

(1907) 04 BOM CK 0001
In the Bombay High Court

Dinshaw Sorabji Mody and Another

APPELLANT

Vs

Dinshaw Sorabji Mody and Others

RESPONDENT

Date of Decision : 15-04-1907

Acts Referred:

Succession Act, 1865 — Section 78

Citation : (1907) ILR (Bom) 472

Hon'ble Judges : Davar, J

Bench : Single Bench

Judgement

Davar, J.—The parties to this suit are interested in the decision of certain questions of law which have arisen in connection with an Immovable property in the village of Ambolee in the suburbs of Bombay, They have entered into an agreement and availed themselves of the provisions of Chapter 38 of the CPC for the purpose of obtaining the opinion of the Court on the questions which have arisen in connection with the said Ambolee property.

2. One Nusserwanji Jehangir Wadia was the owner of this property. On the 29th of March 18S8 he executed an indenture of settlement whereby he granted and conveyed to certain trustees the Ambolee property mentioned in the plaint. He reserved-to himself the rents and profits of the said property and the management thereof during his own lifetime and then to his wife. On the death of the survivor of them, the indenture of settlement provides that the trustees shall hold the said premises in trust for such person or persons or charity or charities and for such purpose or purposes as the said Nusserwanji Jahangir Wadia should "by deed or writing or by his will or any codicil or codicils appoint." In default of appointment the indenture provides that the premises should be conveyed to the Trustees of the Parsi Panchayet of Bombay. The plaintiffs are the present trustees of this indenture of settlement. Defendants 3 to 7 are the present Trustees of the Parsi Panchayet Funds and properties,

3. On the 8th of June 1885 the said Nusserwanji Jehangir Wadia executed his last will and testament whereof he appointed his wife Pirojbai the solo executrix.

By the seventeenth clause of his will the testator gave his residuary estate in the event of his dying without issue to his executrix upon certain trusts mentioned in the said para, of his will. He, by the said clause of his will, appointed certain persons trustees for the purpose of carrying out the Charitable Trusts established by the said seventeenth clause of his will and called them his charitable trustees. He gave the residue of his estate to his charitable trustees with directions that they should apply the annual income in or towards the endowment of hospitals for the sick, in donations, gifts or grants to dispensaries infirmaries, educational or charitable.

4. institutions in the Island of Bombay and also in relieving, poor and indigent Parsis. The seventeenth clause of the will then goes on to provide that in the event of the charitable trusts being held to be void or incapable of taking effect from any cause whatever and in the event of his wife predeceasing him and his dying without issue the whole of the residue of his estate should go to the Parsi Panchayet.

5. Nusserwanji Jehangir Wadia died on the 5th of May 1897 without having revoked his will and without any issue. Before his death he made no express appointment of the Ambolce property. His widow Pirojbai died on the 25th of April 1903. After Nusserwanji's death his widow had certain litigation with his brother Nowroji. By a decree made by the appeal Court in the suit between the widow and the brother of the deceased Nusserwanji, being Suit No. 611 of 1897, the charitable trusts contained in the seventeenth clause of the will of Nusserwanji were upheld and trustees were appointed. The first two defendants are the surviving trustees so appointed by the Court.

6. By the agreement between tire parties two questions are submitted for the opinion of the Court. The first and principal question is "whether the Ambolee property comprised in the indenture of settlement of the 29th of March 1888 has vested in the first two defendants upon the trusts of the charitable bequests contained in the seventeenth clause of the will of the late Nusserwanji Jehangir Wadia." The second question is whether in the event of the Court answering the question in the negative the said Ambolee property passes to the defendants 3 to 7 who are the present trustees of the funds and properties of the Parsi Panchayet, under the provisions" oil the indenture of settlement of the 29th of March 1889.

7. At the hearing of this suit counsel for the plaintiff did not argue the questions but merely submitted to the orders and directions of the Court. The Trustees of the Parsi Panchayet funds and properties did not appear, but the questions were argued before me by Mr. Inverarity who with the Advocate General appeared for the first two defendants.

8. The questions before the Court present no difficulty and the only point for the consideration of the Court is covered by Section 78 of the Indian Succession Act and concluded by a long series of cases which are all collected and cited at page

222 and the following pages of Farwell on Powers.

9. Section 78 of the Indian Succession Act provides that a bequest of the estate of the testator shall be construed to include any property which he may have power to appoint by will to any object he may think proper and shall operate as an execution of such power and. a bequest of property in a general manner shall be construed to include any property which he may have power to appoint by will to any object he may think proper and shall operate as an execution of such power.

10. The question here is - Can the testator be said to have exercised his power of appointment reserved to himself under the deed of settlement of the 29th of March 1888 by the will which he had made and published on the 8th of June 1885 nearly three years previous to the deed of settlement?

11. It must be remembered that a will speaks from the date of the testator's death and in *Stillman v. Weedon* (1848) 16 Sim. 26 it was held that the will though made before the power was created was a good execution of the power.

12. *Boyes v. Cook* (1880) 14 Ch. D. 53 is a very distinct authority establishing the proposition that a power of appointment reserved to a party by a deed may be deemed to be exercised by a will made previous to the instrument conferring the power of appointment provided a contrary intention is not shown by the will. In this case a husband reserved to himself a power of appointment by his will over one-third of the property settled by a deed of separation, He had made a will several months before the execution of the deed of separation and it was held that the will was a good execution of the power although made before the deed of separation.

13. This case was approved of in the later case of *Airey v. Bower* (1887) 12 App. Cas. 263 by the House of Lords.

14. These cases are all of course decided under the English Wills Act (7 Will. IV and I Vic. c 26), but Sections 24 and 27 of that Act only reproduce in concrete form the general principles of the law which are again reproduced in Section 78 of the Indian Succession Act. The proposition of law laid down as the result of the joint operation of Sections 24 and 27 of the Wills Act and deducible from the English authorities, the more important of which I have noticed above, is as stated in *Farwell on Powers*(1), at page 222, that "a general power of appointment may be well exercised by a will executed previously to the creation of the power, and that too, by a mere residuary gift,"

15. I hold that the power of appointment reserved to himself by the indenture of settlement of the 29th of March 1888 was validly exercised by the settlor Nusserwanji Jehangir Wadia by his will made and published by him on the 8th of June 1885.

16. I answer the first question in the affirmative. I am of opinion that the Ambolee property comprised in the indenture of settlement of the 29th of March

18S8 has vested in defendants Nos. 1 and 2 who are parties of the second part to the present agreement upon the trusts of the charitable bequests contained in the 17th clause of the will of their testator Nusserwanji Jehangir Wadia.

17. The second question in view of my answer to the first does not arise. It will be convenient if however I record my opinion in connection with that question that the defendants 3 to 7, the trustees of the funds and properties of the Parsi Panchayet, take no interest whatever in the Ambolee property.

18. Decree to be drawn up in accordance with the agreement re-cited in paragraph 13 of the agreement.

19. Liberty to the parties to apply as the occasion may arise.