
(1951) 11 BOM CK 0007
In the Bombay High Court
Case No : O.C.J. Suit No. 856 of 1951

Edulji Framroj Dinshaw

APPELLANT

Vs

Sir Gawasji Jehangir

RESPONDENT

Date of Decision : 01-11-1951

Acts Referred:

Succession Act, 1925 — Section 113, 114, 120
Transfer of Property Act, 1882 — Section 13

Citation : (1955) 57 BOMLR 763

Hon'ble Judges : Shah, J

Bench : Single Bench

Judgement

Shah J.

1. One Framroz Edulji Dinshaw died on January 3, 1936, leaving him surviving a son Edulji and two daughters Bachoobai and Manekbai. Prior to his death, Dinshaw had made and executed a will on July 23, 1934. After the death of Dinshaw, Manekbai, who was a spinster, died on May 30, 1939. Manekbai died intestate, and Edulji and Bachoobai were her nearest relations on whom the property left by her devolved according to the rules of inheritance governing ParSections

2. Under Clause 11 of his will Dinshaw, who will hereafter be referred to as the testator, gave various directions to his trustees with regard to the corpus and income of his property, and directed that the property be held on trust. For the purpose of this Originating Summons we are primarily concerned with the directions contained in Sub-clauses (g), (h) and (i) of Clause 11. Sub-clause (g) is in the following terms:

After the death of such child my trustees shall hold such share and the future income thereof in trust for all or such one or more exclusively of others or other of the children or remoter issue of such child at such age or time or respective ages or times, if more than one in such shares, and with such trusts for their respective benefit and such provisions for their respective advancement either

after the death of such child or during his or her life with his or her consent, and maintenance and education at the discretion of my trustees or any other person or persons as such child shall by any deed or deeds revocable or irrevocable or by will or codicil without trans-grassing the rule against perpetuities appoint.

The expression "such share" in Sub-clause (g) refers to the division of the estate in three equal shares directed to be made under Sub-clause (d) of para. 11 of the will. That sub-clause provided:

My trustees shall stand possessed of the capital and income of the trust fund in trust to divide the same into three equal shares and to appropriate one of such shares to each of my children now living, namely, Bachubai, Edulji and Maneckbai.

Clause (h) of para. 11 of the will provided:

And in default of and subject to any appointment under the power hereinbefore contained in trust for the child or children of such child of mine who shall be living at my death or born afterwards and who being male attain the age of 18 years or being female attain that age or marry, and if more than one in equal shares.

Clause (i) of para. 11 of the will provided:

No child of such child who shall take any part of the share of such child under any appointment shall in default of appointment to the contrary be entitled to any share of the unappropriated part thereof without bringing the share or shares appointed to him or her into hotchpot and accounting for the same accordingly.

3. This suit has been filed by Edulji and Bachoobai, son and daughter, respectively, of the testator, against the trustees under his will. The plaintiffs have requested this Court to answer the following five questions:

(1) Whether the power of appointment contained in Sub-clause (g) of Clause 11 of the Will as mentioned in the plaint is a General Power of Appointment or a Special Power of Appointment.

(2) Whether the sale proceeds hold by the Defendants of the Immovable properties which were situated outside India and Immovable properties belonging to the deceased F.E. Dinshaw as mentioned in the plaint situate outside India are governed by the provisions of Bombay Act LIV of 1947.

(3) If the answer to question 2 is in the negative then whether the provisions of Sub-clause (g) of Clause 11 of the said Will as mentioned in the plaint are valid in so far as they apply to Immovable properties situate outside India.

(4) If the answer to question No. 3 is in the negative, then whether there would be an in-testacy of the deceased in respect of such properties or the sale proceeds thereof subject to the life interests of the plaintiffs.

(5) Whether the plaintiffs as heirs of the deceased would be entitled absolutely to the properties situate outside India or the sale proceeds thereof on their surrendering their respective life interests therein.

4. The principal question which falls to be decided by this Court is the first question: i.e. whether the power of appointment contained in Sub-clause (g) of Clause 11 of the will incorporates a General Power of Appointment or a Special Power of Appointment....

5. Two constructions of Sub-clause (g) are suggested by the contending parties:

(1) After the death of such child my trustees shall hold such share and the future income thereof in trust for all or such one or more exclusively of the others or other of the children or remoter issue of such child at such age or time or respective ages or times, if more than one in such shares, and with such trusts for then respective benefit and such provisions for their respective advancement either after the death of such child or during his or her life with his or her consent, and maintenance and education at the discretion of my trustees as such child by any deed or deeds revocable or irrevocable or by will or codicil without transgressing the rule against perpetuities appoint, or (in trust for) any other person or persons as such child shall by any deed or deeds revocable or irrevocable or by will or codicil without transgressing the rule against perpetuities appoint, and (2) After the death of such child my trustees shall hold such share and the future income thereof in trust as such child shall by any deed or deeds revocable or irrevocable or by will or codicil without transgressing the rule against perpetuities appoint, for all or such one or more exclusively of others or other of the children or remoter issue of such child at such age or time or respective ages or times, if more than one in such shares, and with such trusts for their respective benefit and such provisions for their respective advancement either after the death of such child or during his or her life with his or her consent, and maintenance and education at the discretion of my trustees or any other person or persons.

6. Now, in Sub-clause (g) there is a singular absence of punctuation. In a very complex sentence there are three commas, two of them being before and after the clause "if more than one in such shares" indicating that the clause is parenthetical, and that they have no other significance. The third comma after the expression "with his or her consent" does not facilitate interpretation of the rest of the clause, and might as well have been omitted.

7. The defendants contend that it was the intention of the testator to grant a special power of appointment to his children exercisable in favour of the children or remoter issue of such children, and that the expression "any other person or persons" governs the clause relating to the exercise of discretion in the matter of application of the funds for the advancement, maintenance and education of the ultimate beneficiaries under the power of appointment. The plaintiffs contend that the testator intended to confer a general power of appointment exercisable either in favour of their children and upon trust for their respective benefits as

are indicated in the clause or in trust for any other person or persons as the donee of the power may appoint. In my view the interpretation suggested by the plaintiffs is not correct. If the testator desired to confer a general power of appointment authorising the donees of the power to appoint the property in favour of any person or persons they desired, it was unnecessary for him to give any alternative direction. It is difficult to understand why the testator who was himself an attorney should have granted a power exercisable in favour of the children or remoter issue of the donees or in favour of any of any other person or persons. Any attempt to transfer the clause "or any other person or persons" so as to make it follow the clause relating to children or remoter issue not only makes the sentence ungrammatical, but the effect becomes more obscure. If the construction suggested by the plaintiffs is to be accepted, in order to complete the sense the words "in trust for" must be added before the expression "any other person or persons". Sub-clause (h) of Clause 11 of the will also appears to support the construction that it was the intention of the testator to benefit his children's progeny under the power of appointment, as in default of the power of appointment the property is directed to go to such child or children of the donee of the power who shall be living at the testator's death or born afterwards and who being male attain the age of 18 years or being female attain that age or marry, and if more than one in equal shares. I am not at this stage concerned with the validity of Sub-clause (h), but I am referring to that clause only for the purpose of showing that the dominant intention of the testator was to benefit his children's children or remoter issue, and with that object he granted the power of appointment to his own children, to whom a life interest was given.

8. It was urged on behalf of the plaintiffs that on the construction suggested by the defendants the donee of the power had really a double power of appointment. It was argued that not only was the donee entitled to appoint his or her children or remoter issue, but was entitled to direct how the property was to be applied for the benefit of the children or remoter issue for their respective advancement, maintenance and education at the discretion of the trustees or at the discretion of other person or persons designated by the donee of the power. In my view there is no substance in that contention. The power of appointment is, under the will of the testator, to be exercised in favour of the children or remoter issue of the donee of the power, and for the purpose of effectuating the appointment ancillary directions for using the share for their benefit and advancement, maintenance and education are permitted to be given. The power is a special power to be exercised in favour of the children or remoter issue of the donees, and the additional direction which may be given in appointing the share, are not an additional power. The fact that the donee of the power may confer a discretion upon the trustees or some other person or persons for application of the benefit for the advancement, maintenance and education of the ultimate beneficiaries appears to be consistent with conveyancing practice. In Key and Elphinstone's Precedents in Conveyancing, Vol. 1, 12th edn., at page 796, standard forms of general power of appointment and forms of trusts for

children and remoter issue are set out ; and the form used by the testator appears closely to follow the form of special power of appointment for children and remoter issue. In note (c) at page 797 in the Precedents in Conveyancing it is observed: "Without such words as these (viz., or any other person or persons) to give a discretion to another person when exercising the power would be invalid as amounting to delegation of the power". When a will has been executed, as in this case, by a practising attorney who has in the course of his professional duties been accustomed to draw up documents according to the English system of conveyancing and appears to have adopted a well-known model form in use for creating trust with a special power, the inference that the executant was conversant with the conveyancing practice and the rules of construction adopted in that practice, and that the executant used that expression in the sense in which they are understood, may readily be made.

9. In Davidson on Conveyancing, Vol. III, Part I, at page 159, it is stated as follows:

As it is considered that the provisions for maintenance and education, and for advancement, usually inserted in the settlements, would not in general apply to an appointed share, such a share being by the appointment, and in so far as it extends, withdrawn from the general operation of the settlement, and it is important that appointments made in favour of minor children should contain proper provisions for those purposes; and as it maybe doubtful whether such powers call be delegated without special authority, the terms of the power of appointment should enable the donees to provide for maintenance and education, and for advancement at the discretion of the trustees of the settlement, or others;....

10. Whereas a special or a particular power of appointment is a power to appoint amongst a named class of persons, a general power on the other hand is a power under which the donee of the power has unrestricted choice. The choice of the donee being restricted in this case amongst the children or remoter issue of the donees of the power, the power of necessity must be regarded as a special power of appointment. On the ground that the conveyancing practice and the grammatical construction both support the view that it was the intention of the testator to confer a special power of appointment upon his children, I agree with the construction suggested by the defendants. The answer to question No. 1 is therefore that the power of appointment contained in Sub-clause (g) of Clause 11 of the will is a special power of appointment....

11. The testator has directed that the donees of the power must so exercise the power as not to transgress the rule against perpetuities, i.e. the rule contained in Section 114 of the Indian Succession Act. If the donees exercise the power contrary to that direction, the exercise of that power would be void. It is contended by "Mr. Maneksha for the plaintiffs that the direction contained in the will may prohibit the donees of the power from appointing property contrary to the rule against perpetuities strictly so called, but the donees are not prohibited

from appointing property in favour of the appointees so as to transgress the provisions of the Indian Succession Act. It was argued that the donees of the power may grant in favour of their children or remoter issue, who were not in existence at the time of the testator's death, estates which do not comprise the whole of the remaining interest of the testator in the thing bequeathed.

12. Now, by Sub-clauses (d), (e) and (f) of Clause 11 of the will the testator has provided life interests in favour of his children in the trust fund. By Sub-clause (g) of Clause 11 of the will, as I have held earlier, a special power of appointment is granted to his children by the testator exercisable in favour of their children or remoter issue of such child, and consistently with the other provisions of the clause. Before I consider the question, whether the special power of appointment conferred upon his children by the testator is valid, it is necessary to note that an important distinction exists between a special power of appointment and a general power of appointment. A general power of appointment makes the appointee practically the owner of the property. In a special power of appointment the appointment is made subject to the limitations imposed by the author of the power and also subject to the limitation as if the deed under which the power is exercised is read as part of the original document under which the power is created. At page 325 in *Farwell on Powers*, 3rd edn., it is stated:

There is an important distinction between general powers and particular powers in this respect (in respect of the application of rules against perpetuities.), The donee of a general power is virtually absolute owner of the property over which his power extends; and he is to be regarded as absolute owner for the purpose of considering the application of the rule against perpetuities to him. The donee of a particular power is not absolute owner; he cannot create any estate in point of perpetuity which might not have been created by the instrument creating the power: he cannot appoint to any person to whom the original creator of the power, could not have appointed. "The test of the validity of the estates raised is to place them in the deed creating the power in lieu of the power itself." (*Sugden on Powers*, 395-96).... "Particular or special powers...differ from general powers in that the donee has not an unrestricted power of alienation, and in that case the rule against perpetuities requires that all limitations made in pursuance of the power shall be such only as would have been valid if inserted in the original will or settlement (*Sug. Pow.* 396). When the power is exercised the limitations created under it are to be written into the instrument which created the power, and, if and so far as they do not exceed the rule against the perpetuities, they are good. At the date of such instrument creating the power the limitations are in such a case not known. Their form depends upon the future action of the donee of the power. It may be that he will so exercise the power as to transgress the rule: if so, the limitations fail. It may be that he will so exercise it as not to exceed the rule; in that case the limitations will be good. At the date of the instrument creating the power it is impossible to say whether the rule will be transgressed or not, but this uncertainty does not render the limitation bad" (i.e., a special power must (1) arise and be exercisable during the period, and (2) only

during the period, and (3) must be exercised so that the limitations arising thereunder might validly have been inserted in the instrument creating the power). The validity or invalidity of the interests created by the execution of a particular or special power is determined by the state of things when the appointment takes effect.

13. In *Thompson, In re: Thompson v. Thompson* [1906] 2 Ch. 199 Mr. Justice Joyce observed (p. 202):

...Where, as in the present case, the will under consideration is made in exercise of a special power of appointment, the question whether an estate or interest appointed by it be too remote depends upon its distance from the creation, not from the exercise, of the power. In other words, the period within which estates and interests limited by the appointment made in exercise of a special power must vest does not begin from the death of the person exercising the power, but, if such power was created by a will, from the death of the original testator. In the case of a will made in exercise of a special power of appointment,--as to any estates or interests given which vest immediately upon the testator's death, or must vest within twenty-one years afterwards,--if the testator, the donee of the power, was living at the time of its creation, there is no objection on the ground of remoteness, since what is given must vest immediately upon, or within twenty-one years after, the termination of a life (that of the donee of the power) which was in existence at the time of the creation of the power.

In the case of a power to appoint by will to issue, however remote, if the donee of the power was alive at the time of its creation, any appointment to objects of the power specified by name or otherwise, but capable at the death of the donee of the power of being ascertained immediately, must be unobjectionable, notwithstanding that neither the appointees, nor their parents, nor their grandparents were alive at the time of the creation of the power. For the interests of the appointees vest at the appointor's death, and the appointor was living when the power was created. But if future estates or interests be given by the will of the donee of the power, the question may arise whether such estates or interests are or are not within the limits allowed by the rule, which requires them to vest not later than twenty-one years after the termination of some life in being at the time of the creation of the power.

14. It is pertinent to note that the rule against perpetuities in England before the Law of Property Act of 1925 comprised two principal rules which were really two branches of the rule relating to remoteness. Those two rules are stated in Halsbury's Laws of England, Vol. XXV, 2nd edn. at page 79, Article 170, as follows:-

...The first is known as the rule against perpetuities, and is to the effect that every limitation of property, unless it depends upon an estate tail, must, to be valid, vest, if at all, within a life or lives in being, and twenty-one years and a period of gestation, afterwards. The second, which has been sometimes referred

to as the rule against double or remote possibilities and is now applicable only to limitations or trusts created by an instrument coming into operation before 1926, is directed against contingent remainders of real estate limited to successive generations of unborn issue.

The second rule set out by Halsbury was, strictly speaking, not a rule against perpetuities, but was commonly, though perhaps inaccurately, described as a rule against double possibilities. That rule was also known as the rule in *Whitby v. Mitchell* (1889) 42 Ch. D. 494. Even before the Law of Property Act of 1925, the rule only applied to equitable estates and not to legal estates and it did not apply to personalty. Since the year 1925 it does not even apply to documents relating to realty executed after the year 1925. The true effect of the rule against perpetuities both in England and in India was that an executory devise or other future limitation must vest, if at all, not later than a life or lives in existence at the time when the deed under which it is created and the period of minority and the possible period of gestation, and if it is not so likely to vest, the devise or limitation would be regarded as invalid. The devise or limitation in order that it may be good is required to be created in such terms that it cannot possibly vest after the expiration of the life or lives in being and the period of minority and the period allowed for gestation.

15. Section 113 and Section 114 of the Indian Succession Act undoubtedly owe their origin to the English Common Law. Section 114 of the Indian Succession Act incorporates the rule against perpetuities as applicable to testamentary dispositions. The English common law did not, however, recognise any rule similar to the one contained in s. 113 of the Indian Succession Act. Based as the rule against perpetuities is on remoteness, the English law merely refers to commencement or the first taking effect of limitations and not to the extinction or determination of devises or limitations. If an estate vests within the period of perpetuity, it is possible in England to limit the estate to unborn persons for life or till the happening of an uncertain event. It may be that in the year 1865 when the Indian Succession Act was originally enacted by the Indian Legislature, it was intended to incorporate in the statute law of India- the rule which was later recognised as the rule in *Whitby v. Mitchell*. But in modifying the rule, presumably to suit Indian conditions, a modification was made which does not appear to have any counterpart in the English law. In *Whitby v. Mitchell* lands were limited by marriage settlement to the use of the husband and wife successively for life, and with remainder after the death of the survivor to the use of a child, grandchild, or remoter issue, or all and every or any one or more of the children, grandchildren, or more remote issue of the husband and wife (such child, grandchildren, or more remote issue being born before any such appointment before any appointment should be made) as the husband and wife should appoint, The husband and wife by a deed appointed part of the settled lands to the use of a daughter for life for her separate use without power of anticipation, and after her demise to the use of such persons as she should by will appoint and in default for use of her children living at the date of the deed. It

was held in that case that all limitations, except the one in favour of the daughter for life were void. It appears that when the rule which ultimately crystallized in *Whitby v. Mitchell* was in the process of development, it was recognised as a rule which invalidated an estate in land to an unborn person for life with remainder to that person's issue, not because it was obnoxious to the rule against perpetuities, but because it transgressed the old rule of the common law, that a possibility cannot be limited upon a possibility, and it was regarded as immaterial that a prior limitation was made to take effect within the period allowed by the rule against perpetuities. But even in *Whitby v. Mitchell* what was regarded as invalid was the remainder in favour of the unborn issue of an unborn person it whose favour an estate in land was created.

16. Section 113 of the Indian Succession Act, even though it may be deemed historically to have been based upon the rule in *Whitby v. Mitchell*, does not directly invalidate the remainder in favour of the issue of unborn persons. The possibility of an interest in favour of the issue of an unborn person granted under a deed or will was clearly recognised under the English common law. But by Section 113 of the Indian Succession Act estates conferred upon unborn persons subject to prior bequests, in so far as they do not comprise the whole of the remaining interest created for the benefit of the unborn persons, are declared void. It is not the limitations which are void, but it is the estate granted in favour of the unborn person which is made void.

17. It must, therefore, be accepted that Section 113 as enacted in India, whatever may be its historical origin, is a rule relating to the quantum of interest which can be conferred upon unborn persons and has nothing whatever to do with the rule against perpetuities. The testator has in his will directed that the appointment made by his children with regard to a share of the property were to be made without transgressing the rule against perpetuities, but the rule against perpetuities referred to in Sub-clause (g) of Clause 11 of the will can only be the rule contained in Section 114 of the Indian Succession Act, and not the rule contained in Section 113 of that Act.

18. In ascertaining whether the special power of appointment is validly exercised, the Court must consider whether the estate granted in exercise of the power could validly have been granted under the original instrument under which the power has been granted. Normally, the question as to the validity or otherwise of the special power cannot arise unless the donee of the power has actually exercised the power. The donee under a special power of appointment may not exercise the power to create estates or interests which the author of the power could not himself in similar circumstances have created. In other words, while the circumstances in which the appointment is made are taken into account, the period reckoned for ascertaining the validity of the dispositions will be from the time of creating the power, and not, as in the case of general power, from the time of exercise of the power. A special power validly given may be exercised in an invalid manner so as to grant an estate which is to vest beyond

the period of perpetuities or by conferring upon persons unborn at the date of the death of the author of the power interests in property which do not comprise the whole of the remaining interest of the author. In those cases the execution of the power would be regarded as invalid. The special power is valid, but the mode of execution of the power is in the circumstances invalid. In other cases, however, the power by reason of the directions given by the author of the power is itself invalid. It need hardly be said that if a power is to be exercised, it must be exercised strictly according to the directions given by the author.

19. Where by the document creating a special power the author has delegated the exercise of the power in a manner which appears to transgress the provisions of Sections 113 and 114 of the Indian Succession Act, the power would be regarded as void. Similarly, if the estate to arise in exercise of the power in favour of unborn persons is otherwise made contingent or defeasible the estate thereby not comprising the whole of the remaining interest of the author in the property, the special power itself would be void.

20. Under the will of the testator a life interest is devised in favour of his children in his property and the children are given a special power of appointment in favour of their children or remoter issue. The validity of that power of appointment has been challenged by Mr. Maneksha on various grounds. Counsel contended that if there were more children than one of the donees of the power, the estate granted to the children may not comprise the whole of the thing Sopher Vs. The Administrator General of Bengal, , p.c. bequeathed, because it may be a mere fractional interest in the property; that the estate in favour of the appointees would be an estate which might vest in them only in the event of the appointees surviving the donees of the power and that in any event such interest conferred upon the appointees would not comprise the whole of the remaining interest in the thing bequeathed, because their interest would come into being on the death of the donees of the power, and not before; that the power contemplated that the trustees under the will of the testator may hold the share of the donee for the benefit of the children or remoter issue at such age or time or respective ages or times, if more than one in such shares, and with such trusts for their respective benefit and such provisions for their respective advancement either after the death of such child as the donee of the power may appoint; that in the exercise of the special power of appointment the donees had the authority to appoint in favour of remoter issue who may not come into existence before the death of the donees of the power ; and that the donees of the power may appoint limited, contingent or defeasible estates in favour of the appointees, and the exercise of the power in those events would be regarded as void.

21. In support of his argument Mr. Maneksha has strongly relied upon two decisions of the Privy Council: Sopher Vs. The Administrator General of Bengal, . and Putlibai Vs. Sorabji Naoroji Gamadia, . There is in my view no substance in the first contention raised by Mr. Maneksha. It is always open to a testator,

subject to the provisions of Sections 113 and 114 of the Indian Succession Act, to give a fractional interest in any property, even to an unborn person. A fractional interest in property, provided it is not subject to other conditions or limitations, comprises the whole interest of the testator in the thing bequeathed—the thing bequeathed being the fractional interest. There is no warrant for holding that a fractional interest in property cannot be a "thing" within the meaning of Sections 113 and 114 of the Indian Succession Act.

22. Section 113 of the Indian Succession Act deals with the quantum of interest which maybe bequeathed in favour of unborn persons. By enacting Section 113 of the Succession Act the Legislature disapproved of any attempt to put limitations upon the estate to be given to persons unborn at the time when the will comes into operation. As observed by their Lordships of the Privy Council in *Sopher v. Administrator General, Bengal*, at page 868, Section 113 as framed "raises or may raise questions of very great difficulty". The difficulty in the interpretation of the section is caused by the clause "the later bequest shall be void, unless it comprises the whole of the remaining interest of the testator in the thing bequeathed". The expression "the later bequest" is obviously used with reference to the bequest in favour of unborn persons. That bequest in order to be valid must comprise the whole of the remaining interest of the testator in the thing bequeathed. The expression "remaining interest" means the entire interest of the testator, less the interest carved out by the prior bequest. In other words, the bequest in favour of unborn persons and the prior bequest between them must exhaust the entire interest of the testator in the thing bequeathed. The section cannot and does not mean that unless the interest bequeathed to an unborn person is in all manner as exhaustive as the interest of the owner of the thing bequeathed, that interest is void. A vested interest granted under a will in favour of an unborn person, possession of which is deferred till the happening of a certain event, is not void by reason of the provisions of Section 113. What that section means is, that where a prior interest is given and a later bequest is provided in favour of an unborn person in the same thing, the completeness of the estate in favour of the unborn person can be limited only to the extent to which a prior valid bequest can limit it. If there are any other limitations which derogate from the completeness of the estate granted in the thing bequeathed, the bequest in favour of an unborn person is void. If the bequest in favour of an unborn person after a prior valid bequest is dependent upon a contingency, the bequest may also be regarded as void. Similarly, any limitation or a condition of defeasance which derogates from the completeness of the estate in favour of an unborn person so as to reduce it to a life estate, or to an estate defeasible on the happening of a contingency renders such estate void. The expression "remaining interest" therefore connotes an interest which is as complete as an interest which the testator had in the thing bequeathed, such interest not being fettered or limited except by and to the extent of the prior estate; but where a vested interest is given in the thing bequeathed in favour of an unborn person, the vested interest will not be avoided merely by reason of imposition of limitations

which restrict enjoyment. The principles which I have set out are, in my view, borne out by the two decisions which Mr. Maneksha has referred to in the course of his argument, and the judgment of the Privy Council reported in (1949) L.R. 76 I.A. 104 (Privy Council) .

23. In *Putlibai v. Sorabji* the testator, a Parsi resident of Bombay, by complex will made provision by Clause 9 of the will for the residence of his children and their respective families in his residential house. He then proceeded by Clause 10 of the will to direct that the Immovable properties were devised on trust to expend the net income thereof for the maintenance and upkeep of such of his children and their respective families until the expiration of ten years from his death or until the death of his last surviving son, whichever should happen first. Under Clause 11 of the will the testator directed that after the expiry of the period mentioned in Clause 10 of the will, the trustees should (subject to certain reservations) divide the properties or the sale proceeds thereof in five equal shares and should hold each of such shares as that of each such son upon trust to pay the income of each such share to such son until his death and from and after the death of each son to pay the same to such persons as shall be presumptively entitled to the corpus until the death of the last surviving son. Clause 12 of the will gave power of appointment by a will or deed upon such trust and upon such conditions with such restrictions, powers and provisions as he might think fit, but subject to the proportion of share and order of priority therein provided. In Clause 13 the testator gave directions as to what was to happen in de-fault of appointment. Clauses 15 and 16 contained provisions for defeasance in certain eventualities. The Judicial Committee decided that the children and their respective families had a right of residence as provided in Clause 9 of the will. They further held that the limitations mentioned contravened the provisions of Section 100 of the Indian Succession Act of 1865 (present Section 113 of the Indian Succession Act). It was observed at page 1134 of the report:

...The bequests to the sons, daughters, widows and issue of the testator's sons thus made do not in all possible instances dispose of the subject matter to which they apply, and so fail to comprise the whole of the remaining interest of the testator. It is obvious that he has reserved contingent rights which might well prove to be of value. The unborn beneficiaries do not take the whole interest undisposed of by reason of the title of his own sons being only for their lives. But the difficulties are not exhausted by those considerations. Clause 15 gives over the share in income or corpus alike of any beneficiary who alienates, in any of a number of ways, and in that event creates a discretionary trust, which may extend, so far as the income is concerned, only to a part of it, for the benefit according to selection by the trustees of some others of a class of beneficiaries somewhat wider than that of those who are to take under the clauses just referred to. The 16th clause also puts an end to the title of every beneficiary who ceases to profess, or marries any one not professing the Zoroastrian faith, and gives the interest over in favour of those who take on the death of such

beneficiary. In the face of this clause it cannot be contended successfully that Section 100 is complied with. For the whole of the remaining interest need not pass out of the hands of the trustees if there is a forfeiture of the income of the sons of the testator.

It was argued that, even if these questions may arise, they do not arise now, and that the Court ought to have refused to decide them, in accordance with the principles that declarations are not usually made as to merely future interests. But the interests are not merely future interests. If the argument based on the invalidity of the subsequent limitations just considered is well founded, the five sons have a present title to the residue subject only to the minor provisions already referred to, which title they are now in a position to enforce.

It follows from this conclusion that in so far as there is a direction in Clauses 10, 11 and 14 implying a postponement of the division of the residue for ten years, or until the death of the last surviving son, that the direction is inoperative, the interest to which it attaches being absolute.

It is clear from the observations that there were numerous limitations upon the completeness of the estate given under the will to unborn persons. By reason of the interaction of Clauses 11, 13, 15 and 16 upon the exercise of the power of appointment contained in Clause 12 the objects of the power who were unborn were liable to be defeated and were not likely to take the estate at all in certain events and in certain contingencies.

24. In *Sopher v. Administrator General, Bengal*, the testator gave under his will an annuity to his wife and the balance of his property to his children, his sons' share being double that of the daughter. It was provided in the will that, if any children predeceased the testator, the widows or children of such children were to take the share of the children so dying. As to the corpus the testator directed that distribution should be postponed till after his widow's death and thereafter the estate should be divided into as many shares as there were children and his predeceased children leaving issues and the income should be paid of each share to each child for life and thereafter to the children of such child until they attained the age of 18 years. The testator then directed that the share of any child who died without issue should be applied in the same manner as in the case of income from the property. Their Lordships of the Privy Council held that "particular bequest in favour of an unborn person must comprise of the testator's remaining interest if the legatee is not in existence at the testator's death...and further gifts however complete in their operation, do not save "the bequest"." Vicount Maugham observed at page 869, referring to *Putlibai's* case:

It is at least consistent with that decision to hold (as was argued in that case) that if under a bequest in the circumstances mentioned in Section 113 there is a possibility of the interest given to a beneficiary being defeated either by a contingency or by a clause of defeasance, the beneficiary under the later bequest does not receive the interest bequeathed in the same unfettered form as that in

which the testator held it, and that the bequest to him does not therefore comprise the whole of the remaining interest of the testator in the thing bequeathed.

Inasmuch, as the interest in favour of the grandchildren was contingent upon their attaining the age of 18 years and surviving their parents, the whole of the remaining interest of the testator was held not to have been bequeathed to the grandchildren, and the Privy Council held the bequest void. Prior to the decision of the Privy Council, it had been assumed, by the legal profession, especially in Bombay, that the extent and operation of the restrictive provisions in respect of estates to unborn persons enacted in Sections 113 and 114 of the Succession Act was the same as under the English law; and on that assumption precedents of English wills and settlements were indiscriminately used in the preparation of wills and settlements without clear appreciation of the difference between the two systems. The will of the testator F.E. Dinshaw at one time a leading solicitor of this Court in the present case is an illustration of how deep-rooted that impression was. The true effect of the decision in Putliabai's case was only appreciated when it was reiterated in Sopher's case.

25. In a recent case *Ardeshir Baria v. Dadabhoy Baria* (1944) 47 Bom. L.R. 287 Mr. Justice Blagden observed (p. 292):

...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.

Mr. Justice Blagden expressed a doubt whether in view of the decision of the Privy Council in *Sopher v. Administrator General, Bengal*, the terms of the third illustration to Section 114 could be regarded as having been in effect repealed. The only point which, however, fell to be decided by Mr. Justice Blagden was whether the interest given to unborn persons under a settlement, which was defeasible under a power of revocation reserved by the settlor and which was also defeasible in the event of unborn beneficiaries predeceasing the sons of the settlor was valid u/s 13 of the Transfer of Property Act. The case was not one under the Indian Succession Act, but arose under the Transfer of Property Act. Again the assumption that the third illustration to Section 114 controls the meaning of Section 113 may be open to doubt. When it is recognised that the rule enacted in Section 113 of the Succession Act is not a branch of the rule against perpetuities or even of the rule against remoteness, and is primarily concerned with the quantum of interest which may be granted to unborn persons, the criticism by the learned Judge of the judgment of the Privy Council that possibly a reference to the third illustration to Section 114 of the Succession Act would have induced their Lordships to come to a different conclusion, appears to have little force. If Section 113 which enacts that an estate in favour of an unborn person, when it does not comprise the whole of the interest remaining upon a prior bequest is void, relates only to the quantum of interest which can be conferred upon unborn persona, and is not a branch of the law of perpetuities

contained in Section 114, it is difficult to appreciate how for the purpose of construing Section 113 of the Indian Succession Act their Lordships of the Privy Council could have been persuaded to seek assistance from the third illustration to Section 114 of the Act. It is true that both Sections 113 and 114 deal with estates in favour of unborn persons. Section 113 deals with limitations which may be validly placed upon the quantum of interest which may be conferred upon unborn persons, while Section 114 deals with the period of vesting of estates granted to unborn persons, but otherwise those provisions do not deal with restrictions of the same nature or quality.

26. *Anirudha Mitra v. Administrator General of Bengal* was a case in which the will of a Hindu governed by the Dayabhaga School of Hindu law, who died in the year 1933, fell to be construed. The testator Rai Bahadur Lai Mitra died leaving him surviving his son Anirudha, his wife Nayani, and his son's wife Nivanani. By Clause 5 of his will the testator gave a right of residence in the family house and use of furniture therein to his wife, his son, and his son's wife for their respective lives. By Clause 7 " he allowed maintenance to his wife, his son, and his son's wife, each at the rate of Rs. 700 per month during their lives, with direction for distribution of the amount on death to the survivor or survivors. By ol. 9 of the will the testator made a bequest in favour of legitimate son or sons of his son Anirudha, whether natural born or validly adopted, of all the rest and residue of his property". It was further provided that if there was only one son, the residue was to be made over to him on his completing the age of 21 years, and if there were more sons than one, the residue was to be made over in equal shares, on the youngest sons attaining the age of 21 years. Anirudha adopted a son, and thereafter was adjudicated an insolvent. He obtained a conditional discharge, and then filed a suit in the Calcutta High Court contending that the devise under Clause 9 of the will was void. Das J. who tried the suit held that Clause 9 conferred a vested interest in favour of the sons of Anirudha, and the condition about the Completion of 21 years was not a contingency but a mere postponement of enjoyment. The Court of Appeal and the Privy Council accepted that view. Sir Madhavan Nair delivering the judgment of the Board observed at (1949) 51 Bom. L.R. 977 :

Coming to Section 113 of the Act, it was held by Gentle and Ormond, JJ. that the interests created by Clauses 5 and 7 of the will, viz., the bequests with respect to the house and furniture to which rights were given to the testator's wife, his son and his wife, and the life annuities, constituted prior bequests contained in the will within the meaning of Section 113. Their Lordships are not satisfied that Section 113 would apply where the prior bequest referred to can be regarded as bequest prior to the disposition of the residue ; if so, Their Lordships think the interests cannot be regarded as prior interests of residue, since the property allocated to meet such bequests does not fall into residue unless until the interests under Clauses 5 and 7 have determined ; but even if the bequests do amount to prior bequests of the residue. Their Lordships are, satisfied that the whole remaining interests of the residua have been bequeathed under Clause 9

and the provisions of Section 113 have no operation on Clause 9 of the will.

Their Lordships indicated the view that the provisions of Clause 9 of the will may be void as being contrary to the rule against perpetuities, but the interest granted being in favour of a class was valid, so far as the adopted son was concerned. It is clear from the observations that their Lordships were of the opinion that where an estate is granted to an unborn person, which is to vest on his birth, if the interest comprises the whole of the remaining interest of the testator, Section 113 has no application, even though there are limitations imposed upon enjoyment by such unborn person....

27. The will of the testator in the present case is partially governed by the Dispositions of Property (Bombay) Validation Act, LIV of 1947, and to the extent to which there are Immovable properties in the State of Bombay and also to moveable properties the taint, if any, arising under Clause 11 of the will must be deemed to have been removed. The question arises only with regard to the sale proceeds of property sold by the executors between the date of the testator's death and the date of partition of India, i. e. August 15, 1947. Under Clause 11, Sub-clause (g) of the will, the testator granted a special power of appointment and authorized the executors of the power (a) in favour of the children or remoter issue or one or more of them exclusively of others as the donees may direct, (b) and at such age or time or respective ages or times and in such shares as the donees may direct, (c) and in such trusts for their respective benefits and provision for their respective advancement, maintenance and education at the discretion of the trustees or any other person or persons as the donees may appoint, and (d) the appointment to be made by a deed or deeds, revocable or irrevocable, or by a will or codicil. In exercise of the power the donees of the power are therefore entitled to appoint their share to one or more child or children to the exclusion of others and at such age or time or at such ages or times to make provision for the advancement, maintenance and education of all the appointees. It would be competent to the donees of the power to make an appointment contingent upon the beneficiaries attaining a specified age or being alive at the happening of a specified event or otherwise. It would also be open to the donees of the power to appoint property subject to the provision for advancement, maintenance and education. In all these respects (except the last) the interest granted to the beneficiaries would not comprise the whole of the remaining interest of the testator after the life interest in favour of his children granted by the testator in the thing bequeathed. Again, it would be open to the donees of the power to make an appointment under deeds which are revocable, so that the appointment may be liable to be revoked. In my view Clause 11, Sub-clause (g), of the will, contemplated the exercise of the power in a manner which may transgress the provisions of Section 113 of the Indian Succession Act, and would therefore be void. This is not a case in which a special power of appointment has been given without any direction as to the mode in which the appointment is to be made, so that unlawful execution of the power would not render the power void, but would make only the execution of the

power void. It is true that a mere possibility of a special power being exercised in a manner transgressing the provisions of Section 113 of the Indian Succession Act would not make the power itself void, A mere possibility of the power being exercised contrary to the provisions of the statute law in India does not invalidate the power. If, however, by the very terms by which the power is granted, it is contemplated that in the exercise of the power the provisions of Section 113 of the Indian Succession Act may be transgressed, the power itself must be regarded as void. Both in Putlibai's case and in Shopher's case their Lordships of the Privy Council held that estates granted by the respective testators in the two cases by the exercise of the power of appointment were void as they were likely to transgress the provisions of Section 113 of the Indian Succession Act.

28. If, as stated in "Sugden on Powers", 8th edn. at page 396, "the test of the validity of the estates raised is to place them in the deed creating the power, in lieu of the power itself", the distinction that in one case the possibility of the interest being defeated either by a contingency or by a clause of defeasance arises expressly by reference to the conditions in the will for the exercise of the power, and in the other cases such possibility arises by reason of the exercise of the power in a manner contemplated by the testator, though it may be possible for the donee of the power to avoid such defeat, must, in my view, be ignored.

29. I may summarise the principles which in my view can be extracted from the pronouncements of the Judicial Committee. They are: (a) where an interest which is to vest on the birth of a devisee, who at the date of the death of the testator is unborn, is granted, subsequent limitations which merely defer enjoyment are not void by reason of the provisions of Section 113, (6) where by reason of a contingency the estate devised in favour of an unborn person subject to a previous bequest may not take effect the bequest is void, as it does not comprise the whole of the remaining interest of the testator in the thing bequeathed, and (c) where an estate which is to vest in an unborn parson subject to a prior bequest is made subject to a condition of defeasance, the bequest is void for the same reason.

30. The form used by the testator is a well-known standard form of a special power of appointment given in "Key and Elphinstone's Precedents in Conveyancing", and if the assumption that Section 113 of the Indian Succession Act was intended to codify the law relating to perpetuities in the same manner as in England, the power granted by Clause 11, Sub-clause (g), would have been regarded as a valid power. But, it appears that in the transplantation of the rule in *Whitby v. Mitchell* (which incidentally was authoritatively stated several years after the Indian Succession Act of 1865 was enacted) has undergone a change which was possibly not contemplated by the framers and has thereby become a rule, not against perpetuities, but of the quantum of estate which may be conferred upon unborn persons. Therefore, the fact that a well-known form, which may have created valid estates in England, has been used cannot

justifiably be a ground for upholding the creation of estates, which the statute law of India prohibits.

31. In view, therefore, of the provisions of Clause 11, Sub-clause (g) of the will, which contemplated in the exercise of the power conditions of defeasance upon estates granted to unborn persons, and also contemplated contingencies which might defeat the estates in favour of unborn persons and thereby transgress the provisions of Section 113 of the Indian Succession Act, I hold that the special power is void.

32. It is true that no question with regard to the interpretation of Sub-clause (h) of Clause 11 of the will has been mooted before the Court. The testator under that clause has provided that the estate devolving in default of appointment by his childrens" children or remoter issue provided they attain the age of 18 years, or if female attain the age of 18 years, or marry, the condition requiring that the grandchildren or remoter descendants should survive the holders of the life interest in the estate and must attain the age of 18 years, or being female attain that age or marry, is a condition which, on the principle of Section 113 of the Indian Succession Act, which I have set out earlier, must be regarded as void. In my view, therefore, the special power of appointment given in favour of children under Clause 11, Sub-clause (g) of the will, is void, and the bequest under Sub-clause (h) must also be regarded as void, both on the ground that they are alternative to a void bequest, and on the ground that they transgress the rule against perpetuities contained in Section 114 of the Indian Succession Act. I need hardly say that the observations which I have made with regard to the validity of the special power of appointment and the effect of Sub-clause (g) and (h) of Clause 11 of the will are only confined to the sale proceeds of the Immovable properties a Karachi which have been sold by the executors of the will between the dates of the death of the testator and the partition of India, that is August 15, 1947. Immovable properties situate in the Province of Bombay and movable properties wherever situate would be governed by the provisions of the Dispositions of Property (Bombay) Validation Act, LIV of 1947. The Immovable properties situate at Karachi which have not been sold before August 15, 1947, will be governed by the law of Pakistan.

33. I proceed to answer the questions as follows:

Questions No. 1 and No. 2 have already been answered.

Question No. 3. The provisions of Sub-clause (g) of Clause 11 of the will are not valid in so far as they apply to the sale proceeds of Immovable properties sold-"between the dates of the testator"s death and August 15; 1947. Question No. 4. There is an intestacy to the testator in respect of the sale pro- ceeds Referred to in answer to question No. 3. Question No. 5 has not "been argued before me and on the view that I have taken, I do not propose to answerit. Even by waiver the heirs of the deceased testator would not be entitled to free themselves from the limitations sought to be placed upon their powers, if the

testator has validly imposed such limitations.

34. Costs of all the parties as between attorney and client to come out of the estate.