
(1919) 12 BOM CK 0033
In the Bombay High Court
Case No : O.C.J. Suit No. 36 of 1918

The Advocate General of Bombay

APPELLANT

Vs

Vithaldas Meghji

RESPONDENT

Date of Decision : 09-12-1919

Acts Referred:

Hindu Wills Act, 1870 — Section 2
Succession Act, 1925 — Section 111

Citation : (1920) 22 BOMLR 1005 : 58 Ind. Cas. 996

Hon'ble Judges : Pratt, J

Bench : Single Bench

Judgement

Pratt, J.—This is a suit filed by the Advocate General as representing a charitable trust-the; Anathahraina-created by the will of Hansraj Ludha. The plaintiff prayed for a declaration of the properties that were the subject-matter of the trust and for the removal of defendant No. 1 from the office of trustee and for the administration of the estates of Hansraj Ludha and of his wife and of the trust properties. But by consent the suit has been confined to one for declaration as to what properties are subject to the trust and for the preparation of a scheme for the administration of the Charity. The defendant No. 1 is the trustee and supports the Advocate General. The second defendant claims certain properties adversely to the trust find it is against him that the declaration is sought.

2. Hansraj Ludha died at Jamnagar on the 27th day of May 1 1901, leaving a widow Hiravahu and a daughter Jivibai. His property consisted of:---

(a) A house in Bombay-the Ramdas Mala.

(b) Two houses in Jamnagar.

(c) Moveables, consisting of

(i) a fund standing in the name of a former wife and of Hiravahu ;

(ii) household effects and furniture ;

(iii) Hiravahu's Stridhan; and

(iv) the assets of his business termed "Punji" in his will.

3. The provisions of Hansraj Ludha's will (omitting details not relevant for the purposes of this suit) are as follows :-

4. The trust fund is set apart out of the punji: some of the surplus is applied to legacies: and the rest of the Punji, the Stridhan, and the fund in the wives' names and the house-hold effects and furniture are given to Jiravahu absolutely by Clauses 7, 5 (a), 5 (b) and 5 (c) of the will. The Jamuagar houses are given to Hiravahu absolutely.

5. The Uamdas Mala is disposed of by Clause 5 (d) of the will under which Jiravahu is given life estate with a power of disposition for specified purposes in her life-time,

6. But all the bequests to Hiravahu are subject to Clause 9 under which they are all declared to be to Hiravahu for life; on her death to Jivibai for life and on Jivibai's death to her lineal male descendants, if any, and if not to the Anathashrama Charity.

7. Hiravahu died a year after her husband on the 5th of June 1902. She made no disposition in her life-time of the Ramdas Mala but left a will in which she expressed her intention to conform in all respects to the direction contained in her husband's will and then proceeded to make the following dispositions,

8. The Mala she gives to Jivibai and in case of her death without male lineal descendants to Charity (clause 11 (3)).

9. The Jamnagar houses to Jivibai and in case of her death without male descendants to her sister's sons (clause 13).

10. The surplus of the Punji and the wives' Khata she bestows in legacies and to other charities (clause 16).

11. The Stridhan and household effects she gives to Jivibai absolutely (clauses 14 and 15).

12. But all the bequests to Jivibai are subject to a defeasance clause-Clause 31 of the will-in case of her death without children.

13. Jivibai died childless in 1912.

14. Now the trustee of the Anathashrama is the defendant No. 1 who is the executor of both the wills. He has possession of the part of the Punji set apart for the Charity. But the Advocate General claims, for the Charity, the Kamdas Mala, the Stridhan, and the household effects, the surplus of the Punji and the wives' Khata. Mr. Taraporevalla for the trustee supports that claim.

15. As regards the Kamdas Mala the provision of Hiravahu's will is inoperative for

it is quite clear that under the will of Hansraj, Clause 5(d), Hiravahu was given a life interest and a limited power of disposition during her life which she did not exercise. The Mala is disposed of in Clause 9 of the will of Hansraj in the following words:

All the property which Hiravahu may not have disposed of shall accrue to Jivibai on the following conditions: Should those be Jivibai's lineal male descendants the said property shall go down to the said lineal male descendants but should there be no lineal male descendants of hers then as to my Mala which there is in Bombay and which is known as that of Vithaladaa Kamdas, if the same should be in the same condition in which it is now or as to the sum which may have been received either by the sale or mortgage thereof, the right thereto for life will accrue to Jivibai (i.e., Jivibai shall have a life interest therein). But after Jivibai's lifetime the said property shall not go down to Jivibai or to my heirs (but) the right in respect of this Mala in Bombay, in whatever form the same may be at that time, shall form part of the "Anathashrama Dharmada Fund" which fund I have set apart.

16. There is, therefore, after the death of Hiravahu a gift to Jivibai for life and after that an alternative gift, on the one hand to her male issue, if any, and on the other hand in default of male issue to the Charity. The bequest to the male issue is void under the rule in Tagore case (1872) L.R. IndAp 47 (*Jyotendromohan Tagore v. Ganendromohan Tagore*) but that would not affect the other alternative bequest to the charities : *Javerbai v. Kablibai* ILR (1891) 16 Bom. 492.

17. The Ramdas Mala is, however, situated in Bombay and the construction of the will so far as it relates to this property is by Section 2 of the Hindu Wills Act made subject to Section III of the Indian Succession Act. It is, therefore, contended that as the gift over to the charities is contingent on Jivibai dying sonless, it cannot take effect unless that event occurred before the period of distribution, i. e., before Hiravahu's death, in other words, the Charity can only take if Jivibai died sonless in the life-time of Hiravahu.

18. Section 111 of the Indian Succession Act embodies a rule in *Edwarda v. Edwards* (1852) 15 Bear 357 which, though overruled in *O'Mahoney v. Burdett* (1874) L.R. 7 H.L. 388, has still statutory force in India. But it is at most a rule of construction and is therefore subject to any other provisions in the will which may rebut its application.

19. The reason of the rule is that when there is a gift followed by a contingent gift over, the inclination of the Court is to interfere as little as possible with the first gift. The second gift is therefore read as a gift in substitution and not in remainder. In Illustration (d) to Section III of the Indian Succession Act, the legacy is to A for life and after A's death to B and "in case of B's death without children" to C. This is an absolute gift to B and the contingent gift to C only operates if the gift to B fails owing to B's death in A's life-time. But if the gift to

B were expressed by the testator to be for life only, there is no scope for the operation of the rule. It cannot be invoked to defeat the expressed intention of the testator and convert a life estate into an absolute estate. Again the occurrence of the event on which the contingent gift depends is the death of B. If the estate of B is not expressed to be a life estate that does not sufficiently define the time of the event. Did the testator mean that B should have a life estate and that the ultimate gift should take effect even if he survived A ? Or did the testator mean that B should have an absolute estate and that the ultimate gift should only take effect if B died in the life-time of A "I Thus, even though the death of B is mentioned, the time of the event is left uncertain and the section comes in and fixes the time. But where B is expressed to have a life estate, it is immaterial whether B dies before or after A. The death of B, therefore, sufficiently defines the time for the occurrence of the event. This circumstance excludes Section III which only applies where the time is left uncertain. The case of Bhupendra Krishna Ghose v. Amarendra Nath Dey (1915) 18 Bom. L.R. 317 : ILR 43 Cal. 432. is an express authority on this point.

20. Now, in my opinion, the gift to Jivibai of the Ramdas Mala is for life, and that being so, Section III of the Indian Succession Act would not govern the construction of this clause of the will. It is immaterial whether Jivibai died before or after the previous life-tenant, Hiravahu. It is contended that the gift to Jivibai and after her to her lineal descendants, if- any, is an absolute gift and that therefore Section III applies. But in the first place the expression "shall accrue to Jivibai on the following conditions" shows the intention was not to confer an absolute estate. And in the second place Clause 9 expressly says Jivibai shall have a life interest. In the third place the testator was a Hindu and it is very unlikely that he intended to confer an absolute estate on a woman who had passed out of his family by marriage.

21. The Charity therefore is entitled to the Ramdas Mala.

22. Next as to the wives". Khata and the surplus of the Punji. The absolute bequest to Hiravahu of these properties in Clauses 7 and 5 (b) of Hansraj's will is reduced by Clause 9 of the will by the following words:

In like manner as regards the several Bums which I have directed to be paid in cash to my wife Hira, if she should not have dealt with (or disposed of the same and if Jivibai should get the same and if Jivibai also should not have in her life-time appropriated the same to her own use, then those sums also shall form part of this Anathashratu JAuid.

23. Hiravahu has a life estate with power of disposition during her life-time and after her Jivibai and if neither of them exercise that power, the property goes to the charity. Hiravahu had therefore no power to dispose of the surplus Punji and wives" Khata by will and these must go to the Charity.

24. Stridhan and household effects are not cash and, therefore, not effected by Clause 9 of Hansraj's will. Hiravahu was entitled to dispose of them by her own

will. By Clause 14 she has given them to Jivibai absolutely. But those are cut down by Clause 31 of her will which is as follows.-

Indirect the properties bequeathed to Jivibai by this will with full power and control are bequeathed on this condition that the same shall not descend to her heirs in case she dies issueless but shall go to the funds for the destitute.

25. The fund of the destitute is Anathashrama Charity. This is a defeasance clause and it is contended that it is inoperative as this part of the will is not governed by the Hindu Wills Act and Section 118 of the Indian Succession Act has, therefore, no application.

26. But it is settled law that it is competent to a Hindu testator to provide for the defeasance of a prior absolute estate contingently on the happening of a future event: *Kriatororaoni Dasi v. Narendro Krishna Bahadur* ILR (1888) Cal. 383 : L.R. 16 IndAp 29. It is not the case of a repugnant condition attached to an absolute gift. This clause is, therefore, valid, and by virtue of it the Charity is entitled to the Stridhan and household effects.

27. I, therefore, find on the issues :-

(1) What is the interest of the Charity under the two wills of Hiravahu and Hansraj Ludha ?

Under the will of Hansraj the Charity is entitled to the Raradas Mala, the wives' Khata and the surplus of the Punji, and under the will of Hiravahu to the Stridhan and household effects.

(2) What interest did Jivibai take in the Mala under the will of Hansraj after the death of Hiravahu ?

A life interest after the death of Hiravahu.

(3) Whether, on the true construction of the will of Hansraj and in the events that have happened, the defendant No. 2 became entitled to the Mala as the heir of Jivibai ?

In the negative.

(4) Whether the conditions in Clause 31 of the will of Hiravahu are valid and operative in law ?

In the affirmative.

(5) Whether the defendant No. 2 in the events that have happened became entitled to all the Stridhan ornaments in Bombay and Jamnagar and all the household furniture mentioned in the will of Hansraj ?

In the negative.

(6) Whether the claim of defendant No. 2, if any, in the Baid estate is not barred by the law of limitation ?

Unnecessary.

28. As the charity is to be administered in Jamnagar I do not frame a scheme.

29. Decree, therefore, declaring that the Charity is entitled to the Vithaldas Ramdas Mala, the balance of the Punji, the wives' Khata, Stridhan and household furniture. The first defendant to render an account of his administration of the trust properties and to pass his accounts before the Commissioner. Costs of all parties as between attorney and client to come out of the trust funds.