

(1922) 07 BOM CK 0003

In the Bombay High Court

Case No : O.C.J. Appeal No. 22 of 1922 and Suit No. 5265 of 1921, O.S.

Dadabhai Framji Cama

APPELLANT

Vs

Cowasji Dorabji Panday

RESPONDENT

Date of Decision : 21-07-1922

Acts Referred:

Succession Act, 1925 — Section 84

Citation : AIR 1923 Bom 177 : (1922) 24 BOMLR 1111

Hon'ble Judges : Marten, J;Lallubhai Shah, J

Bench : Division Bench

Judgement

Lallubhai Shah, Acting C.J.

1. This appeal arises out of an originating summons taken out by the trustees for the construction of two deeds, one of August 13, 1879, and the other of July 19, 1888. The original summons stated the questions in a general form; but the questions for decision are stated in the judgment of Mr. Justice Kanga, and we have ordered the summons to be so amended as to indicate in terms the points which we have to decide. On a further hearing of this appeal, we have directed further amendment of the summons, and as a result of that two more questions have been raised.

2. It will be convenient to show in a tabular form the relationship of the parties interested in these questions:-

Dhanabaiji (died in 1891). | Rustomji (died in 1893) married Maneckbai |
(died in 1897); ----- | | |
| Framji (died in 1898) married Gulbai Byramji (died in 1908) = married (daughter)
(died in 1886; Havabai (deft. 2.) in 1920 (deft. 3) married Dinbai. in 1918). married Dinbai re-married | Meherbai in 1890
Murzban | (deft. 4) Kohiar) (deft. 5) ----- | | |
----- Dadabhai (original Hirabai | | | plff. No. 3 and sub-
(Deft. 1.) Dhanbai Kakhshru Minocher | sequently joined as (deft.6) (deft. 7)

(deft. 8)| Deft. 10). Meherbai (deft. 9).

3. The plaintiff's including Dadabhai, son of Framji, obtained the summons as trustees but in view of his personal interest in the estate Dadabhai has been joined as defendant No. 10.

4. Dhunbaiji executed a deed of settlement in August 1879, by Which she settled certain properties upon trustees for her benefit for her life, then for Rustomji for Ma life, and then for Rustomji's sons and "their male heirs" (Ex. B). Rustomji in his own right and as a trustee, and Muncherji Cama as the cotrustee were parties to this deed. Byramji died in 1886 without any issue, but left a widow Dinbai. In 1888 another deed was executed by Dhunbaiji, Rustomji and his two sons, Framji and Edulji, and the trustees under the first deed (Ex. 1 C). This deed in terms purports to revoke the first deed and to settle the same properties in trust upon the same trustees for the benefit of Dhunbaiji, then for her eon Rustomji and after his death for the benefit of his sons, Framji and Edulji, in equal shares and for division and distribution, in the manner stated therein, after their deaths. Rustomji and his two sons Framji and Edulji, and the trustees under the first settlement were parties to this deed of revocation. It dealt with the whole property described in the first deed and Government Promissory Notes of the face value of Rs. 10,000.

5. Dhunbaiji died in 1891 and Rustomji in 1893. Rustomji left a widow Manekbai, who died in 1897. She left a will under which her daughter Gulbai is the residuary legatee. Dinbai. widow of Byramji, remarried during the interval. She died in 1901 leaving her second husband and children by the second husband. Framji died in 1908 leaving his widow Havabai, who died in 1918, and a son Dadabhai and a daughter Hirabai. Edulji died in 1920 leaving a widow Meherbai.

6. The original trustees were succeeded by different trustees as detailed in paragraphs 12 and 13 of the plaint. The plaintiff No. 3, though one of the trustees, is interested in his own right under these deeds. The other trustees seek the directions of the Court as to the administration of the trusts.

7. Defendant No. 1 is the sister of Dadabhai and is interested like her brother in the estate under the second deed. Defendants Nos. 2 and 3 are the daughters of Rustomji but their interests are not identical so far as Manekbai's share is concerned Defendant No. 4 is Meherbai, the widow of Edulji.

8. The other defendants Nos. 5 to 9 are the second husband and children of Dinbai. The originating summons was taken out in December 1921. The questions raised at the hearing and now stated in the summons are as follows :-

(1). Whether on a true construction of the deed of August 13, 1879, the three sons of Rustomji Dadabhai Cama after the death of their father Rustomji Dadabhai Cama took the trust properties absolutely in equal shares, as tenants-in-common or whether they were entitled to a life-interest in the said properties ?

(2). Whether the trusts created by the deed of 1879 are validly revoked and

whether the deed of 1883 is a valid trust deed ?

(3). Whether the claim of defendants 3 and 5 to 9 to the Immovable properties comprised in the trust deed of 1879 are barred by the law of limitation ?

(4). Whether the words "the said trust property" where they appear in the following passage of the deed of revocation and re-settlement of July 19, 1888, refer to the whole of the trust estate or to the share therein only of the grandson of the settlor dying without issue, viz., " And if either of them the said Framji Rustomji Cama and Edulji Rustomji Cama shall die without issue then and in such case the said trust property shall go to and be divided between the sons and daughters &c.?

(5) In what proportions the income accruing up to the death of Edulji ought to have been distributed among the parties entitled thereto?

(6). Whether the widows of Framji and Edulji took absolute interest under the gift over contained in the deed of 1888 or for widowhood only or at all?

9. The learned Judge came to the conclusion-(a) that the three sons of Rustomji took absolutely the trust properties after the death of Rustomji in equal shares as tenants-in-common :

(b) that the deed of 1879 was not revocable but the interests of the consenting parties only were validly settled under the deed of 1888; but the interests of the heirs of Byramji not parties to the deed, i.e. Dinbai (the widow) and Manekbai (the mother), were not affected thereby, whose shares in the one-third share of Byramji were one-half and one-sixth of that one-third, i.e., one-sixth and one-eighteenth of the whole property respectively according to the rules of Parsi intestate succession:

(c) that the claims of Gulbai claiming under Manekbai and of defendants Nos. 5 to 9 claiming under Dinbai under the deed of 1879 were not time-barred : and

(d) that the words "the said trust property" in the particular clause of the deed of 1888 meant the whole trust property, including the Government Promissory Notes, with accumulated interest effectively settled by that deed.

10. As regards question 5 it appears that the question of the distribution of the income of the trust property was left over for decision hereafter, but at the hearing of the appeal today the question has been put in a definite form, and it is clear that the point as thus stated can be dealt with by us.

11. As regards the 6th question, though the opinion of the learned trial Judge is indicated in the judgment, the point does not appear to have been specifically raised.

12. From this judgment Dadabhai, son of Framji, has appealed, and Meherbai, the widow of Edulji, has filed cross-objections. All the questions have been argued before us on behalf of all the parties according to their respective

interests.

13. I shall deal with these questions in the order in which they are stated.

14. As regards the first question, the material passage in the deed of 1879 is as follows:-

Upon trust for the said Dhanbaiji for and during her life...and after the decease of the said Dhanbaiji widow, upon trust for the said Rustomji...and after his decease upon trust for his sons and their male heirs absolutely in equal shares and proportions as tenants-in-common.

15. It is urged on behalf of the appellant that the use of the words "male heirs" imposes a limitation upon the interests of the sons of Rustomji and in support of the contention reliance is placed upon the clause about maintenance in the deed.

16. Looking at the main clause without reference to the maintenance clause, I do not feel any doubt that the estate given to the sons of Rustomji is absolute and not limited. The use of the expression " male heirs" means no limitation upon it. The words "absolutely in equal shares and proportions as tenants-in-common" appear to me to negative the idea of any limitation upon the estate given to the sons of Framji.

17. Further, the use of the words ""male heirs" does not import any limitation. According to the rule of construction laid down in Section 84 of the Indian Succession Act as to wills, such an expression in a will will be rejected as having no effect in the absence of any indication of a contrary intention. I do not see any reason why a different effect should be given to that expression in a deed. It may be that under the English law there is some reason for interpreting the same expression differently when used in a will and in a deed. I express no opinion on that point. But I do not see any reason for such differentiation under the Indian law. Apart from that if the expression is taken literally, it will create an estate which is anomalous, and uncertain in its operation. It will include male heirs among collaterals and exclude females in the descending line. No authority has been cited to show that such a construction is permissible. On the contrary it appears from *Doe d. M'Kenzie v. Pestonji* (1852) 10 O.C. 531 decided long ago far back as 1352 by Sir Erskine Perry C.J., that the grant to "master builders and their sons" and to "their family and descendants" was held to be an absolute estate; and the contention of the son of the grantee that the alienation by the grantee was invalid was disallowed. Though it was a grant by the Crown it was held that it did not create an estate tail and that no reversion to the Crown was reserved.

18. Further, even according to English law, the use of this expression in deeds imports no limitation. As pointed in *Williams on Real Property* at p. 90 (21st Edition) and *Norton on Deeds*, pages 305 and 306 (Edition of 1906), under a gift to A and his male heirs A takes the fee simple.

19. Lastly, I do not think that the words used in the maintenance clause curtail in

any way the absolute estate to the sons of Rustomji nor do they indicate any intention to the contrary. I do not think that the clause was intended to have or that it can have any such effect even if it be construed as suggested by Mr. Coltman on behalf of the appellant. But in fact it appears as if the clause has been copied from some precedent without any relation to the requirements of the deed in question. I do not think that in fact anything more than "the sons of Rustomji" is meant by the expressions "the heirs male" and "his or their male heirs" used in that clause. I have not considered it necessary to quote the clause here. It is to be found at the top of page 4 of Part III of the paper-book. Even assuming that for the purpose of maintenance and education, if any son of Rustomji died leaving a minor son, that minor son would have a legal right to claim some interest in the share of his father at the discretion of the trustees, I do not think that it could be said to curtail the gift to the sons of Rustomji in the prior clause which I have already dealt with. On the contrary it would be rejected as being repugnant to the absolute gift in the prior clause in favour of the sons of Framji, if the clause as to maintenance is read in that sense. I think, therefore, that the view of the learned Judge is right and the appellant's contention must be disallowed.

20. [The judgment then proceeded to deal with other questions arising in the case.]

Marten, J.

21. This is an appeal from the judgment of Mr. Justice Kanga on an Originating Summons taken out by the then plaintiffs as trustees, and asking the following two questions, viz.,

(1) On the true and proper construction of the deed of settlement of August 13, 1879, and the deed of revocation and appointment dated July 19, 1888, who are entitled to the immoveable properties set out in the said deeds and in what proportions ?

(2) Who are entitled to the funds mentioned in the deed of revocation and appointment and the accretions thereto and in what proportions ?

22. Unfortunately, the parties have given the Court a good deal of unnecessary trouble by disregarding ordinary rules of procedure. In the first place, mere general questions like these should not be asked, when specific questions can easily be framed. See *In re Harman: Lloyd v. Tardy* [1894] 3 Ch. 607. Accordingly, we directed the Originating Summons to be amended so as to raise the exact questions which the Court was asked to decide.

23. Nor should the third plaintiff have been joined as such. It is true that he is one of the trustees, but his interests as a beneficiary are distinct and substantial, and cannot be represented by any of the other parties. This is exemplified by the fact that he is the sole appellant. There is the further difficulty that, speaking generally, co-plaintiffs cannot sever at the trial but must appear by the same

solicitors and counsel. Accordingly before us the proceedings were amended by striking out the appellant as the third plaintiff, and adding him as the tenth defendant. The original draftsman of the plaint and Originating Summons had fallen into the opposite error of making the appellant both a plaintiff and a defendant, although Sir Lawrence Jenkins had long ago pointed out that this cannot be done: *Rustomji v. Sheth Purshotamdas* ILR (1901) 25 Bom. 606; 3 Bom. L.R. 227, The trial Court remedied this mistake, but unfortunately the amendment then made was to strike out the appellant as defendant No. 1, and to retain him as plaintiff No. 3. Hence the further amendment ordered by us.

24. Then the preparation of the paper book leaves much to be desired. It does not contain the formal order of the learned Judge: and it now appears that the order was never drawn up, and that we were allowed to hear this appeal without our attention being drawn by anybody to this material omission. The explanation now given to us is, that this was thought unnecessary, because, after the question of construction was decided in the appellate Court, the trial Judge would decide certain further subsidiary points. It is, however, elementary practice both on the original side and in the English High Court that an appeal lies not from what a Judge says but from what he orders; and that what he orders is to be found in the sealed or signed formal order which is entered in the records of the Court.

25. Apart then from urgency or some special ground, no appeal should be determined without the production of the formal order Under appeal. And, in my opinion, there was no adequate excuse in the present case for departing from this well established practice.

26. So, too, the notes of hearing before the trial Judge were not printed. Consequently one cannot tell what has been put in evidence and what not. All one can say is that the alleged Exhibit numbers in the Paper Book do not correspond with the actual Exhibit marks on the documents produced to us. We have taken steps to put all these matters in order, and also to supplement the evidence by a pedigree and by two deeds of appointment of new trustees, but in my opinion this is not work which appellate Judges should find it necessary to do.

27. One other matter I will mention. No doubt in course of time practitioners in this Court will get more familiar with the procedure by Originating Summons; but with reference to para. 15 of the plaint, I think the better practice is not to plead counsel's opinions. In general, they are no more relevant on a Originating Summons than they are in an ordinary suit. So, too, as regards para. 11, trustees should not submit that certain beneficiaries of theirs are barred by limitation or otherwise. That is for the Court to decide. The trustees should not take sides.

28. Turning to the facts, the parties to the suit are all Parsis, and the deeds in question were settlements executed by Dhunbaiji, a Parsi widow, in favour of herself and her only son Rustomji and remoter issue and others. The settled

property is all in Bombay, and is stated by counsel to be now worth some twelve lacs. We are entitled to know the exact position of her family at the dates of these two deeds, and accordingly we directed a pedigree to be put in to supplement the evidence in the Court below. This pedigree shews that at the date of the 1879 deed Rustomji had three sons, Framji, Edulji and Byramji, and two daughters, Ratanbai and Gulbai. Framji and Edulji had both married, but had no issue. Edulji and Byramji were both minors. At the date of the 1888 deed, Byramji had died a minor without issue, leaving a minor widow Dinbai. Framji had meanwhile had two children, viz., the appellant and Hirabai, the first defendant. Edulji had no issue. The subsequent events were that Dhunbaiji, the settlor, died in 1891, Rustomji her son in 1893, Framji her grandson in 1908, and Edulji her surviving grandson in 1920. Framji had only the above two children, viz., the appellant and his sister Hirabai. , Edulji never had any issue. Framji's widow Hawabai predeceased Edulji, but Edulji's widow Meherbai is still living, and is defendant No. 4. Byramji's widow Dinbai died in 1901, and his and her interests are represented by defendants Nos. 5 to 9 who are her second husband and her children by him. Rustomji's daughters, Ratanbai and Gulbai, are still living, and are defendants Nos. 2 and 3. Rustomji's widow Maneckbai died in 1897, and her interests have passed to her daughter Gulbai, defendant No. 3.

29. On the first point raised on the Originating Summons, the decision of the learned Judge was as follows.-

The first question is, whether on a true construction of the deed of August 13, 1879, the three sons of Rustomji Dadabhoy Cama after the death of their Father Rustomji Dadabhoy Cama, took absolutely the trust properties in equal shares, as tenants in common, or whether they were only entitled to a life interest in the said properties.

The Trusts as regards the said three sons of Rustomji Dadabhoy Cama are as follows :-

From and after his (Rustomji Dadabhoy Cama) decease, upon trust for his sons and their male heirs absolutely in equal shares and proportions as tenants in common.

It has not been contended before me that Parsis in the Island of Bombay are not subject to English law generally and that the English law does not apply to this case. According to English law, a gift or devise to a man and his heirs gives him the fee. The words "his heirs or his male heirs" are regarded as words of limitation and not of purchase. They are not taken as conferring any estate on the heir, but simply as showing or marking out the estate the ancestor takes.

On the construction, therefore, I hold that the three sons of Rustomji Dadabhoy Cama took absolutely the trust properties after the death of their father, in equal shares, as tenants in common.

30. I concur in the result which the learned Judge arrived at, but for somewhat

different reasons. The real difficulty arises here from the maintenance clause which runs:-

Provided...that from and after the decease of the said Rustomji if the sons of the said Rustomji or the heirs male of any of them shall be under the age of eighteen years then...it shall be lawful for the trustees...during every such minority to receive the rents...of the...hereditaments and premises...or the share or shares therein respectively to which such infant son or sons or his or their male heirs shall be so entitled as aforesaid and to pay and apply the same or...part thereof...for...the maintenance and education of the person aforesaid for the time being under the age of eighteen years.

31. Then follows a trust for accumulation of the surplus rents, and to stand possessed thereof upon the trusts therein declared "concerning the trust premises or the share or shares therein from which the same shall have respectively proceeded."

32. Now this maintenance clause contemplates the heirs male of a son being "entitled" to a share under the trusts of the settlement. If, however, the true view is that the son takes absolutely, then his share would pass either to his assigns inter vivos, or on his death to his devisees or his heirs general. In no event therefore, would the heirs male as such take the son's share. Further, if they took at all they would take as on the intestacy of the absolute owner (viz., the son), and not as persons "entitled" under the trusts of the settlement. Further, this limitation to the sons and their male heirs may be contrasted with the limitations elsewhere in the deed to the trustees and their heirs.

33. It is consequently argued that this maintenance clause must be read along with the main clause quoted by the learned Judge, and that these two clauses when read together show an intention on the part of the settlor that the heirs male should succeed to the sons. Assuming, for the sake of argument, that that is so, I fail to see how the settlor's alleged intention can be carried out except by construing the limitations as conferring an estate in tail male. But this proposed construction raises many difficulties, and to my mind they are insuperable. In the first place, even if this was an English deed of settlement, the gift is to the "sons and their male heirs" and not "to the sons and the male heirs of their bodies." Nor are there any other provisions confining this male heirship to descendants of the sons. Consequently, the first requisite for an estate tail is wanting. As is put in Coke upon Littleton, 9 b: "If a man devise land to a man et sanguini suo, that is a fee simple; but if it be semini suo it is an estate taile" (see Halsbury, Vol. XXVIII p. 767, (note (h))). The word "devise" there means by deed. In those old days its use was not confined to wills as now a days.

34. The cy-pres doctrine is an instance of how this may sometimes be done (see Halsbury, Vol. 28, p. 673). Another example will be found in Halsbury, Vol. 28, p. 764, where it is said : "The context may show that by "heirs" was meant "heirs of the body." So that an estate tail only is created."

35. Next, if one confines the limitation to male heirs generally, this limitation as such is unknown to the law. Under English law in a deed a gift to a man and his heirs confers an estate in fee simple: and a gift to a man and the heirs of his body or the heirs male of his body gives him an estate in fee tail or tail male as the case may be. But a gift to a man and his male heirs is an attempt to create an estate unknown to the law. Consequently, English law rejects the word "male" as being repugnant, and construes the gift as if it were to the man and his heirs simpliciter, viz., as a gift in fee simple (see Norton on Deeds, page 805, and Williams on Real Property, 22nd Edition, page 148).

36. Another example will be found in Peerage cases. Thus the limitation in the Letters Patent must be to the future heirs of the patentee and the limitation must be one known to the law. The usual limitation is to the heirs male of the body. But, as stated in Halsbury, Vol. 22, p. 288: "A limitation to heirs male, as distinguished from heirs male of the body, is void in England but not in Scotland." (See also Wiltes Claim of Peerage (1862) L.R. 4 H.L. 126. Then at Halsbury, p. 269, it is said; "A peerage is an incorporeal hereditament, inalienable and descendible according to the words of limitation contained in the grant. A limitation to a man and his heirs" will not carry it to collateral heirs. For the purposes of descent, therefore, this limitation is practically equivalent to "heirs of the body."") It can be understood, therefore, that in a Peerage case there would be a strong reason for construing the limitation as one to the heirs of the body, for otherwise the limitation would practically fail. That reason does not, however, exist in English law in a grant of land by deed similar to the one we have to deal with. Such a grant of land would vest an absolute estate in fee simple in the grantee.

37. But English law draws a distinction between gifts by deed and gifts by will. In an English will there is authority to shew that a devise to a man and his male heirs would be construed as giving an estate in tail male (see Williams on Real Property, 22nd Edition, p. 259, Theobald on Wills, 7th Edition, p. 409; and see *Crumpe v. Crumpe* [1900] A.C. 127.

38. But in the present case we have to deal with a deed. If then One applies English law to the present settlement, the word "male" in the main gift and also in the maintenance clause would I think be rejected. And this construction would be aided by the word "absolutely" in the main gift. Under those circumstances the main gift would confer an estate in fee simple, and in my opinion the maintenance clause quoad the heirs would be rejected as being repugnant to the prior absolute gift.

39. But the difficulties of the appellant do not stop there. The settled land is Indian land and must devolve according to the *lex loci*. But estates tail or in tail male are unknown to Indian law, and may they always remain so. To introduce into this country the mixed common and statute law on the subject, and to refer to the Statute De Donis and to recoveries, and fines, disentailing deeds and protectors of settlements would indeed be a calamity. I am, therefore, unable to

concur in the view of the learned Judge that Parsis are subject to English law generally, and that English law applies to this case. In my opinion novel estates unknown to the law of India can no more be introduced into Bombay by Parsi settlors than they can be by Englishmen or Hindus. As was pointed out by Mr. Kania for defendant No. 2 the illustrations to Section 84 of the Indian Succession Act make it quite clear that in wills governed by that Act, gifts which under English law would confer an estate tail confer under Indian law an absolute estate. A fortiori, therefore, the same result would follow in a settlement effected by deed and not by will. So in effect, both under Indian law as well as under English law, the result would be the same in a settlement effected by deed and not by will, viz., an absolute estate.

40. I, therefore, reject entirely the suggestion that the sons took an estate in tail male.

41. I also reject the applicant's argument that on the death of Rustomjee in 1893, the persons to take were a class to be ascertained at that date, and consisting of (a) his then surviving sons, and (b) such of their heirs presumptive then living as were male. This contention appears to me to be a hopeless one. For one thing, it introduces the element of survivorship of Rustomjee, which the settlement itself does not stipulate for. For another, it gives part of the property to persons who on no construction of the settlement can possibly take as specified beneficiaries. Heirs presumptive are not necessarily the heirs at law. *Nemo est hoeres viventis*.

42. Question 1 will accordingly be answered by declaring that the three sons took the trust property comprised in the 1879 deed absolutely in equal shares as tenants in common

43. [The rest of the judgment is not material to this report].