

(1908) 03 MAD CK 0009
In the Madras High Court

Mary Harriett Annie Wilson

APPELLANT

Vs

George Oakes and Another

RESPONDENT

Date of Decision : 23-03-1908

Acts Referred:

Trusts Act, 1882 — Section 83

Citation : (1908) ILR (Mad) 283 : (1908) 18 MLJ 331

Hon'ble Judges : Miller, J; Charles Arnold White, J

Bench : Full Bench

Judgement

Charles Arnold White, Kt., C.J.—In this case the plaintiff sues as administratrix of the estate of one William Graham Mclvor. The

defendants are the executors of the will of Anne Mclvor, his wife. William Mclvor made a will on May 24, 1876, and died on June 8, 1876. Anne

Mclvor took out probate of this will on August 3, 1876, and took possession of the testator's estate and remained in possession until her death.

Anne Mclvor made her will on March 27th, 1900, and died on November 23, 1903. The plaintiff, as representing the estate of William Graham

Mclvor, claims relief against the defendants, as representing the estate of Anne Mclvor. The hearing of the suit before the Subordinate Judge of the

Nilgiris was very protracted, and a great number of questions of law and fact were raised before him and disposed of by him.

2. The learned Judge held, amongst other things, that, under the will, Mrs. Mclvor took an ordinary life estate, and that the will did not operate so

as to create a trust for the benefit of the residuary legatees. He also held that the defendants were not liable for waste in respect of a portion of the

property known as the Hulikal coffee estate. The appeal is against the decree of the Subordinate Judge with reference to these questions. There is

also a cross-appeal by the respondents. The question raised by the cross-appeal mainly turns on the construction of a particular clause in the will.

3. In construing the will in question the test we have to apply is : What did the testator mean having regard to the words he used? and in applying

this test we must give effect to the principle that "technical words of known legal import must have their legal effect even though the testator uses

inconsistent words, unless those inconsistent words are of such a nature as to make it perfectly clear that the testator did not mean to use the

technical terms in their proper sense" per Lord Davey in *Lalit Mohun Roy v. Chukkum Lal Roy* ILR (1897) C. 834.

4. Applying these tests, I am of opinion that the will did not create a trust in favour of the residuary legatees and that Mrs. Mclvor took an ordinary

life estate.

5. It is clear that there would be no ground for the appellant's argument that the will operated so as to create a trust were it not for the words "in

trust" which occur in paragraph.

6. The argument was that these words occurring in paragraph 1 should be imported into paragraph 10 and that their effect was to constitute Mrs.

Mclvor a trustee of the property for the purposes mentioned in paragraph 10 of the will for the benefit of the parties entitled under the residuary

devise and bequest; or if the trust, though validly created, was not legally enforceable for the benefit, by way of a resulting trust, of the next of kin

of the testator. (See Section 83 of the Indian Trusts Act.)

7. The way in which the appellant sought to establish the trust was, as I have said, to import the words "in trust" into paragraph 10 and then to read

the words "that she shall receive and dispose of all proceeds, rents and profits from the said property as to her may seem best in the interests of the

property" as defining the purpose of the trust.

8. The testator did not in terms appoint his wife a trustee. He refers to her in the will apparently indiscriminately as administratrix and executrix. In

paragraph 1 he wills and bequeaths, in the most general language which he could adopt, all his property to his wife "in trust and for her maintenance

and support during her life," and, after making this disposition he appoints her his sole administratrix. The will was obviously drawn by the testator

himself, or at any rate by a layman, and, in my opinion, in using the words "in

trust"" the only object which the testator had in view was the nature of the estate which he intended his wife to take, and that he considered the words appropriate as indicating that she should enjoy the income of the property for life, but that she should not be entitled to deal with the corpus except as specially directed and empowered by the will.

9. I think I should be warranted in holding that, reading the will as a whole, it was clear the testator did not intend to use words ""in trust"" in their technical sense, but it is not necessary for me, to go as far as this. I am prepared to give their legal effect to the words ""in trust,"" and I think their legal effect is to give both the legal and the equitable estate to Mrs. Mclvor, that the two estates merge and Mrs. Mtelvor takes the legal estate.

The cases in which the Courts have held that a trustee does not take beneficially have no application to a case of this sort, where, as it seems to me, if the testator intended to create a trust at all, the trust was in terms in favour of the part 7 in whom the legal estate was vested. The question whether the will operated so as to create a trust cannot be considered apart from the question whether Mrs. Mclvor took under the will a life estate, or something less than a life estate, because if, on the true construction of paragraph I, the only interest she took is a right to be maintained and supported during her life, this would go a long way to support the view that the testator intended the property to vest for the benefit of the residuary legatees.

10. As regards paragraph 1, I am of opinion that the words ""for her maintenance and support"" are words of description or motive, and in no way cut down the estate ""during her life"" which the testator in terms gave to his wife. I do not propose to discuss the authorities which were cited on the one side and the other with reference to this question; but I think I am right in saying that in no case has it been held that where there has been a devise or bequest of all a man's property the generality of the disposition has been held to be cut down unless the intention that it should be so cut down is clear. In this particular case we cannot overlook the fact that the party to whom the bequest was made was not a stranger but the testator's wife for whom, as the will abundantly shows, he was desirous of making generous provision.

11. I now turn to paragraph 10. The first observation which occurs to me is that

notwithstanding that the wife is referred to "as sole executrix," it is an enabling paragraph. The first clause enables her to do what as tenant for life she could not do, viz., spend a portion of the corpus on her own maintenance and the working and maintenance of the property. The last clause gives a power of sale in the widest possible terms. The intermediate clause, according to the appellant's contention, so far from having any enabling effect, or being in any way for Mrs. Mclvor's benefit, imposes on her the obligation of spending on the property every rupee which was not required for her own maintenance, wholly regardless of whether or not such expenditure was prudent or desirable. Now it seems to me clear that what the testator intended by this clause was to make it clear that Mrs. Mclvor's discretion with regard to the maintenance and development of the property should be unfettered, and should not be questioned by any party who might be interested in the reversion. I cannot read the clause as if the words "as to her may seem best" were eliminated, and I read the clause as meaning that the income of the property which she spends upon the property should be applied as she thinks fit. The construction which the appellant asks us to put upon the words in paragraph 10 which he relies on as defining the purpose of the trust, involves giving a different meaning to the word "shall" (shall receive and dispose, & c.) from that which it obviously bears in the first clause of the paragraph (shall draw from viz. shall be entitled to) and it is quite inconsistent with the general tenor of the paragraph and with the express power of sale given by the last clause of the paragraph. This power of sale would have enabled Mrs. Mclvor if she were so minded to sell every acre of the property and invest the proceeds, and if this had been done, there would have been no "property" (in the sense in which the word is used in paragraph 10) and no income from the property. Further the effect of this construction would be practically to destroy the life estate which, in my view, Mrs. Mclvor took under paragraph 1 of the will.

12. The view that the testator intended that Mrs. Mclvor, while being given the widest discretion and the amplest power - extending to the sale of the whole property if she thought it desirable - in connection with the management of the property, should take in return a sum sufficient to maintain her, unaffected by any increase in the value of the property, seems to me wholly

unreasonable. Such a disposition of property in the case of a steward or bailiff would be ungenerous and unbusinesslike. In the case of a testator's wife it seems to me to be almost inconceivable. Of course, if the words of the will made it clear that this was the intention of the testator, it would be our duty to give effect to this, but construing the will quite independently of any a priori ideas as to what the testator might or might not have intended, I think the language of the will, read as a whole, makes it clear that the testator intended to give a life estate to his wife, that he did not intend to create a trust in the legal sense, and that, if he did, he intended the trust to be for the benefit of his wife and of his wife only.

13. I do not propose to discuss the authorities which were so fully considered by the Subordinate Judge. As I have observed before, in a case of this sort authorities are of little use except in so far as they lay down broad canons of construction.

14. As regards the construction of the will, I agree with the conclusions arrived at by the Subordinate Judge in his able and exhaustive judgment.

15. Besides the question of the construction of the will a subsidiary question was argued before us on appeal. It was contended that Mrs. Mclvor

had been negligent in the management of a portion of the property known as the Hulikal coffee estate and that her estate was liable to the plaintiff

as representing the estate of the testator for "" permissive waste."" The Subordinate Judge's view of the law was (see paragraph III of his judgment)

that the 1st clause of paragraph 10 of the will expressly enjoined on Mrs. Mclvor the duty of repairing and maintaining the property in which she

had the life estate and that she was liable for ""permissive waste."" I do not pause to consider whether the Judge was right or wrong in his view as to

the legal effect of this portion of the will. I assume he was right. A large body of evidence was given with reference to this question, and the

evidence was fully considered by the learned Judge in paragraphs 112-133 of his judgment. His finding of fact was that though the Hulikal estate

deteriorated considerably during the life tenancy of Mrs. Mclvor, the deterioration was not due to negligence on her part. I see no reason to differ

from this finding of fact.

16. The question raised by the respondent's cross-appeal turns, upon the construction of the words ""as she may requite"" in paragraph 10 of the

will. The words occur in the direction given by the testator empowering Mrs. Mclvor to draw upon "current deposit accounts" for her maintenance and for the working and maintenance of the property. The respondents contended that the words meant "as she may think fit." The appellant contended they meant "as may be necessary." The Subordinate Judge accepted the latter construction, and I think he was right. In the same paragraph when the testator wanted to give an absolute discretion to his wife he used the words "as to her may seem best." Further the authority given to the wife was an authority to do something beyond the ordinary powers of a tenant for life and I think the words, if ambiguous, as they undoubtedly are, should be construed against the tenant for life. There was no doubt considerable force in Mr. Napier's contention that the will made no provision for the wife in the shape of a legacy to meet immediate expenses and that the testator's object was to secure his widow against temporary financial inconvenience by reason of his death. But what I think the testator had in his mind was that at some future time the return from the property might be insufficient to provide adequately for the widow and for the upkeep of the property, and that it was for this contingency that he wished to make provision. Accepting this construction, it was for the defendants to show that when Mrs. Mclvor drew on the current accounts, she was under the necessity of doing so. The evidence furnished by the accounts is quite inconclusive. Mr. Napier's contention, if I understood his argument aright, was that the widow was entitled to draw on the current accounts until money began to come in from the property and that she was not to be held accountable for any drawings on the current accounts made when the estate account, so to speak, was not in funds. I think, however, the evidence furnished by the accounts is too vague to enable us to say there was any necessity for Mrs. Mclvor to draw on the current accounts at the time the drawings in question were made. I would dismiss the appeal with costs.

17. I would also dismiss the cross-appeal with costs.

Miller, J.

18. I have had the advantage of reading the judgment which the learned Chief Justice has just delivered and I agree with all that he has said. It

seems clear to me that in paragraph 10 of the will the testator was conferring on

his wife certain powers which in his view would not belong to her as tenant for life and the exercise of which might, if they were not expressly conferred upon her by him, be questioned by those who would, take the property after her death. The words "as sole executrix" may perhaps have reference to this view. She was to have certain powers of administration in respect of the corpus of the estate. She was empowered to draw on part of it in case of need; she was to have uncontrolled power to deal with the income in what she might consider the most profitable way, the testator no doubt reasonably assuming that till a favourable opportunity for conversion should occur she would endeavour to maintain the property in as prosperous a condition as might be possible ; and she was empowered at a favourable opportunity to convert the whole into cash.

19. It is impossible I think to read the second clause of this paragraph as a direction to expend all the income on the property. To do so we have to read the word ""all"" as meaning ""all except what is required for other purposes for which provision is made in this will;"" we have to give to the word ""shall"" a different meaning in each of two consecutive clauses of the same paragraph in both of which it stands in the same position, and we have to hold that the testator inserted one of the most important clauses in the will, a clause by which the disposal of the income is to be regulated and which would naturally find place in paragraph ii between two clauses by which he gave his widow the most extensive powers of dealing with the property. We have also to attenuate the significance of, if not altogether to eliminate, the phrase ""as to her may seem best;"" and we have to suppose that the testator did not contemplate the probability of his wife exercising the power which he expressly and immediately conferred upon her of selling all the ""property"" at a favourable opportunity. It is far easier, and it is, I think, far more reasonable, to construe the clause in question as enabling Mrs. McIvor to exercise her own discretion in the matter of expenditure on the maintenance of the property, especially when it is remembered that the testator was a childless husband making provision for his widow. I do not think that any indication of a trust is to be found in paragraph 10, and that being so the words "in trust" in paragraph 1 do not present any great difficulty. I have had little doubt from the moment the Advocate-General read the will to us that the testator did not use these words in

the technical sense in which a lawyer would use them. He did not intend to appoint his widow a trustee but merely intended to convey his desire that she should preserve the corpus of the estate until her death. But giving their legal effect to the words it seems clear that there is no beneficiary other than the trustee herself. Apart from paragraph 10, out of which no trust can be derived, there is nothing in the will to suggest that the testator contemplated the preservation of any of the income of the property, for the use of any person except his wife, while paragraph 1 indicates sufficiently clearly that the whole of it was intended for her use, described as her maintenance and support. The only trust which can be spelt out of the will is a conveyance to Mrs. McIvor in trust to pay an annuity to the testator's sister, and the rest of the income to herself for her life. It is said that it is not likely that the testator would have been at the pains to create a trust for such a purpose, but the answer seems to be that if we are to consider what it is likely that he meant to do we shall find that he did not intend to create any trust at all; but if, in order to give due effect to the language of the will, we have to hold that he did intend to declare a trust, then that is the trust which the will declares. None other can be found in it except by putting on paragraph 10 a construction which it cannot reasonably be expected to bear.

20. I, therefore, agree with the conclusions of the Subordinate Judge as a result of his construction of the will. As regards the question of fact, assuming it to arise, I think, it has been properly dealt with by the Subordinate Judge. Evidence that a coffee-estate which was under cultivation in 1876 is not now cultivated with coffee is, to my mind, hardly even prima facie evidence that it has been improperly treated or neglected and here there is evidence which explains the present condition of affairs without indicating that Mrs. McIvor is to blame for it. As regards the cross-appeal, I do not think it altogether likely that the testator was in the 1st clause of paragraph 10 intentionally making provision for the needs of his wife until the estate should be put in funds by the sale of crops, but whether that be so or not, the only evidence to which our attention was called, i.e., the accounts, is insufficient to prove that the sums drawn from the banks were either utilized for the maintenance and support of Mrs. McIvor or for the upkeep and working of the estate, or were required for either of those purposes.

21. I agree, therefore, in dismissing with costs both the appeal and the cross-appeal.