Privy Council Appeal No. 118 *of* 1917.

Kaikhushru Bezonji Nanabhoy Capadia - *Appellant*

v.

Shirinbai Bezonji Capadia and Others - - *Respondents.*

FROM

THE HIGH COURT OF JUDICATURE AT BOMBAY.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 26TH JULY, 1918.

Present at the Hearing:

LORD SHAW.
LORD PHILLIMORE.
SIR JOHN EDGE.

[*Delivered by* LORD PHILLIMORE.]

The suit to which this appeal relates was brought in order to settle certain questions of construction arising on the will of a wealthy Parsee inhabitant of Bombay, Bezonji Nanabhoy Capadia, who died on the 3rd April, 1906, leaving his wife, two sons, and several daughters surviving him. The will is dated the 10th April, 1905. It is long and elaborately drawn, and contains thirty-three paragraphs.

The testator appoints executors and trustees. He makes certain specific gifts, he directs his executors, "in the event of" the death of his wife, which must mean "on" the death of his wife [See *Penny* v. *Commissioner for Railways*, 1900, App. Ca., at p. 634], to expend a certain sum of money in providing the expenses of her funeral and the customary rites and ceremonies. He makes certain provisions for a daughter on the occasion of her marriage, and he leaves annuities to be paid to the wife, the daughters, and certain other relatives during the wife's life, and he directs that the residuary income should be divided and paid during his wife's life to his two sons, with certain provisions in the event of either son's death for the latter's widow and issue. Then come gifts which are of special importance to the present purpose. He devises to his wife during the term of her natural life the house in which he was living called "Capadia House," and he directs his executors during the lifetime of his wife to let another house of his called "Rutton Villa," the rent of Rutton Villa being to count as part of the residuary income.

Paragraphs 19, 20, 21, and 25 are those the construction of which is to be determined in this suit.

"19. I further direct that after the decease of my said wife Shereenbai or in case she shall predecease me then forthwith after my death my executors shall stand seised and possessed of the 'Capadia House' and the furniture therein and 'Rutton Villa' and all my residuary property upon the several trusts in that behalf hereinafter declared that is to say:—

"20. My trustees shall stand seised of the 'Capadia House' upon trust for my said son Jehangir for life and in the event of his death upon trust for his widow and issue in such shares and proportions as the said Jehangir may by his will direct provided that it shall not be lawful for the said Jehangir to appoint more than one-fourth part of the said premises to his widow and subject thereto and in default of any such appointment upon trust for the issue of the said Jehangir such issue to take *per stirpes* and not *per capita* and if more than one in the same class equally between them and in default of any such issue and subject to any appointment for his widow as aforesaid upon trust for his brother the said Kaikhushru if then living and failing him upon trust for the right heirs of me the said Bezonji Nanabhoy Capadia as if I the said Bezonji Nanabhoy Capadia had died possessed thereof intestate in equal shares and proportions but the issue of any heir shall take *per stirpes* and not *per capita* and if more than one in the same class equally between them and excluding from such heirs and such division the widowers of my said daughters and the widows of my said sons."

Paragraph 21 has similar limitations with regard to "Rutton Villa," the two brothers being put in inverse order.

"25. My trustees shall divide the rest residue and remainder of my property equally between my said sons Jehangir and Kaikhushru but the property or the proceeds thereof shall be held by my executors for the benefit of the said Jehangir and Kaikhushru respectively upon the trusts which are hereinbefore declared of and concerning 'Capadia House' and 'Rutton Villa' respectively as fully and effectually as if the share of the said residue given to my son Jehangir were part and parcel of 'Capadia House' and the share of the said residue given to my son Kaikhushru were part and parcel of 'Rutton Villa.'

The son Jehangir is now dead without leaving widow or issue; but the widow of the testator is still living. The other son, Kaikhushru, now claims that he has fulfilled the condition imposed in paragraph 20, inasmuch as at the death of his brother he was "then living:" but those interested in the subsequent limitation as the right heirs of the testator in the language of paragraph 21, contend that Kaikhushru will not fulfil the condition in paragraph 21 unless he survives his mother as well as his brother.

In these circumstances Kaikhushru, who is the present appellant, brought a suit on the 11th January, 1916, to have the construction of the will determined in respect of this and some other matters not now to be considered, making the trustees and executors, his mother, his sister, and certain other parties defendants, and having filed his plaint took out a summons for the determination of certain questions *inter alia*:—

"1. Whether in the events that have happened the plaintiff is not absolutely entitled to the property known as 'Capadia House' subject to the life interest of the first defendant therein and who is now entitled and for what interests therein to the said House?

"2. Whether in the events that have happened the plaintiff is not entitled to the balance of the rents of 'Rutton Villa' and the income of the residuary estate of the said testator subject to the annuities directed to be paid by clauses 16, 17, and 18 of the said will during the lifetime of the first defendant?

"3. Whether the plaintiff has not a vested interest in one-half of the residuary estate of the said testator and is not entitled to possession thereof on the death of the first defendant and whether the other half of the residuary estate is not subject to the same trusts as are created in respect of 'Rutton Villa'?

"4. What are the rights and interests of the plaintiff in 'Rutton Villa' and in the residuary estate of the said testator during the lifetime of the first defendant and on her death?"

Macleod, J., being of opinion "that the proper time to construe the will with regard to the trusts which are to come into operation on the death" of the widow would arrive when the widow dies, declined to answer any of the questions propounded, but gave to the plaintiff and to the defendants, Nos. 2 to 8 and 9 and 10 (there is apparently an error in the print of the record describing these last as 10 and 11), their several costs out of the estate as between attorney and client.

It appears to their Lordships that it was an error on the part of Macleod, J., to consider the questions as premature and to refuse to answer them. If the construction for which the plaintiff contended was correct, he would have a vested remainder with which he could deal, and he was therefore entitled to the decision of the Court.

From the order of Macleod, J., an appeal was taken to the Appellate Division of the High Court at Bombay, and this Court entered upon the question of construction; but, taking a view unfavourable to the plaintiff, and holding that he had no vested interest, concurred in the decision of Macleod, J., and dismissed the appeal, giving to the defendants 2 to 8 their costs out of the estate as between attorney and client, and ordering the plaintiff to pay the costs of defendants Nos. 9 and 10 as between party and party.

It is from this judgment that the present appeal is brought. The Chief Justice and Heaton, J., who formed the Court, were of opinion that this case did not fall within the rule "that where there is a gift after prior interests to persons then living the word 'then' refers most naturally to the last antecedent"; but within another class of cases, such as *Harvey* v. *Harvey*, 3 Jurist, 949, and *Gill* v. *Barrett*, 29 Beavan, 372, in which it was held that, if the object of the testator is not to limit successive interests but to provide for personal enjoyment by the legatees by substituting for persons dying before the period of enjoyment a class of persons then living, the word "then" refers most naturally to the period of enjoyment.

If the fact that the prior gift to the wife for her life is direct and the subsequent gifts indirect through the medium of trustees be laid aside, the will falls directly within the rule of *Archer* v. *Jegon* (8 Simon, p. 446). In that case the testator gave a sum of stock interest for his sister for life, after her decease for her husband for life, and after his decease for the children of his sister "who should then be living." There were five children. The husband died first, then one of the children, then the wife; and it was held that the deceased child took a vested interest in one-fifth of the fund, because the word "then" necessarily referred to the last antecedent, the husband's decease, and the child was living at that time.

In re Milne (57 L.T.N.S., p. 828) the Court of Appeal followed and approved of *Archer* v. *Jegon*, holding that the word "then" in the will under discussion referred to the last antecedent. This was a very strong decision, because this construction created an intestacy. In the course of his judgment Lindley, L.J., referred to the statement of the rule in Jarman on Wills, where the result of the cases *Archer* v. *Jegon* and others is collected and summed up, with approval.

Counsel for the respondents relied upon the two cases quoted by the High Court, and also upon *Hoghton* v. *Whitgreave* (1, Jacob and Walker, p. 146), and *Wordsworth* v. *Wood* (4 Mylne and Craig, p. 641).

Neither of these latter cases has any bearing upon the present one.

In *Hoghton* v. *Whitgreave* the point to be decided was, who took under a bequest to survivors upon the death of the one tenant for life. In *Wordsworth* v. *Wood* there might have been a question as to whether survivorship related to the death of the testator or to the death of the tenant for life. But the Lord Chancellor held that it was not a case of substitution of a child's issue for the child, but of modification of the gift to the child, and that the child had to survive the tenant for life in order to take.

In *Harvey* v. *Harvey* there was a bequest of a life interest to a daughter, and the capital was then to go to the daughter's son; but in case he should die in the lifetime of his mother the money was to be divided among his children then living, who were to take vested interests on attaining 21 or in the case of a female, marriage. It was held that the period when the class was to be ascertained was the death of the daughter. This was apparently on the ground that the division could not take place till her death. No cases appear to have been cited, and the decision turned upon the particular language of the will.

In *Gill* v. *Barrett*, *Harvey* v. *Harvey* and *Archer* v. *Jegon* were cited, and the Master of the Rolls expressly gave his assent to *Archer* v. *Jegon* and to the rule that "then" refers to the last antecedent. But in this case he held, as had been held in *Harvey* v. *Harvey*, that the time of division was the time to be

looked to, and that the word "then" referred to that time. Neither of these cases are like the present one.

Counsel for the respondents submitted that, even supposing that the rule in *Archer* v. *Jegon* would otherwise have applied, the particular language of this will would take the dispositions out of the rule; because the gift to the wife of Capadia House for her life was direct, whereas the subsequent limitations were to trustees for the benefit of the subsequent beneficiaries.

In their Lordships' opinion this argument rather tends in the contrary direction. The limitations which begin with paragraph 19 are all after the death of the wife, and the interests which they give are necessarily in remainder after her death. If they or any of them were to be conditional on survivorship of her and not in remainder to her, this ought to have been expressed at the outset of the clause, and it would be awkward, to say the least, to express it in the middle of the limitations. The limitations to the beneficiaries in clauses 20 and following may be treated as being all bracketed under the trust, being limitations ensuing upon the death of the tenant for life. They may be conditional *inter se*. They are, however, not so expressed as to be conditional upon survivorship, but as subsequent to the life estate. If it had been intended to make the plaintiff's estate in remainder conditional upon surviving his mother instead of its being conditional upon surviving his brothers, the words would have had to occur in a different collocation. If it had been intended to make it conditional upon survivorship of both, additional words would have been necessary.

Upon the whole, their Lordships are of opinion that the point is settled by authority, and that the construction of paragraph 20, for which the plaintiff contends, is the right one; and the same construction must be applied to paragraph 25, which directs that half of the residue should be held upon "the trusts declared of and concerning Capadia House."

A question was asked upon Rutton Villa and the other half of the residue; but it is not apparent why it was asked, as there is no difficulty or uncertainty upon these points in the will. It will be sufficient to make a general declaration which will give the answer to the material questions.

In the Court of First Instance costs were given to the plaintiff and to defendants, Nos. 2 to 8 and 9 and 10, as between attorney and client, out of the estate, and this was correct. In the Court of Appeal costs were given to defendants 2 to 8, as between attorney and client, out of the estate; this also was correct. The plaintiff was, however, ordered to pay the costs of the 9th and 10th defendants. This order can no longer stand. Their Lordships think that, this being a case of construction, and apparently one of some difficulty, and having given rise to difference of judicial opinion, it would be proper that the party-and-party costs of the plaintiff and the 9th and 10th defendants, who are the respondents on this appeal, should come out of the estate.

Their Lordships will therefore humbly recommend His Majesty that the judgment of the High Court should be reversed, except in so far as it confirmed that part of the judgment of Macleod, J., which dealt with the costs of the suit, and except in so far as it awarded to the defendants 2 to 8 their costs out of the estate, as between attorney and client, and that it be declared that, in the events which have happened, the plaintiff is absolutely entitled to the property known as Capadia House and to the one-half of the testator's residue bequeathed upon the trusts declared of and concerning Capadia House, subject to the life interest of the first defendant, and that it be ordered that the plaintiff appellant and the 9th and 10th defendants and respondents should have their costs, as between party and party, in the High Court and of this appeal out of the testator's estate.

In the Privy Council.

KAIKHUSHRU BEZONJI NANABHOY CAPADIA

v.

SHIRINBAI BEZONJI CAPADIA AND OTHERS.

DELIVERED BY

LORD PHILLIMORE.

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