Privy Council Appeal No. 81 of 1928.

K. T. Ganapathy Pillay - - - - - - - *Appellant*

v.

Alamaloo and another - - - - - - - *Respondents*

FROM

THE COURT OF APPEAL OF THE FEDERATED MALAY STATES (STATE OF SELANGOR).

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 18TH FEBRUARY, 1929.

Present at the Hearing:

THE LORD CHANCELLOR.
LORD DARLING.
SIR CHARLES SARGANT.

[*Delivered by* SIR CHARLES SARGANT.]

This appeal concerns the distribution of the residuary trust funds held under the Will dated the 20th May, 1898, of a testator, K. Tamboosamy Pillay, who died in the year 1902. By that Will, after giving directions for the sale, conversion and investment of his real and personal estate and constituting thereout a residuary trust fund (therein called the trust funds), the testator directed that for a period of 21 years after his death certain shares or parts only of the income of the trust funds should be paid and applied as therein mentioned, and the residue of the income of the trust funds should be accumulated by investing the same and the resulting income thereof to the intent that such accumulations should be added to and form part of the *corpus* of the trust funds. And after certain further directions not material to be here stated the testator made a final direction and bequest in the terms following, that is to say:—

> "And I direct my trustees on the expiration of twenty-one years after the date of my death to divide my trust funds into five shares and to pay one of such shares to my said wife and such share shall be held to vest in her at the date of my death and to pay one other of such shares to each

of my said sons Parimanum, Komarasamy, Mootoosamy also called Ratanam, and Ganapathy and in the event of any such son of mine dying before the expiration of such period of twenty-one years leaving child or children him surviving such child or children and if more than one equally between them shall take the share to which such son of mine would have been entitled if he had survived such period of twenty-one years and in default of issue of any son the share of such son shall be payable to the surviving sons equally between them subject to such provision as my trustees shall think fit in their absolute discretion to make for the surviving widow of any son."

The general legal character of the interests created by these words of gift is reasonably clear. The widow's interest in her one-fifth, though postponed in possession for 21 years, is immediately vested and is indefeasible. On the other hand, the similarly postponed interest of each of the sons in his one-fifth is also immediately, though not indefeasibly, vested and is liable to be divested and given over should he die before the expiration of the term of 21 years from the testator's death; and in that case two alternative and mutually exclusive events are considered and provided for in somewhat loose language. In the first event, namely, of his death, leaving a child or children him surviving, the share he would have been entitled to had he survived is given to such child or children. In the second event namely, of his death without leaving issue (it is fortunately unnecessary to construe this word) his share is given to the surviving sons.

In the arguments and to some extent in the judgments in the Courts of the Federated Malay States expressions have been used which imply or suggest that the interests of the sons were not vested till the expiration of the term of 21 years, and also that the case was one in which ordinary questions of accruer have to be considered. In their Lordships' view, neither of these implications nor suggestions is correct. The terms of the original gift to the sons is such as to create a plain vested gift, and the subsequent alternative gifts operate by way of divesting in certain events that vested gift. On the other hand, though the original gift to each son of his share is vested, there is not prior to the expiration of the term of 21 years any intermediate gift over as between the sons or their issue of the shares of sons dying successively within the period, such as would or might involve the ordinary problems as to accruer and the ultimate destination of accrued shares. The position of each son as to survivorship or as to prior death either with or without leaving issue has to be considered at one definite date and one date only, namely the expiration of the fixed period of 21 years from the testator's death.

This view of the case was not seriously contested by Mr. Jenkins in his able argument for the respondent Tamboosamy; but he urged with a good deal of force that the gift to the children of a deceased son was not of that son's original share only, but

of the share to which he would have been entitled had he survived the period of 21 years : and he contended that, in considering what the son would have been entitled to in that event, the Court should have regard to the subsequent hypothetical enlargement of the son's share by possible survivorship. But, when carefully examined, this contention is more plausible than sound, and appears to amount to an attempt to combine the result of two mutually exclusive alternatives, and to take away from a surviving son in favour of his nephews or nieces a part of the share of a deceased and childless brother which, under the second alternative gift, is given in its entirety to the surviving son. It seems impossible to do this without contradicting to this extent the second alternative gift, and the only way of avoiding such a contradiction, and yet arriving at the result advocated by Mr. Jenkins, would be to read the phrase surviving sons as meaning surviving by themselves or by their issue. Such a construction would be contrary to well-established principles, and, indeed, was not pressed for the respondent Tamboosamy.

The case of *Re Hunter's Trusts* (L.R. 1 Eq. 295) was relied on for the respondent and has some resemblance to the present case. But the decision there does not rest on or lay down any rule or principle of general construction and depends solely on the particular language of the Will there in question. And to construe the reasonably clear words in the present Will by the light of the construction given to the somewhat similar provisions in that Will would be to offend against the principles clearly laid down in *Scalé* v. *Rawlins* ([1892] A.C. 342) and in many other cases. The present Will is one in which very little, if any, assistance is to be derived from the interpretation of other Wills.

It may be added that the hypothetical character of the phrase " the share to which such son of mine would have been entitled had he survived such period of 21 years " is sufficiently satisfied by considering the words of contingency as referring to the possibility of the failure of the son to live to obtain the personal enjoyment of his share.

For the foregoing reasons their Lordships are compelled with respect to differ from the conclusions both of the Chief Justice and of the Court of Appeal, and to hold that, on the true construction of the Will in question, on the expiration of the period of 21 years from the death of the testator the appellant Ganapathy Pillay took, in addition to his original fifth share of the residuary trust funds called in the Will " my trust funds," the entirety of the original fifth share of his brother Ratanam, deceased ; that K. T. Achikannu (since deceased) took the original fifth share of her father, K. T. Komarasamy Pillay, and that the respondent P. Tamboosamy took the original fifth share of his father Parimanum.

In discharging the order of the Chief Justice some difficulty would appear at first sight to arise from a part of that order

being expressed to be made by consent, namely, that the respondent P. Tamboosamy and the appellant were each entitled to one-half of the estate of K. T. Achikannu, being one-fifth of the trust funds. It was afterwards pointed out by Acton J. in his judgment that this, though wrong in point of form, made no difference in substance because though on the view then taken Achikannu was strictly entitled to one-fifth plus one-fifteenth of the trust funds, and the appellant and the respondent P. Tamboosamy were strictly entitled to one-fifth and one-fifteenth each only of the trust funds, yet this was put right in substance by the fact that the appellant and the last-named respondent became entitled between them to the estate of Achikannu on her subsequent death. On the decision now being given the share of Achikannu was, in fact and apart from consent, that which it is stated to be in the order of the 8th September, 1927, namely, one-fifth, and as that fact will be independently stated in the order of His Majesty in Council, it seems desirable to strike out from the order of the Chief Justice the similar declaration expressed to be by consent.

In the result the order of the Chief Justice should be discharged except so far as it directs the taxation and payment of costs; the whole of the order of the Court of Appeal should also be discharged; a declaration should be substituted as to construction to the effect hereinbefore stated. The costs of the respondent Alamaloo as between solicitor and client and those of the appellant and the respondent P. Tamboosamy as between party and party, both of the appeal to the Court of Appeal and of the appeal here, should be paid out of the four-fifths of the estate other than the fifth bequeathed to the respondent Alamaloo and the respondent P. Tamboosamy should repay to the appellant any costs paid by the latter under the order of the Court of Appeal. Their Lordships will humbly advise His Majesty accordingly.

In the Privy Council.

K. T. GANAPATHY PILLAY

v.

ALAMALOO AND ANOTHER.

DELIVERED BY SIR CHARLES SARGANT.

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