

(1959) 11 CAL CK 0014
In the Calcutta High Court

PHILIPSON-STOW AND OTHERS

APPELLANT

Vs

INLAND REVENUE COMMISSIONERS.

RESPONDENT

Date of Decision : 20-11-1959

Acts Referred:

Finance Act, 1894 — Section 2(2)

Citation : (1963) 49 ITR 6

Hon'ble Judges : Sellers, J; Harman, J

Bench : Full Bench

Judgement

SELLERS L.J. - I agree with the judgment the Master of the Rolls has just delivered, which I have had an opportunity of reading beforehand, and I too would uphold the decision of Upjohn J. and would dismiss the appeal.

HARMAN L.J. I have the misfortune to dissent from the conclusions arrived at by my Lords.

The words to be construed are "the proper law regulating... the disposition." I agree with Lord Evershed M.R. in holding that the disposition here is the testators will and I accept his views both as to the origin of the words "proper law" and the meaning to be attached to them. I feel no great difficulty in applying these words to an unilateral document such as a will but as will be seen hereafter they do not produce the same effect as when applied to contracts where the proper law is to be determined once for all at the contract date. In the case of a will, the proper law may, and in the instant case does, change at a time after the testators death, and cannot be settled on the happening of that event.

The testator here has expressly declared that his will should operate according to the law of England "so far as the case admits." and the question is whether in the case of foreign immovables the case does so admit. The words are an acknowledgment that in many countries the law does not allow freedom of testamentary disposition. The law in South Africa apparently does allow it in this respect, but it is that law and not the English law which makes the disposition

effective. It is conceded by the Crown that if the Finance Act, 1949, had been law before the testator's death, estate duty would not have been payable on the happening of that event, nor indeed on a devolution thereafter so long as the administration of the estate in South Africa was not complete. This must be because the South African law was the law regulating the disposition at those stages. It is furthermore conceded that if there had been a direct devise of the property to Sir Elliot after his mother's death, no estate duty would have been payable when the property devolved upon him because the proper law would still be that of South Africa.

It is, however, argued that there comes a point when there is a change in the proper law and, indeed, so far both parties agree. What is in dispute is the point at which this event occurs. The Crown argues, and my brethren agree, that this point had been reached before Sir Elliot's death because the administration was complete and the former tenant for life at the time of his death was receiving the rents and profits by virtue of the English will. The taxpayer argues that this point will not come until the date when, if ever, the trust for sale in the English will is carried into effect and the proceeds are transferred to this country.

It seems to me cardinal that the existence of the trust for sale in the English will has not altered the quality of the property from an immovable to a movable asset. Authority for this is *In re Berchtold*, and it as I understand not disputed by the Crown. The reason is that the law attaching to immovable property is the *lex situs* and that in that law the equitable doctrine of conversion has no part. Clearly then to this extent the law regulating the disposition is the law of South Africa. Similarly, in *In re Moses* the English rule in *Howe v. Dartmouth* (Lord) was excluded by the *lex situs*. Again in *In re Miller* the English law prevailed in its effect upon the devise of an English immovable and prevailed over the law of Scotland where the will was made and where the testator was domiciled.

It seems to me that so long as the foreign immovables remains an immovable, it must in fact be controlled by the *lex situs*. The immediate reason why the present tenant for life is receiving the rents and profits is no doubt because of a direction in the English will, but that only takes effect because the South Africa law allows it to do so. If, for instance, that law did not recognise the provision cutting down the interest of a tenant in tail living at the death of the testator to a life interest but conferred upon him an absolute interest, that would undoubtedly prevail over the direction in the English will.

It is objected that to construe the statute in the way I have suggested is to nullify its effect in every case of foreign immovables and that it would have been much simpler if that were the legislature's intention, to say so in so many words. I do not feel the force of this. It is conceded by the taxpayer that once the asset arrives in England or rather perhaps when it becomes a movable, then the beneficiaries take solely by virtue of English law and that becomes the proper law. *Attorney-General v. Campbell* is a good illustration of this for there the foreign property had in fact been converted in obedience to the directions in the

will and invested in England and, therefore, on the death of the annuitant an English succession arose, notwithstanding the fact that the testator was domiciled in Portugal and his property was originally situated there. In that case Lord Westbury in his speech said : "Now, all this is an immediate consequence of the first principles of law, and the Master of the Rolls has been misled by language which was used by Lord Cranworth; L. C. in *Wallace v. Attorney-General*, where the extraordinary conclusion was contended for, that under the will of a gentleman dying domiciled abroad the first legatee, though he was not liable to legacy duty, became liable to succession duty under the Act. It is quite clear that you cannot apply an English Act of Parliament to foreign property whilst it remains one property; but after the purposes of administration have been answered and distribution made, if a party taking this distributive part comes to this country and invests it upon trusts, it assumes the character of a British settlement and British property and is no longer to be dealt with as if it was merely a portion of a foreign testators estate to be received in the course of administration."

Similarly, in *Attorney-General v. Belilios* the testators property remained situate in Hongkong and it was declared that no estate duty was payable u/s 2(2) of the Finance Act, 1894. In *Attorney-General v. Jewish Colonisation Association* estate duty was held payable because the trustees under the relevant deed in whom the assets were vested was an English company and the trusts must be executed solely under English law.

This leaves *Attorney-General v. Johnson*, which undoubtedly decides that though the foreign property was still unsold, estate duty was payable in England. In my judgment this decision was wrong and really depended on the view of the judge that the trust for sale operated to convert the foreign property into movables - see the judgment. This is the explanation suggested by Lord Greene M.R. in *In re White*. This decision was not criticised in *Attorney-General v. Belilios* (above) but the point did not arise directly in that case and was not, I think, being considered by Sargant and Lawrence L. JJ. Moreover, the decision in *Attorney-General v. Johnson* has not much left to support it after the criticisms of Lord Greene M.R. in *In re White*, and the concession which the Crown felt constrained to make here that it could not rely on the judges view that the Assam property was an English chose in action.

I am further of opinion that the liability to estate duty under the section depends on the situation at the relevant time, which here is the death of Sir Elliot, of the property disposed of by the will and that Diceys rule applies.

In my judgment the case does not depend upon the forum in which the trusts of the will ought to be enforced. The cases of *Sudeley v. Attorney-General* and *In re Smyth* seem to turn on the question of the forum of administration and on the view not now contended for that an English trust for sale of foreign immovables converts them into personal property and, therefore, into movables. True it is that the trusts of this will might be enforced against the trustees by a suit in

England but it could only be effective by obliging them to take proceedings in South Africa and the ultimate sanction must lie there. Suppose, for instance, that the law of South Africa were to be altered so that the trusts of an English settlement were ordered to be disregarded so far as they related to land in South Africa it could not be denied that the South African law would prevail. It seems to me, therefore, that the law regulating the disposition remains in the last resort the South African law and that law, therefore, so long as the property remains unconverted in South Africa, is the proper law of the disposition.

Appeal dismissed with costs. Leave granted to appeal to the House of Lords.