

(1896) 07 CAL CK 0017
In the Calcutta High Court

G. W. A. Lloyd

APPELLANT

Vs

A. B. L. Webb and Another

RESPONDENT

Date of Decision : 28-07-1896

Acts Referred:

Citation : (1897) ILR (Cal) 44

Hon'ble Judges : Sale, J

Bench : Single Bench

Judgement

Sale, J.—This a suit for the construction of the will and for the administration of the estate of William Lloyd, who died in the Darjeeling district on the 15th of January 1896, leaving the plaintiff, his son, an only child, and a widow who resides in England. The will is dated the 16th of September 1890, and the defendants, who are appointed the trustees for carrying out the wishes of the testator expressed in the will, obtained probate as executors according to the tenor, on the 10th of February 1896. It appears that the testator had for many years carried on, and was carrying on at the date of his death, a banking business in Darjeeling, of which the defendant Alexander Baness Lumley Webb was the manager, and that the business is still being carried on by the defendants as the trustees appointed by the will. It also appears that at the date of the will the plaintiff had attained full age but had not adopted a profession, though it is said that before the death of his father he succeeded in obtaining a commission in the Militia.

2. The main question raised on the construction of the will of the testator is as to the effect to be given to the provisions contained in the will relating to the plaintiff.

3. Subject to the payment of an annuity to the widow, about which no question arises, the will, which is an inartificial and ill-expressed document, contains the following directions:

I leave all my estate, whether private or appertaining to Lloyds Batik, in trust for

the benefit of my only child, George William Aylmer Lloyd, and hereby appoint Alexander Baness Lumley Webb and his brother Edwin John Webb trustees for carrying out my wishes.

4. A subsequent clause provides as follows:

And my son is to be allowed only such small sum pecuniary as may force him to earn his own bread. At the end of the year 1900 the trust shall cease.

5. Then follows the provision:

At the end of 1900 years my son is to be allowed to enjoy the estate.

6. The first question is, what is the nature of the gift to the son, is it an absolute gift of the whole estate with immediate vesting, or is it a postponed gift contingent upon the son surviving to the end of the year 1900, when the trust is to cease.

7. It is to be observed that there is no gift over in the will nor is there any separate or express devise of the surplus income of the estate for the period intervening between the death of the testator and the cessation of the trust after providing for the widow's annuity, the son's subsistence allowance, and the trustees' remuneration.

8. It is said that though the testator leaves his estate in trust for the benefit of his son, the benefit which it was intended that the son should take is explained by the subsequent provisions of the will and is limited and controlled thereby. But the object of the trust, so far as it is defined by the subsequent directions of the will, is not to create a benefit in favour of the son, but to cut that benefit down and to restrict it to a subsistence allowance until the year 1900, when the trust is to determine. It seems to me, therefore, the benefit given by the earlier clause of the will cannot be confined to the benefit to be enjoyed by the son under the terms and during the pendency of the trust.

9. The gift is in express terms of the whole of the estate to trustees for the benefit of the son. The testator, however, desires that his estate is not to come into the possession or enjoyment of the son for a given period so as to afford the son an opportunity of learning to earn his own livelihood. Similar provisions with a similar object have been held to constitute an immediate and absolute gift.

10. In *Hanson v. Graham* 6 Ves. 239 the subject of immediate gifts with postponed enjoyment and gifts postponed to or contingent on the donee attaining a certain age was much discussed, and at p. 248 of the report Sir W. Grant, M. R., observes as follows as regards the decision in the case of *Love v. L'Estrange* 3 Bro. 337. "It was not a simple unqualified gift, but there were many circumstances to shew that Walter Nash was meant to have the benefit absolutely, and that the enjoyment was only postponed; the testator giving it to trustees in the meantime; and applying a reason for withholding the enjoyment from this minor; that he wished him to follow his trade as a journeyman; with

which object he naturally thought that fortune would interfere, and therefore he postpones the enjoyment of it until the age of twenty-four. But he gives it to trustees entirely and absolutely for the benefit of Walter Nash; to improve it for his benefit, to transfer the whole to him when he arrives at that age, and to make him a certain allowance in the meantime. That is very different from a simple bequest to him, when twenty-four, for if that had been a legacy it would have been separated from the residue immediately upon the testator's death, and must have been paid over to the trustees immediately, and they would have managed it until the legatee had attained the age of twenty-four."

11. In *Saunders v. Vautier* Cr. & P. 240 where a testator bequeathed certain stock to trustees upon trust to accumulate the dividends until the intended donee should attain 25 and then to transfer the principal together with the accumulation to the donee absolutely, it was held that the donee, though a minor at the testator's death, took an immediate vested interest in the legacy, and at p. 248 of the report Lord Gottenham referring to the eases of *Love v. L'Estrange* 3 Bro. 337 and *Hanson v. Graham* 6 Ves. 239 makes the following observations:

That case has many points of resemblance to the present, and although Lord BOSSLYN seems in *Monkhouse v. Holme* 1 Bro. G. C. 298 to question the principle of the decision, Sir W. Grant in *Hanson v. Graham* justifies it upon grounds most of which apply to this case, particularly that the fund was given to trustees till the legatee should attain a certain age, and that it should then be transferred to him; from which and other circumstances he thought it was to be inferred that the fund was intended wholly for the benefit of the legatee, although the testator intended that the enjoyment of it should be postponed till his age of twenty-four. Such, I think, was clearly the intention of the gift in this case.

12. It appears to me that these observations of Sir W. Grant and Lord Gottenham are applicable to the circumstances of the gift in question in this suit, and that in accordance therewith I must hold that the plaintiff under the will of the testator took an immediate vested interest in the estate of the testator.

13. The next question is whether the gift is an absolute gift of the entire estate, or whether the gift is qualified or restricted in any way by the subsequent directions to the trustees, and in particular by the direction that the son is not to be allowed to enjoy the estate till the end of the year 1900.

14. The plaintiff contends that there is an absolute gift of the estate to him, and that the subsequent restrictions are repugnant to the previous absolute gift and should be disregarded.

15. The rule under which the Courts will set aside or disregard conditions or restrictions as repugnant to a previous gift is well recognized in England, and it is thus stated by Lindley, L.J., in the case of *Harbin v. Masterman* L. R. Ch. Div. (1894) 2 184 (196). "Now notwithstanding the general principle that a donee or legatee can only take what is given him on the terms on which it is given, yet by

our law there is a remarkable exception to this general principle. Conditions which are repugnant to the estate to which they are annexed are absolutely void, and may consequently be disregarded. This doctrine, I apprehend, underlies the rule laid down in *Saunders v. Vautier* Cr. & P. 240 and enunciated with great clearness by Vice-Chancellor Wood in *Gosling v. Gosling* Joh. 265 (272). Vice-Chancellor Wood says this: "The principle of this Court has always been to recognise the right of all persons who attain the age of 21 to enter upon the absolute use and enjoyment of the property given to them by a will, notwithstanding any directions by the testator to the effect that they are not to enjoy it until a later age:---unless during the interval the property is given for the benefit of another. If the property is once theirs, it is useless for the testator to attempt to impose any fetter upon their enjoyment of it in full so soon as they attain twenty-one. And upon that principle, unless there is in the will, or in some codicil to it, a clear indication of an intention on the part of the testator, not only that his devisees are not to have the enjoyment of the property he has devised to them until they attain twenty-five, but that some other person is to have that enjoyment,---or unless the property is so clearly taken away from the devisees up to the time of their attaining twenty-five as to induce the Court to hold, that, as to the previous rents and profits there has been an intestacy---the Court does not hesitate to strike out of the will any direction that the devisees shall not enjoy it in full until they attain the age of twenty-five years.""

16. And in *Weatherall v. Thomburgh* L. R. 8 Ch. Div. 261 Lord Justice JAMES refers to the same rule in these words:

The Court acted on the established principle that where there is an absolute gift to an adult male any direction to restrain his enjoyment of it is absolutely idle, unless there is a defeasance. In such a case a direction to accumulate the income is only a mode of preventing the person entitled from enjoying the property, which can have no effect.

17. Now can it be said in this case that as to the intermediate interest or as to the surplus income of the estate prior to the end of the year 1900, there is either an intestacy or a defeasance. In my opinion it cannot. The testator intended, I think, to make a present gift of the entire estate to his son, and he intended that his son should have the ultimate enjoyment of the whole estate in the hands of the trustees after payment of the legacies. It was only the present enjoyment of the estate of which the testator desired to deprive the plaintiff, and this attempted restriction is in my opinion invalid and must be disregarded.

18. It is true that the rule as to repugnant conditions has not been introduced into this country by the Succession Act, or by other statutory enactment, but on the other hand it has been applied by Phear, J., in the case of *Mokoondo Lall Shaw v. Gonesh Chunder Shaw* ILR 1 Cal. 104 and also by the Bombay Court in the case of *Gosavi Shivgar Dayager v. Rivett-Carnac* ILR 13 Bom. 463 and by the Privy Council in the case of *Ashutosh Dutt v. Doorga Churn Chatterjee* ILR 5 Cal. 438: see page 444 of the report.

19. A question has also been raised as to the trustees' remuneration. The will provides that "three per cent, commission be allowed among the trustees annually." Is the commission to be calculated on the corpus or income of the estate?

20. The testator contemplated the trust continuing till the year 1900, and even longer should the son die before that time and the wife survive. The remuneration given to the trustees is for the management of the general estate, and the direction that the commission is to be allowed annually appears to indicate that; it was to be calculated on the income of the estate. It is said, however, that if calculated in this way, the remuneration would be wholly inadequate as a Bank manager's salary---and that the testator could not have intended to reduce so largely the salary of the defendant Alexander Baness Lumley Webb, who has for many years acted as the manager of the Bank.

21. But in my opinion the remuneration provided by the will for the trustees, was intended to be wholly apart from the salary which the defendant Alexander Baness Lumley Webb would be entitled to so long as he continued to be the manager of the Bank. The remuneration provided by the will is intended for the discharge by the trustees of the duty of general management of the estate and not for performing the special duties of a manager of the Bank. The remuneration for the latter duties must be specially provided for in due course of the administration of the estate.

22. There must be a decree for administration of the estate with a declaration of the right of the plaintiff to immediate possession of the estate, subject to the payment of the debts and legacies, or provision being made therefor, in due course of administration.

23. Costs of all parties to be taxed on scale 2 as between attorney and client and to come out of the estate.