Privy Council Appeal No. 9 of 1922.

Putlibai and others - - - - - - - - *Appellants*

v.

Sorabji Naoroji Gamadia 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 15TH MAY, 1923.

Present at the Hearing:

VISCOUNT HALDANE.
LORD SHAW.
LORD PARMOOR.
MR. AMEER ALI.

[*Delivered by* VISCOUNT HALDANE.]

This is an appeal from a decree, made on the 8th April, 1920, of the High Court at Bombay, in its appellate capacity, affirming with variations a decree dated the 14th March, 1919, of Macleod J., the Judge of first instance. The questions decided arose in a suit for the construction and administration of the trusts of the will of the late Naoroji Jehangir Gamadia, who left a large estate, mainly in Bombay. The chief questions which their Lordships have to decide are whether certain provisions made by the will for persons other than the testator's sons and daughters, relating to residential property, are valid, and whether other and more general dispositions also made by the will can be treated as effective.

The Courts below have decided that all the dispositions referred to, with certain limited exceptions, are invalid, and that consequently the property is now presently divisible between the testator's sons equally under a gift of the residuary estate, but

subject for a limited period to a right of maintenance out of the income of such persons as during that period may be entitled to the benefit of such of the excepted dispositions of residential property as have been found to be valid.

The suit was originally brought by the first respondent against the respondents Nos. 4, 2, 3, 5 and 6, and the present appellant. The respondents Nos. 7, 8 and 9 were added as defendants by order. The respondent No. 10 is a child of the first appellant, and was added as a defendant during the proceedings in the Appellate Court below.

The first appellant is the daughter-in-law, and the second and third appellants are sons of the testator, who left, in addition, three other sons and a daughter, who are respondents. The second and third appellants were defendants to the suit, and by an Order in Council of the 27th March, 1923, were ordered to be added as co-appellants.

By the will the testator, after declaring certain charitable trusts of a house in Bombay, as to which no question now arises, disposed by Clause 9 of other houses in Bombay described as the Mahalaxmi Bungalow and 56 Homjee Street, along with certain furniture and other effects :—

> . . . " upon trust to permit my daughter during her life and until her death or marriage whichever shall first happen, and also all my sons and also their respective families during as well as after the respective lifetime of such respective sons, including the widows of any of my male lineal descendants to occupy the said premises and make use of the said furniture and effects free of rent during their respective lifetime and until the youngest of my grandsons living at the death of the last survivor of my sons shall attain the age of 18 years and from and after such youngest of my grandsons as aforesaid shall attain the age of 18 years to sell, realise and convert the same into money and divide the sale proceeds after deducting all expenses among such persons as shall be entitled to the proceeds of my other Bombay properties under the directions in that behalf contained in Clauses 11, 12 and 13 hereof, provided always and I hereby direct that the right of residence hereby granted to every member of the family as aforesaid is strictly personal and will entitle such member personally to right of residence and use of the furniture and effects, but that such rights shall not entitle any member entitled thereto to transfer or alienate the same."

There then followed provisos that on any attempted alienation or transfer the right should cease, and also provisions directing that in case of any son marrying a daughter or son's daughter of a certain person or ceasing to profess the Zoroastrian faith or marrying a person who did not profess that faith or was not born of Parsi parents professing that faith, " then and in any such case the trust in favour of such person and his family for the right of residence and use of furniture herein contained shall forthwith cease and determine and become void."

By Clause 10 the immovable properties in Bombay, including the bungalow and the Homjee Street houses, subject to the trusts affecting them already mentioned, were devised on trust to expend the net income for the maintenance and upkeep of all such of his children and their respective families entitled to

the right of residence under Clause 9 as should reside in the premises there reserved for their residence, until the expiration of ten years from his death or until the death of his last surviving son, whichever should first happen.

It is on these two clauses that the first question to be decided arises. It will, however, be convenient before further reference to this question, to set out so much of the rest of the will as is required for the decision of the other questions.

Clause 11 directed that on the expiration of the first ten years from the testator's death, or from and after the death of his last surviving son, whichever shall first happen, the trustees should divide the Bombay properties (but the Mahalaxmi Bungalow and the Homjee Street House subject to the right of residence therein granted), or the sale proceeds thereof, and the investments for the time being representing the same, into five equal shares, and should hold each such share as that of each such son upon trust to pay the income of each such share to such son until his death, and from and after the death of each son, or, if he should have died previously to pay the same to such persons as should be presumptively entitled to the corpus under the provisions in that behalf thereinafter contained, until the death of his last surviving son, and from and after the death of the last surviving son to hold each of such shares upon such trusts as such son might have pursuant to the power in that behalf thereinafter given in Clause 12 directed.

Clause 12 authorised every son whose interest should not have ceased under Clause 16 to dispose by will or deed upon such trusts and upon such conditions with such restrictions, powers and provisions as he might think fit, but subject to the proportion of shares and order of priority thereinafter provided and subject to Clauses 15 and 16 in favour of his issue widow or next-of-kin, of the share which should be treated as allotted to him as aforesaid, provided that he should exercise the power in the manner following :—

(1) If the son had sons or lineal descendants of sons, then in their favour only.

(2) In default of these, in favour of his widow and daughters or lineal descendants of daughters.

(3) Only in default of any lineal descendants male or female in favour of any other next-of-kin.

Clause 13 directed that, in default of the exercise of the power so given, each son's share should devolve on his sons or their issue *per stirpes*, and failing such sons or issue, on his sons' widows and daughters, or the issue of the latter. In the event of failure of sons and daughters and their issue the widow of any son was to take one-fourth of his share, and the testator's remaining sons were to have the remaining three-fourths added to their shares.

Clause 14 devised the residue of the testator's property to

the executors upon trust to convert for payment of funeral and testamentary expenses, debts, and legacies, and to divide the balance into five equal parts, and to pay one part to each of his sons for his absolute use with a proviso that the trustees should not be bound to sell for ten years, and should in the meantime be entitled to carry on the business of the testator.

Clause 15 directed that in case any person beneficially entitled to any share in the income or corpus of the estate should (1) alienate or charge his interest; or (2) become bankrupt; or (3) should have decree passed against him for over Rs. 25,000; or (4) should become indebted in any sum or sums exceeding Rs. 25,000, his interest should thereupon cease and become void, and it was directed how such interest should be applied according as it was a share in the income or in the corpus.

Clause 16 directed that if any beneficiary should cease to profess the Zoroastrian faith, or become a convert, or marry a person not born of Parsi parents, his interest should forthwith cease and become void as if he or she had died, and the trustees should hold such interest in trust for such persons or person as should be entitled to it on the death of such beneficiary, but subject to the provisions of Clauses 15 and 16.

The questions raised in this appeal fall under two heads. The first relates to the persons entitled to the rights of residence given by Clause 9. The second is concerned with whether the five sons of the testator to whom he has given his residuary estate have become entitled to have it divided among them at once, provision being made only for the maintenance and residence of the testator's daughter, the right to such an immediate division being based on the invalidity of the limitations and powers in Clauses 11 to 16, inclusive.

The case was elaborately argued in the Courts of Bombay, first before Macleod J. and afterwards before the High Court at Bombay in its appellate jurisdiction, Heaton, Acting C.J., and Marten J. being the Judges. In the Court of Appeal there were two hearings, the first of which resulted in a judgment mainly concerned with proceedure and ending with a direction for a rehearing to be concerned with the merits. The rehearing took place in the spring of 1920. The outcome was that the decision of Macleod J. was, so far as the substance was concerned, affirmed, but for somewhat different reasons, and with declarations which differed in form from those made by him.

The learned Judges in both Courts below delivered opinions characterised by much knowledge and consideration and from the work put into those judgments their Lordships have derived much assistance. If they have arrived at conclusions on certain points divergent from those reached below, it is not from want of appreciation of the weight attaching to the views there expressed.

Turning, in the first place, to the points raised on the construction of Clauses 9 and 10, these are whether the rights of

residence and maintenance under these clauses extend to anyone excepting the sons and daughter of the testator. So far as the question is one of more than mere construction account must be taken of the provisions in the Indian Succession Act, under which, by Section 100, " where a bequest is made to a person not in existence at the time of the testator's death, subject to a prior bequest contained in his will, the later bequest shall be void, unless it comprises the whole of the remaining interest of the testator in the thing bequeathed." Section 101 of the Act invalidates any bequest whereby the vesting of the thing bequeathed may be delayed beyond the life of a person living at the testator's death, and the minority of some person to be in existence at the expiration of that period, and to whom, if he attains full age, the thing bequeathed is to belong. Section 102 provides that if a bequest is made to a class of persons, with regard to some of whom it is inoperative by reason of the rules in the two preceding sections or either of them, such bequest is void.

The rules just quoted constitute the law of British India applicable to succession to the property of everyone except Hindus, Mohammadans or Buddhists. They are, therefore, applicable to those subject to a variety of systems of jurisprudence, and must therefore be construed according to the generally current meaning of the words used and apart from such technical considerations as are only appropriate in the law of England. The will in the present case was that of a Parsi, and, although the principle of joint family may not apply to a Parsi with the rigidity with which it applies, for example, in the case of a Hindu, still the conception of joint family rights which is common in Oriental countries ought not, in their Lordships' opinion, to be left wholly out of sight in interpreting the words of a Parsi such as the author of the will before them. When, therefore, the question arises as to the meaning of the direction in Clause 9 to the executors to permit occupation to the daughter until death or marriage, and to all the sons and also all their respective families, during as well as after the respective lifetimes of the sons, including the widows of the testator's lineal male descendants the testator ought to be contemplated as having before his mind the family arrangements which would be natural in the case of his own sons. As to the daughter no question arises. No reference is made to a family in her case, and it may well be that she could not properly claim a right to bring in husband and family if she had them. But in the cases of the sons their Lordships think that on the true construction of the words the title conferred on them to occupy extended to occupation along with their wives and families. The question is one purely of intention as shown by the particular words used in this will, and their Lordships think that so regarded the words give the right to the sons themselves, and that it is only through them that it extends to those they would naturally bring in for the purposes of occupa-

tion. Servants must be included on more general grounds. Even the daughter must be entitled if she resides to have a cook and the servants necessary for a household. But, while in her case it is not natural in the same way that she should bring with her a family of which she is not the head, in the cases of the sons they may have such families and be bound by religion as well as law to have these resident with them. The individual right of occupation is, therefore, although made strictly personal by the proviso to the clause, one which, while given to the sons themselves, is of this character. The expression " personal " in the proviso signifies, in the light of the words prohibiting alienation which follow, merely that the testator desired to prohibit attempts at alienation of a son's title. As the sons are all alive, no question so far arises as to the title to reside which can be claimed for the widows or families of deceased sons.

Their Lordships therefore abstain from expressing an opinion on the title in such circumstances. They desire merely to point out that Sections 99, 100 and 101 may give rise to difficulty in the claim of a widow and family who have survived a son. It is not clear that the whole of the testator's interest in the thing bequeathed was comprised in the bequest in such a case in their favour. All that is decided on this occasion is that the words used import a gift to the sons of the right to occupy for themselves and their wives and families, along with such servants as are required. The appellant, Putlibai, is the wife of the appellant, Jehangir, and it is clear on this construction that she ought to be allowed to occupy along with her husband who supports her claim, if he desires it. But the title is in law that of Jehangir, the husband, and not hers. It does not, however, appear that serious additional expense has been incurred through her having joined with her husband in this appeal, and the course taken has its convenience from the point of view of the Courts. What has now been said disposes also of the analogous question raised under Clause 10 as to the persons entitled to the maintenance allowances provided by that clause.

As to the other questions raised in the appeal their Lordships have arrived at substantially the same results as the learned Judges in the Courts below. They think that, subject to provision being made for the valid bequests as to which no question arises, and for giving effect to the rights of occupation and maintenance just considered, the five sons of the testator have a present title to have the residue of the testator's estate divided between them. The will by Clause 11 directs that at the expiration of ten years, or after the death of the last surviving son, whichever should first happen, the Bombay properties and their proceeds (subject to the rights of residence already referred to), are to be divided into five shares, of which one is to go to each son. But he is to have a life interest only. If he dies, the persons presumptively entitled to the corpus under subsequent provisions are to have the income until the death of the last survivor of the five sons. Then, by Clause 12

each son may by deed or will appoint in favour of his own sons or their lineal descendants, and on failure of such issue then in favour of his widow and daughters or their lineal descendants. By Clause 13, in default of the exercise of this power, the share of each son, if he has left a son or issue of such son living at the death of the last survivor of the testator's sons, is to be held for the sons of such son and the issue of his predeceased sons *per stirpes*, and if the son of the testator has left no such son or issue then for his widow and daughters and the issue of predeceased daughters.

Their Lordships concur in the view expressed in the judgments of the Court of Appeal that these limitations contravene the provisions of Section 100. The bequests to the sons, daughters, widows and issue of the testator's sons thus made do not in all possible instances dispose of the subject matter to which they apply, and so fail to comprise the whole of the remaining interest of the testator. It is obvious that he has reserved contingent rights which might well prove to be of value. The unborn beneficiaries do not take the whole interest undisposed of by reason of the title of his own sons being only for their lives. But the difficulties are not exhausted by these considerations. Clause 15 gives over the share in income or corpus alike of any beneficiary who alienates, in any of a number of ways, and in that event creates a discretionary trust, which may extend, so far as the income is concerned, only to a part of it, for the benefit according to selection by the trustees of some others of a class of beneficiaries somewhat wider than that of those who are to take under the clauses just referred to. The 16th clause also puts an end to the title of every beneficiary who ceases to profess, or marries anyone not professing the Zoroastrian faith, and gives the interest over in favour of those who take on the death of such beneficiary. In the face of this clause it cannot be contended successfully that Section 100 is complied with. For the whole of the remaining interest need not pass out of the hands of the trustees if there is a forfeiture of the income of the sons of the testator.

It was argued that, even if these questions may arise, they do not arise now, and that the Court ought to have refused to decide them, in accordance with the principle that declarations are not usually made as to merely future interests. But the interests are not merely future interests. If the argument based on the invalidity of the subsequent limitations just considered is well founded, the five sons have a present title to the residue subject only to the minor provisions already referred to, which title they are now in a position to enforce.

It follows from this conclusion that in so far as there is a direction in Clauses 10, 11 and 14 implying a postponement of the division of the residue for ten years, or until the death of the last surviving son, that the direction is inoperative, the interests to which it attaches being absolute.

Their Lordships think that what they have said disposes of all the questions that were argued at the Bar. The reasoning of Macleod J. is somewhat different from that of the Court of Appeal, although the result he reached was in essentials not different. Their Lordships have not thought it necessary to express an opinion on the grounds on which Macleod J. himself arrived at in conclusion that the five sons were presently entitled to absolute interests. But they appreciate the acuteness which guided him in the distinctions he drew, and they do not desire to be understood as differing from his mode of approaching the questions he decided merely because they have themselves adopted what seems to them the simpler argument which prevailed with the Court of Appeal.

There remains the question of the form of the decree. After putting the procedure into what seemed to them a somewhat better shape by the first judgment they delivered, the Court of Appeal declared in a final judgment, to begin with, that the right of residence given by Clause 9 to each son was strictly personal and did not entitle him to take with him his wife and children as residents. With this declaration their Lordships are unable to agree for the reasons already assigned. They are of opinion that the right is one which is given at all events to each of the sons now alive individually, and is a right which entitles each son to occupy not only by himself, but with his wife and family and such servants as he requires. A declaration to this effect must be made. As to the rest of the decree of the Court of Appeal their Lordships see no reason to disturb any part of it, and it stands affirmed. That Court dealt with the costs of the suit and of the appeal in a fashion to which their Lordships take no exception, excepting so far as concerns the direction that the appellants and the second respondents in the Court of Appeal should pay costs. Their costs in the Courts below must be provided for out of the estate.

As to the costs of the appeal to the Sovereign in Council, they have given to this question consideration. The litigation has been occasioned by dispositions made by a wealthy testator in contravention of the law of India. The points so raised have given rise to much difficulty and complication. The first appellant may not strictly speaking have been entitled to sue or to bring this appeal. But her husband has joined with her in a way that gets over any serious consequences arising from this. Under these circumstances their Lordships think that the costs of all parties of this appeal as between solicitor and client should be paid out of the estate. The case will go back to the Court of first instance, with directions to vary the decree in accordance with what has been now said.

They will humbly advise His Majesty accordingly.

In the Privy Council.

PUTLIBAI AND OTHERS

v.

SORABJI NAOROJI GAMADIA AND OTHERS.

DELIVERED BY VISCOUNT HALDANE.

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