir's Trust Fund ",

(a) to pay the net income thereof to Ardeshir for life,

(b) after the death of Ardeshir absolutely for all Ardeshir's sons in equal shares, provided that if Ardeshir should predecease the settlor, Ardeshir's trust fund should only be divisible amongst Ardeshir's sons at the settlor's death, this proviso being of course essential in order to make the 6th and 4th trusts consistent with one another.

7. As to the other such part called "Rustomji's Trust Fund" on precisely similar trusts to those of Ardeshir's trust fund, substituting Rustomji for Ardeshir.

3. It was then provided that if Ardeshir and Rustomji should each predecease the settlor without male issue him surviving, the trusts should determine and the trust property should belong to the settlor absolutely. The settlor then took absolute power to revoke or vary the settlement in whole or in part for his own benefit.

4. Provision was then made for postponement of payment of corpus and income to minors for their advancement, out of income or corpus and for investment of income not required for such advancement and payment over of accumulations on majority. Apart from a power to appoint new trustees, the remaining clauses of the settlement are immaterial.

5. The main questions raised by the summons-namely whether the gifts to Ardeshir's and Rustomji's sons are valid-must depend not on what did happen since October 30, 1922, but on what might have happened. I am, however, shortly stating the subsequent history of the matter in, order to make it clear how and to what extent the present parties come to be interested.

6. On August 10, 1923, the settlor died.

7. On September 14, 1926, a son, defendant No. 1 (minor) was born to plaintiff No. 2.

8. On April 15, 1934, Rohinton unfortunately died intestate. His heirs are his father, plaintiff No. 1, and mother, defendant No. 2.

9. By a deed of April 24, 1943, plaintiff No. 3 was duly appointed a trustee in place of the settlor. He is not otherwise interested.

10. So much for the facts.

11. The first group of questions to be answered on the summons concerns the validity or invalidity of the gifts to the settlor's grandsons. I propose to consider Rustomji's trust fund first, Rustomji having no son born at the date of the settlement. The principal relevant enactment is Section 13 of the Transfer of Property Act, 1882, viz.:

Where, on a transfer of property, an interest therein is created for the benefit of a person not in existence at the date of the transfer, subject to a price interest created by the same transfer, the interest created for the benefit of such person shall not take effect, unless it extends to the whole of the remaining interest of the transferor in the property.

This section was an attempt to import into and adapt for use in this country what used before 1926 to be known in England as "the rule in *Whitby v. Mitchell* (1890) 44 Ch. D. 85," or "the rule against double possibilities." As in so many importations, the goods have deteriorated in transit, but (conversely) neither English expression was entirely happy : the former because the rule existed long before 1890, when *Whitby v. Mitchell* was decided, and the latter because it loses in clarity more than all that it gains in succinctness. But the principle is clear enough, however difficult its application in particular cases; it is, as I understand it, that a person disposing of property to another shall not fetter the free disposition of that property in the hands of more generations than one. The rule is quite distinct from the rule against perpetuities, though their effects sometimes overlap.

12. The learned Advocate General, who appeared for defendant No. 1, invited me in this case to consider the settlement as a double one; a settlement of income during the settlor's life and of income and corpus after his death, and that is, I think, a very accurate way of looking at it. But on consideration, I am unable to follow him in the next step he invites me to take, which is to say that the settlement of corpus considered by itself is inoffensive.

13. Bearing in mind the principle which I have just stated, let me try to analyse into its simplest possible terms the rather complicated provisions the settlor has made as regards Rustomji's trust fund, that is to say the settlement of his share of corpus. It amounts to this:

Subject to the settlor's power of revocation

(a) to Rustomji for life,

(b) remainder to the settlor for life,

(c) remainder to Rustomji's sons in equal shares absolutely in the case of majors, but subject to discretionary trusts during any minority, this interest being defeasible if Rustomji and Ardeshir both died in the testator's lifetime without surviving male issue.

It is true, and important to notice, that apart from the last recited provision, no allusion is made to Rustomji's sons "him surviving", so that the vesting of this interest does not depend on the contingency of their surviving their parents. But the interest so vesting is defeasible if (a) the testator exercised his power of revocation and (b) if Rustomji's and Ardeshir's sons and their male issue predeceased Rustomji and Ardeshir and they both predeceased the settlor. Moreover, in the event of any person taking under this disposition being a minor at the time his share falls into possession his power to dispose of his property is drastically controlled. An interest in property which in two possible events is defeasible and in a third possible event is controlled is obviously less than full ownership. Nor can the extent of the gift be enlarged by the fact that neither event on which it was defeasible has happened or now can happen.

14. If the disposition of corpus now under consideration had not been made, there would on Rustomji's death have been a resulting trust for the settlor absolutely and therefore the "whole of the remaining interest of the settlor" in Rustomji's trust fund was nothing less than full ownership. It seems to me, therefore, apart from authority, that the gift to Rustomji's male issue is invalid.

15. This is the more unfortunate, because had the settlor been a little less ambitious he could by following the third illustration to Section 114 of the Indian Succession Act, 1925, have achieved substantially what he wanted, unless indeed a recent decision of their Lordships of the Privy Council, of which more anon, must be held to have repealed the proposition of law there stated by the Legislature.

16. The authorities, of which there is a singular dearth, so far from conflicting with the opinion which I have formed, rather encourage the belief that it is correct.

17. In *Putlibai Vs. Sorabji Naoroji Gamadia*, a testator attempted to make gifts to the issue of his sons unborn at his death subject to powers of appointment and to forfeiture in certain events. The Court held that these gifts failed by reason (inter alia) of the powers of appointment and their Lordships of the Privy Council came to the same conclusion both for that reason and because of the forfeiture clause. In any view of the matter, the interest given to the unborn issue of the testator's sons was less than the whole of the remaining interest of the testator as I think, in the present case. I have also been referred to the recent decision of their Lordships in *Sopher Vs. The Administrator General of Bengal*, . In that case a testator disposed of his residuary estate by will in, briefly, the following manner. As to income an annuity was to be paid to his widow and the balance to his children, the share of each son being double that of each daughter, the children of any child predeceasing him or his widow to take their parent's share of income subject to the same discrimination between sexes and the share of any child predeceasing him or his widow without issue to accrue to the other children or grandchildren with the like discrimination. As to corpus his directions were to postpone division till his widow's death and thereupon to divide the property into

shares as numerous as his surviving children and his predeceased children leaving issue living at his death, and to designate each share by the name of one such child, the share of a male child being always double that of a female to pay the income of each share to each child for life and thereafter to the children of such child, subject to the like discrimination, until they attained the age of eighteen and thereafter in trust for such child or children absolutely subject to the like discrimination. He then provided for the accrual of the share of any child who should die without issue as he had done in respect of income and made further provision for the case of children who should survive him but not his widow. He further provided a fixed maintenance allowance for any child and a discretionary allowance out of that grandchild's share of income for any grandchild who should be entitled to receive a share of income or corpus during his or her minority.

18. The will with which their Lordships were concerned is certainly very complicated, but one thing about it does seem clear. As in ill. (3) to Section 114 of the Indian Succession Act, some person or persons were in any event-short of the end of the world-going to get the whole of the testator's residuary estate at the latest at the expiry of life in being (namely, the testator or his wife according to which died first) plus eighteen years at the utmost. Even the period of an actually existing gestation did not there enter into consideration, for of three things one must happen. Either (a) Mrs. Sopher must die before Mr. Sopher, or (b) Mr. Sopher must die before Mrs. Sopher or (c) Mr. and Mrs. Sopher must die simultaneously. In the first and third events no difficulty arises. In the second it might happen that at her husband's death Mrs. Sopher was enceinte and that she died in childbed. I do not know enough about obstetrics to say whether when a child is artificially brought into the world (e.g., by a Caesarian operation) it is possible for the mother to die before the child has any independent existence. But, assuming such a thing to be possible, it seems obvious that the interval between death and birth could only be a matter of seconds, or at the most minutes, and the gulf-if any-would be bridged by the maxim that the law (in general) takes no account of parts of a day. But though the bequest was to a class not ascertainable at the testator's death but ascertainable and certainly taking within eighteen years of the expiry of a life in being at his death, such bequest was not absolute but subject to discretionary trusts in the case of minors if any, so that, the testator's interest being absolute it was not in reality a gift of the whole of the testator's interest remaining after the gift to his widow, but a gift of that interest subject to a fetter in the case of any minor.

19. Their Lordships, however, who differed from both the trial and appellate Judges in Calcutta, do not seem to have decided as they did on that ground but on the ground that it was not certain who would take under the bequest if valid. Their Lordships were without "the advantage of knowing the opinions of the learned Indian Judges" on some of the points argued before their Lordships' Board. Far be it from me to suggest that this was in itself a serious matter, but it does seem unfortunate that their Lordships' attention was apparently focussed

entirely on Sections 113 and 120 of the Indian Succession Act and does not seem ever to have been called to the third illustration to Section 114. Apart from the complications caused by Mr. Sopher's evident misogyny and from the discretionary trust for the advancement of minors any distinction which there may be between the case there put and the case before their Lordships appears to be a distinction without a difference. Yet their Lordships held the bequests in the case before them bad though those in the illustration just cited are expressly declared by the Legislature to be valid on the ground, apparently, that the quantum of an estate is diminished by uncertainty as to who will ultimately get it. I confess myself, no doubt entirely through my own mental incapacity, quite unable to follow this train of reasoning, and trust I may be forgiven for echoing the dying request of (I think) Sir Isaak Newton for "More Light". The following parable will serve to illustrate the difficulty which I feel. Suppose that a gambling party is in progress, and that Re. 1 is staked in a game of roulette. Until "giddy Fortune's furious fickle wheel" has come to a standstill no man can tell which of the gamblers will get that rupee; indeed, just as in the case of Mr. Sopher's grandchildren, it is not certain that any one of them will get it, for at any moment dacoits or the police may raid the premises and seize it. Yet, surely, the rupee at all times consists of sixteen annas and no less.

20. However, while praying that for the future my darkness-in which I gather the profession is also groping-may be illumined, it is sufficient for the purpose? of this case to say that as far as Rustomji's trust fund is concerned the decision of their Lordships confirms the conclusion at which I have arrived; indeed this case is all the clearer because of the power of revocation, which was naturally absent in Mr. Sopher's will.

21. My own, unreported, decision in *Dhunbai Ardeshir Kapadia v. Official Trustee of Bombay* (1944) O.C.J. 384 : decided by Blagden J. On June 14, 1944 is not now of any assistance in the present case. At the time I gave it the prints of their Lordships' judgment in *Sopher v. Administrator General, Bengal* had not reached India and, without that judgment to guide me I then assumed, perhaps erroneously, that I could safely rely on the accuracy" of a statement in an illustration which the Legislature had been good enough to give me.

22. These are, I believe, all the authorities bearing on the point and as already stated they confirm my own view that the dispositions of Rustomji's trust fund beyond Rustomji's life interest are invalid. I am glad to know that this is unlikely to make any practical difference to Rustomji's descendants as the two brothers, I am told, propose as their father's heirs to make a settlement which will give effect to their father's desires, which will be an extremely generous act on their part.

23. Turning to the case of *Ardeshir's* trust fund the only distinction is that he had a son in existence at the date of the settlement. That son died alter the settlor and *Ardeshir*, so far, has had no other son. Does this make a difference?

24. In my judgment, no, because, the settlement was made before Section 15 of the Transfer of Property Act was amended by Act XX of 1929. As the law then stood the section read:

If on a transfer of property an interest is created for the benefit of a class of persons with regard to some of whom such interest fails by reason of any of the rules contained in Sections 13 and 14 such interest fails as regards the whole class.

On an absolutely literal construction of this section it would be possible to hold that the questions as regards Ardeshir's trust fund are unanswerable till the death of Ardeshir as a widower or until at least nine months after his death leaving a widow, because until the happening of one of those events it cannot be certain that his deceased son Rohinton was not the whole of the class of persons benefited. Actually, however, the unamended section was evidently intended to import into this country the English rule in *Leake v. Robinsons* (1817) 2 Mer. 363 (a will case) in which case the Court said (p. 390):

I must make a new will for the testator, if I split into portions his general bequest to the class, and say, that because the rule of law forbids his intention from operating in favour of the whole class, I will make his bequests, what he never intended them to be, viz. a series of particular legacies to particular individuals,?.

In other words, the word "fails", when, first used in the unamended section, means, in the events which have here happened, "may fail".

25. In my opinion, therefore, the gifts of Ardeshir's trust fund beyond the life estate given to Ardeshir can no more take effect than those of Rustomji's trust fund beyond the life estate given to Rustomji. Again it is pleasing to think that owing to the generosity of the two brothers this will not in fact make any practical difference.

26. In spite of the foregoing conclusions, there are now distinct trusts of each trust fund, and as the parties concerned all desire the appointment of separate trustees of each, there can be no objection to this being done; nor can I see any reason against their providing for the appointment of new trustees of each such fund in the manner proposed in the plaint.

27. The specific questions I am asked by the summons are, and for the reasons aforesaid I answer them respectively, as follows:

(a) Whether on a true construction of the relevant provisions contained in the said declaration of trust Rohinton the son of plaintiff No. 1 took a vested interest in the trust property at the date of the settlement or at the date of the death of the settlor?-Neither.

(b) Whether the interest of Rohinton was liable to be divested under any circumstances?-Does not arise.

(c) Whether plaintiff No. 1 and defendant No. 2 as the heirs of the said Rohinton

have in the circumstances that have happened become entitled to the corpus of Ardeshir's trust fund?-No.

(d) If so, whether they are entitled to dispose of or deal with the same during the lifetime of plaintiff No. 1?-Does not arise.

(e) Whether defendant No. 1 took a vested interest in Rustomji's trust fund and if so, on what date?-No.

(f) Whether under the circumstances that have happened the trust fund or any part thereof reverts to the settlor?-Yes, the whole of each trust fund on the death of Ardeshir, and on the death of Rustomji respectively.

(g) Whether the plaintiffs may be directed and authorised to appoint separate trustees for the said Ardeshir's trust fund and Rustomji's trust fund as stated in the plaint?-Yes.

(h) Whether plaintiff No. 1 and plaintiff No. 3 may be discharged from their office of trustee so far as relates to the said Rustomji's trust fund and plaintiff No. 2 and plaintiff No. 3 may be discharged from their office of trustee so far as relates to the said Ardeshir's trust fund?-Yes.

(i) Whether the plaintiffs are directed and authorised to transfer the properties comprised in Ardeshir's trust fund to the trustees of Ardeshir's trust fund and the properties comprised in the Rustomji's trust fund to the trustees of Rustomji's trust fund?-Yes.

(j) Whether the plaintiffs are directed and authorised to execute the necessary deeds of appointment of new trustees and other acts and assurances for carrying into effect the above arrangement?-Yes.

(k) Whether the plaintiffs are further directed and authorised to incorporate a power of appointment of new trustees in each of the said deeds of appointment in manner mentioned in para. 10 of the plaint?-Yes.

(l) What provision should be made for the costs of this suit?-I make no order as to costs.