
(1924) 10 PRI CK 0005

In the Privy Council

Case No : Privy Council Appeal No. 148 of 1923

Cowasji Edalji Dadachanji

APPELLANT

Vs

Ratanbai and another

RESPONDENT

Date of Decision : 28-10-1924

Acts Referred:

Citation : (1925) AIR(PC) 27

Hon'ble Judges : John Edge, Carson, Dunedin, JJ.

Advocate : Letty and Hart, T.L. Wilson and Co., R.J.S. Gibson, M.R. Jardine, E.B. Raikes, G. Lowndes, W.H. Upjohn, for the Appearing Parties.

Judgement

Lord Carson

The only question which this Board is asked to decide is whether upon the true construction of the will dated the 10th July 1913, of a Parsi named Rustomji Edalji Dadachanji, who died on the 17th July, 1913, a bequest of the residuary estate in favour of his son, since deceased, was vested or contingent upon his attaining his majority.

The clauses of the will which are material for the determination of this question are in the words and figures following :-

" (5) My present surviving wife Ratanbai is now in the family way. And she has expressed in my presence her free will and accord to live as a member of the family with my executor (i. e.) my elder (or eldest) brother Doctor Kavasji Edaljee Dadachanji. As to whatever children (1 child) that may be born of her womb, my brother shall bring up and maintain the same. And my said executor shall defray all the expenses in connection there with out of my property and effects. And he shall maintain the family. (The expression maintenance of the family includes that of the maintenance of my said executor also.)

Should a daughter be born of the womb of my wife Ratanbai, she shall be brought up and maintained and shall be educated properly and my executors or after his death his executors or executrices shall after making outlays in

accordance with my circumstances get her married at a proper place (i. e., in a suitable family).

Should a son be born he also shall be cherished and maintained and educated and brought up. And when he comes of age my executor or after his death his executor or after his death his executors or executrices shall make over the whole of my remaining properties to the said son.

Should the child (whether daughter or son born of the womb of my wife, die in tender age i. e. minor) and should my wife for any reason whatever be unwilling to live as a member of the family with my executor, then my executor shall out of my property purchase Bonds for Rupees five thousand bearing interest at four per cent, at the market rate and shall transfer the same to the name of my said wife Ratanbai.

" 14. After having defrayed all the household expenses out of the income of my Punji (property), as to what ever there may remain over, my executor shall, if he thinks proper, expend the same in giving encouragement to education and the works of science and arts as well as in erecting through for cows (and) cattle to drink water from.

In case my executor should not do that then he has absolute authority to do so. If he likes he may make outlays in this manner or he may not even make the same.

"15. As to my property (or properties) lands at Nasik and Kherwadi and as to my share in my paternal property and Punji situated at Navsari I bequeath the same also to my executor my brother, Dr. Cawasji Edalji Dadachanji. And I annul and cancel the right of my heirs from all those.

"16. My executor shall make such use thereof as he may think proper. He is the owner of all those. As to the whole of the effects and furniture chattels in my home and the goods and property what ever there may remain over after payment of the above Warsas I bequeath the same to my said executors."

The parties are governed by the Indian Succession Act (X of 1865) the material section of which is in the following terms :-

"107. A legacy bequeathed in case a specified uncertain event shall happen does not vest until that event happens until the condition has been fulfilled, the interest of the legatee is called contingent.

* * * * *

"Exception - Where a fund is bequeathed to any person upon his attaining a particular age, and the will also gives to him absolutely the income to arise from the fund before he reaches that age, or directs the income, or so much of it as may be necessary, to be applied for his benefit, the bequest of the fund is not contingent."

Both the Courts in India held that the bequest to the testator's son is contingent within the meaning of the first clause of S. 107, a decision with which their Lordships agree.

The main contention, however, before the Board on behalf of the contesting respondent was that the terms of the gift came within the exception contained in S. 107.

The trial Judge held that the case did not fall within the exception to S. 107. The appellate Court, however, took a different view and held that by reason of the exception "the bequest in favour of the son was vested in interest at the date of the testator's death." It is necessary, therefore, to examine the clauses referred to in the will to see whether the fund is bequeathed to the son "upon his attaining a particular age, and the will also gives to him absolutely the income to arise from the fund before he reaches that age or directs the income, or so much of it as may be necessary, to be applied for his benefit".

In the first place it is to be noticed that there is no direct gift to the son, but only a direction to hand over, not any particular fund, but the whole of the testator's remaining properties when the son comes of age. Nor is income of such remaining properties to be employed in any way in accordance with the terms of the section absolutely for the son, nor is it directed that the income, or so much of it as may be necessary, should be applied for his benefit.

That would be impossible, as the remaining properties are not in any way ascertained or ascertainable (see *In re Gossling* (1902) 1 Ch. 945 and the same case reported on appeal in *In re Gossling* (1903) 1 Ch 448 : 88 LT 279 : 72 LJ Ch. 433.

As the learned trial Judge states in his judgment in analyzing the will : "In this case the executor is directed to maintain the family of the testator and the maintenance of the family includes the maintenance of the executor.

The direction to the executor is that he should maintain himself, the testator's wife and the son or the daughter of the testator out of the properties and effects of the testator. The executor it seems may for the purpose of maintenance of the testator's family, spend the corpus, for the maintenance of the family was to be out of the property and effects and not out of the income only of the property. If the maintenance of the family did not exhaust the whole income, as discretionary power was given to the executor by clause 14 of the Will to spend the surplus income in giving encouragement to education and works in science and arts as well as in erecting troughs for cows and cattle to drink water from." There is, therefore, no definite ascertained interest "to arise from the fund."

Their Lordships agree with the trial Judge that the case does not fall within the exception to S. 107 of the Indian Succession Act, and, as has been already stated, their Lordships agree that the bequest of the residue to the son is contingent on his attaining the age of majority. Their Lordships will, therefore,

humbly advise His Majesty that the appeal should be allowed, and the decree of the trial Court restored. The order as to costs made by the High Court in appeal will stand.

The respondents will pay the costs of this appeal.