
(1914) 11 PRI CK 0011

In the Privy Council

Case No : Privy Council Appeal No. 78 of 1913

Jehangir Dadabhoy and another

APPELLANT

Vs

Kaikhusr Kavasha and others

RESPONDENT

Date of Decision : 26-11-1914

Acts Referred:

Citation : (1914) AIR(PC) 18

Hon'ble Judges : Ameer Ali, John Edge, Shaw, Lords Dunedin, JJ.

Advocate : Chester, Ford, Ranken Ford, T.L. Wilson and Co., G.R. Lowndes, Robert Finlay, Horane Miller, DeGruyther, for the Appearing Parties.

Judgement

Lord Shaw

This is an appeal from a decree of the High Court of Judicature at Bombay, dated the 9th December, 1910. The High Court affirmed a decree of the Subordinate Judge of Thana, dated the 2nd April, 1910.

The case has reference to the construction of a will executed by one Dadabhoy Byramji on 8th August, 1866. By this will the testator narrated that of his three sons then living he has given one in adoption to a paternal uncle. His other two sons were named Pallonji and Jehangirji. The material portions of the will disposing of the "estate" are these :-

"The said two sons are proprietors, half and half alike, and in equal (shares), of my whole "estate", outstandings, debts, title and interest.....Both the heirs are to take care of the said "estate" and look after it. and both the heirs living together, are duly to enjoy the balance which may remain after payment of the Sarkar"s assessmentIn this my testamentary writing I, the testator, have appointed my two sons as (my) heirs."

The will then states that Pallonji, the elder, a man then of about thirty-nine years of age, was in a confused state of mind, and that the other son Jehangirji was accordingly entrusted with the management of the "estate."

"By his true and pure integrity, and both the heirs are to equally enjoy half and half alike the whole estate" with unanimity with my elder son Pallonji in such a way as not to injure his (Pallonji's) right."

Up to this point in the Will there can be no doubt whatsoever that the property of the estate was effectually and equally divided between these two sons. There then follow, however, the clauses which are said to create difficulty. They are these :-

"At present my elder son Pallonji has no male issue of his body. (He) has only a daughter. Therefore, if my elder son Pallonji gets a male issue, half of the "estate" is to be made over to him, on his attaining (his) full age."

And it may be proper that the 11th clause of the Will should be quoted in full. It reads thus :-

"I, the testator have in the second clause of this Will appointed my two sons Pallonji and Jehangirji as my heirs. The wife of Pallonji, the elder of them, has now gone to her father's house. On her return, if she, by instigating her husband, or by any (other way) cause to be mortgaged, sold, given in gift, charity, etc., or disposed of, whatsoever in any way to any one, any immoveable and moveable "estate," etc., appertaining to the half share during the life-time of my son Pallonji or, after his death, which God forbid, my son Pallonji or his wife, or daughter or any (other person) (shall) as stated in the third clause of this will have no authority, power and right so to do. If my son Pallonji does not get a son, my son Jehangirji is to give away his son as Pallonji's Palak (or his adopted son). All the clauses of this will are applicable to the said adopted (son). If a son be born of the body of Pallonji he shall on his attaining (his) full age be the owner of half share in the whole of the immoveable and moveable "estate" belonging to me. My heir (and) Vakil (or executor) Jehangirji, or his heirs shall raise no objection to give him the share. If they raise any objection, the responsibility arising therefrom is on their heads. All the clauses written in this will are applicable to the said son of (his body)."

The material facts of the case are that the testator having executed this Will on 8th August, 1866 died within a fortnight thereafter, viz., on 21st August 1866. He was survived by his two sons. Pallonji, the elder, was of weak intellect as the Will indicates. Jehangirji entered upon the management of the whole estate, having obtained Probate of the Will in 1867. This state of matters lasted for thirty years, viz., till 1897, when Pallonji died. Pallonji was twice married but had no son. He left a widow and other representatives who are respondents in this appeal and are his heirs according to the Parsi Intestate Succession Act. The nature of the suit by these heirs is for an account, for an ascertainment of the rights and interests of the parties in the estate and for partition, and the claim is grounded on the right of Pallanji as, it is contended, the owner of one half of the estate from the date of the testator Dadabhoy's death.

One other fact may now be mentioned, viz., that it is alleged, that on 3rd

December, 1886 Pallonji adopted, as his palak, Byramji his nephew, and son of Jehangirji. Jehangirji and his son Byramji resist the suit, maintaining that Byramji as palak, or adopted son of Pallonji, succeeds in terms of the settlement to the half of the estate which Pallonji so long enjoyed. It is, of course, also maintained that under the terms of the settlement Pallonji never was owner of the one-half of the estate, or, as it would be expressed in English phraseology, the terms of the Will were such as to prevent vesting in Pallonji.

The learned Judges of the Court below have not only dealt with this question but with certain others, including the special situation of Byramji as palak of his uncle. The points among others discussed were (1) whether such a palak could ever take under the Will, looking to the fact that it remained uncertain until Pallonji's death that the condition of a palak taking could ever be purified, viz., that Pallonji should die without a son, and (2) the peculiar point as to the office of a palak to a Parsi becoming effectual only three days after the adoptive father's death. (3) A further question was keenly argued, viz., whether the will contained in itself sufficient words of grant or gift to the palak.

In the view taken of this case by their Lordships these questions, however interesting, are not necessary for the decision about to be pronounced. For their Lordships are clearly of opinion that under the terms of Dadabhoy Byramji's Will one-half of the estate conveyed vested in Pallonji *a morte testatoris*. The result of the argument presented would be that if Pallonji had had a son who reached twenty-one during his father Pallonji's life, then in that event that son would have taken so as to cut out Pallonji from all rights under this will. The right of Pallonji would accordingly be restricted to that of enjoyment, not even for life, but until the majority of his own son. Their Lordships cannot agree with such a construction.

The destination over to a son, who should take upon attaining twenty-one years of age, would appear to their Lordships to be language appropriate to events of the death of Pallonji during the life-time of the testator and of his having left a son - the situation also being provided for of that son being at that period of time under twenty-one.

But when the father Pallonji himself survived the testator, it does not appear to their Lordships that there are any words in the Will sufficient to cut down the right of Pallonji to one-half of the estate to a tenancy for life therein, or for a less period, according to the argument. On the contrary, the words employed seem to fit the case of the entire estate being on the testator's death divided into two portions, and of each portion becoming then the absolute property of one of the two sons.

While these are the general principles which would be applicable in the construction of such a Will, in their Lordships' opinion the same result is precisely reached by the application of Section 111 of the Indian Succession Act. Their Lordships agree with the view that has been taken as to the applicability of

that section in the Courts below. No further question, this being so, need be dealt with.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed, and that the appellants will pay the costs.