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SHIVLAL
v.
SHRIKISSON-
DAS AND
MITCHELL,

The third party to put in affidavit of documents within a fortnight from service of amended or fresh notice.

Hearing of the suit to come on in its ordinary course.

Costs of the plaintiffs and defendants to be costs in the cause.

Costs of the third party reserved to be dealt by the Judge hearing the suit.

Counsel certified.

Attorneys for third parties: *Messrs. Pestonji, Rustim & Kola.*

Attorneys for the plaintiffs: *Messrs. Dikshit, Dhunjisha & Co.*

Attorneys for defendants: *Messrs. Tyabji, Dayabhai & Co.*

B. N. L.

ORIGINAL CIVIL.

Before Mr. Justice Davar.

DINSHAW SORABJI MODY AND ANOTHER, PLAINTIFFS, v.
DINSHAW SORABJI MODY AND OTHERS, DEFENDANTS.*

1907.
April 15.

*Civil Procedure Code (Act XIV of 1882), section 527, case stated under—
Indian Succession Act (X of 1865), section 78—Will—Appointment by
general bequest—Power created subsequently to the will.*

A general power of appointment may be well exercised by a will executed previously to the creation of the power and that too by a mere residuary gift.

THIS suit was filed in pursuance of an agreement between the parties under section 527 of the Civil Procedure Code for taking the opinion of the Court on the question of law set forth in paragraph 12 of the said agreement. The material facts are set forth fully in the case stated for the opinion of the Court which was as follows:—

1. One Nusserwanji Jhangirji Wadia, late of Bombay, Parsi, died on or about 5th day of May 1897, having previously thereto made his last will and testament dated the 8th day of June 1885, and thereby appointed his wife Pirojba (since deceased) the sole executrix thereof. After giving diverse legacies the said testator by the 17th clause of his said will gave his residuary estate in the event of his death without having issue to his said executrix upon the trusts following:—“And I declare that in case I shall die without leaving

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any issue my said executrix shall stand possessed of the said residue of my estate upon trust to pay transfer and make over the same unto my mother Bai Motlibai, Sorabji Shapurji Bengali of Bombay Parsi inhabitant Esquire and Jehangir Gustadji also of Bombay Parsi inhabitant Esquire, hereinafter called my 'Charitable Trustees.' And I declare that my said Charitable Trustees shall stand possessed of the said residue upon trust to invest the same upon any securities of or guaranteed by the Government of India and to apply the annual income arising from such investment in or towards the endowment of such hospitals for the sick and in donations, grants and gifts to such dispensary, infirmaries, educational or charitable institutions situate in the Island of Bombay as in their own absolute discretion my said Charitable Trustees may select and also in relieving poor and indigent Parsis in such manner and to such extent as my said Charitable Trustees may think fit. And I declare that in case the Charitable Trusts hereinbefore declared shall from any cause be void or incapable of taking effect, then in the event of my dying leaving a daughter or daughters I give and bequeath one half of the said residue of my estate unto my wife absolutely and in case she shall have predeceased me then to the Trustees for the time being of the Parsi Panchayat and in the event of my dying without leaving issue then I give and bequeath the whole of the said residue unto my said wife Pirojbai absolutely and in case she shall predecease me then to the Trustees for the time being of the Parsi Panchayat."

2. The said testator on the said 8th day of June 1885 also made a codicil to his said will, but he did not thereby revoke or alter the appointment of his wife the said Bai Pirojbai as his sole executrix as aforesaid or the aforesaid clause 17 of his said will.

3. The said testator duly deposited in the office of the Registrar of Bombay his said will and codicil and survived the making of such deposit for more than a whole year.

4. By an indenture bearing date the 29th day of March 1888 and expressed to be made between the said Nusserwanji Jehangirji Wadia of the one part and the said Nusserwanji Jehangirji Wadia, Sorabji Rustomji Mody and the said Dinshaw Sorabji Mody and Temulji Bhikaji Nariman of the other part, the said Nusserwanji Jehangirji Wadia granted and conveyed unto the said Nusserwanji Jehangirji Wadia, Sorabji Rustomji Modi, Dinshaw Sorabji Modi and Temulji Bhikaji Nariman and their heirs, executors and administrators all these hereditaments and premises particularly described in the schedule hereunder written to hold the same premises unto and to the use of the said Nusserwanji Jehangirji Wadia, Sorabji Rustomji Modi, Dinshaw Sorabji Modi and Temulji Bhikaji Nariman and the survivor of them and the heirs, executors and administrators of such survivor, their and his assigns for ever subject to all and every the rates and taxes then levied or which might thereafter be levied in respect of the said premises upon trust to permit the said Nusserwanji Jehangirji Wadia during his life to collect, get in and receive and take the rents and profits of the said premises and to lease and to manage and to order all the

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affairs thereof and to apply the rents and profits thereof either for his own use or for such purposes and for such persons and objects as he should in his absolute and uncontrolled discretion think fit and from and after the decease of the said Nusserwanji Jehangirji Wadia in trust to permit Pirojbai, the wife of the said Nusserwanji Jehangirji Wadia, during her life to collect, get in and receive and take the said rents and profits of the said premises and to lease and manage and order all the affairs of the said premises and to apply the rents and profits thereof either for her own use or for such purposes and for such persons and objects as she should in her absolute and uncontrolled discretion think fit. And after the decease of the survivor of them the "said Nusserwanji Jehangirji Wadia and Pirojbai in trust to hold the said trust premises and the rents and profits thereof for such person or persons or charity or charities and for such purpose or purposes as the said Nusserwanji Jehangirji Wadia should by any deed or writing or by his last will or any codicil or codicils appoint and in default of such appointment and so far as any such appointment should not extend in trust to convey the said trust premises and to pay the rents and profits thereof to the Trustees for the time being of the Parsi Panchayet of Bombay to be held and applied by them for the charities of which for the time being they should be trustees for the Parsis of Bombay."

5. The said property is hereinafter called the said Ambolee property.

6. The said Nusserwanji Jehangirji Wadia died childless about 9 years ago without having made any express appointment of the said Ambolee property.

7. After the death of the said Nusserwanji Jehangirji Wadia differences arose between his widow and executrix the said Bai Pirojbai and his brother Nowroji Maneckji Wadia, whereupon the said Bai Pirojbai filed a friendly suit in the High Court of Judicature at Bombay being Suit No. 611 of 1897 for the purposes of determining in substance and effect (*inter alia*) the shares and interests of the said Nusserwanji Jehangirji Wadia in the estate of Maneckji Nowroji Wadia, Jehangirji Nusserwanji Wadia and Bai Motlibai respectively in the plaint in the said suit more particularly mentioned and for other declarations and reliefs in regard to the provisions of the said will in relation to the said bequest to charity made by clause 17 thereof and the appointment of new trustees and for settling a scheme if necessary as more particularly mentioned in the plaint therein.

8. By the appeal Court's decree in the said suit dated the 12th day of August 1898 the charitable trusts contained in the said 17th clause of the will of the said testator Nusserwanji Jehangirji Wadia were in substance and effect upheld and trustees were appointed of whom the parties hereto of the second part are the only survivors.

9. The said Bai Pirojbai died on the 25th day of April 1906, leaving a will and codicil to which it is not necessary to refer.

10. The parties hereto of the first part are advised that the said Nusserwanji Jehangirji Wadia not having otherwise exercised the said power of appointment

the said Ambolee property, the intended subject thereof, has fallen into and forms part of his residuary estate and follows the destination thereof under the terms of the 17th clause of his said will and that the general bequest of his residuary estate to the charities therein named and indicated amounts by law to an execution by him of the said power of appointment and that therefore the trustees of his said residuary property who are the parties hereto of the second part are bound and entitled to administer the said Ambolee property as part and parcel of his said residuary estate.

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11. The value of the said Ambolee property is estimated to be Rs. 50,000.

12. The questions for the opinion of this Hon'ble Court are:—

(a) Whether the said Ambolee property comprised in the said indenture of settlement of the 29th day of March 1888 hereinabove mentioned has vested in the parties hereto of the second part upon the trusts of the charitable bequests contained in the 17th clause of the will of the said Nusserwanji Jehangirji Wadia?

(b) If not, whether the same property passes to the parties of the third part as Trustees of the Parsi Panchayet Funds and properties under the provisions of the said indenture of settlement of the 29th day of March 1888?

Lowndes for plaintiffs referred to section 78 of the Indian Succession Act.

Inverarity (with *Scott*, Advocate General) for defendants 1 and 2:—A general power may be exercised by a will executed previously to the creation of the power and that too by a mere residuary gift. The first question should be answered in the affirmative.

To negative the execution of a general power by a general devise it is necessary to show a contrary intention and such contrary intention must appear on the will itself.

They cited the following cases:—*Stillman v. Weedon*⁽¹⁾, *Moss v. Harter*⁽²⁾, *Hutchins v. Osborne*⁽³⁾, *Patch v. Shore*⁽⁴⁾, *Pettinger v. Ambler*⁽⁵⁾, *Hodsdon v. Dancer*⁽⁶⁾, *Boyes v. Cook*⁽⁷⁾, *In re Clark's Estate*⁽⁸⁾, *In re Hernando*⁽⁹⁾, *Re Old's Trusts*⁽¹⁰⁾, *Airey v. Bower*⁽¹¹⁾, *In re Marsh*⁽¹²⁾.

(1) (1848) 16 Sim. 26.

(2) (1854) 2 Sm. & Giff. 458.

(3) (1855) 4 Kay & J. 252.

(4) (1862) 2 Dr. & Sm. 589.

(5) (1866) L. R. 1 Eq. 510.

(6) (1868) 16 W. R. 1101.

(7) (1880) 14 Ch. D. 53.

(8) (1880) 14 Ch. D. 422.

(9) (1884) 27 Ch. D. 284.

(10) (1886) 54 L. T. 677.

(11) (1887) 12 App. Cas. 263.

(12) (1888) 38 Ch. D. 630.

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DAVAR, J.—The parties to this suit are interested in the decision of certain questions of law which have arisen in connection with an immoveable property in the village of Ambolee in the suburbs of Bombay. They have entered into an agreement and availed themselves of the provisions of Chapter 38 of the Civil Procedure Code for the purpose of obtaining the opinion of the Court on the questions which have arisen in connection with the said Ambolee property.

One Nusserwanji Jehangir Wadia was the owner of this property. On the 29th of March 1888 he executed an indenture of settlement whereby he granted and conveyed to certain trustees the Ambolee property mentioned in the plaint. He reserved to himself the rents and profits of the said property and the management thereof during his own lifetime and then to his wife. On the death of the survivor of them, the indenture of settlement provides that the trustees shall hold the said premises "in trust for such person or persons or charity or charities and for such purpose or purposes as the said Nusserwanji Jehangir Wadia should by deed or writing or by his will or any codicil or codicils appoint." In default of appointment the indenture provides that the premises should be conveyed to the Trustees of the Parsi Panchayet of Bombay. The plaintiffs are the present trustees of this indenture of settlement. Defendants 3 to 7 are the present Trustees of the Parsi Panchayet Funds and properties.

On the 8th of June 1885 the said Nusserwanji Jehangir Wadia executed his last will and testament whereof he appointed his wife Pirojbai the sole executrix. By the seventeenth clause of his will the testator gave his residuary estate in the event of his dying without issue to his executrix upon certain trusts mentioned in the said para. of his will. He, by the said clause of his will, appointed certain persons trustees for the purpose of carrying out the Charitable Trusts established by the said seventeenth clause of his will and called them his charitable trustees. He gave the residue of his estate to his charitable trustees with directions that they should apply the annual income in or towards the endowment of hospitals for the sick; in donations, gifts or grants to dispensaries, infirmaries, educational or charitable

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institutions in the Island of Bombay and also in relieving poor and indigent Parsis. The seventeenth clause of the will then goes on to provide that in the event of the charitable trusts being held to be void or incapable of taking effect from any cause whatever and in the event of his wife predeceasing him and his dying without issue the whole of the residue of his estate should go to the Parsi Panchayet.

Nusserwanji Jehangir Wadia died on the 5th of May 1897 without having revoked his will and without any issue. Before his death he made no express appointment of the Ambolee property. His widow Pirojbai died on the 25th of April 1905. After Nusserwanji's death his widow had certain litigation with his brother Nowroji. By a decree made by the appeal Court in the suit between the widow and the brother of the deceased Nusserwanji, being Suit No. 611 of 1897, the charitable trusts contained in the seventeenth clause of the will of Nusserwanji were upheld and trustees were appointed. The first two defendants are the surviving trustees so appointed by the Court.

By the agreement between the parties two questions are submitted for the opinion of the Court. The first and principal question is "whether the Ambolee property comprised in the indenture of settlement of the 29th of March 1888 has vested in the first two defendants upon the trusts of the charitable bequests contained in the seventeenth clause of the will of the late Nusserwanji Jehangir Wadia." The second question is whether in the event of the Court answering the question in the negative the said Ambolee property passes to the defendants 3 to 7 who are the present trustees of the funds and properties of the Parsi Panchayet, under the provisions of the indenture of settlement of the 29th of March 1889.

At the hearing of this suit counsel for the plaintiff did not argue the questions but merely submitted to the orders and directions of the Court. The Trustees of the Parsi Panchayet funds and properties did not appear, but the questions were argued before me by Mr. Inverarity who with the Advocate General appeared for the first two defendants.

The questions before the Court present no difficulty and the only point for the consideration of the Court is covered by sec-

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tion 78 of the Indian Succession Act and concluded by a long series of cases which are all collected and cited at page 222 and the following pages of Farwell on Powers.

Section 78 of the Indian Succession Act provides that a bequest of the estate of the testator shall be construed to include any property which he may have power to appoint by will to any object he may think proper and shall operate as an execution of such power and a bequest of property in a general manner shall be construed to include any property which he may have power to appoint by will to any object he may think proper and shall operate as an execution of such power.

The question here is—Can the testator be said to have exercised his power of appointment reserved to himself under the deed of settlement of the 29th of March 1888 by the will which he had made and published on the 8th of June 1885 nearly three years previous to the deed of settlement?

It must be remembered that a will speaks from the date of the testator's death and in *Stillman v. Weedon*⁽¹⁾ it was held that the will though made *before* the power was created was a good execution of the power.

Boyes v. Cook⁽²⁾ is a very distinct authority establishing the proposition that a power of appointment reserved to a party by a deed may be deemed to be exercised by a will made previous to the instrument conferring the power of appointment provided a contrary intention is not shown by the will. In this case a husband reserved to himself a power of appointment by his will over one-third of the property settled by a deed of separation. He had made a will several months before the execution of the deed of separation and it was held that the will was a good execution of the power although made before the deed of separation.

This case was approved of in the later case of *Airey v. Bower*⁽³⁾ by the House of Lords.

These cases are all of course decided under the English Wills Act (7 Will. IV and I Vic. c. 26), but sections 24 and 27 of that Act

(1) (1848) 16 Sim. 26.

(2) (1887) 14 Ch. D. 53.

(3) (1887) 12 App. Cas. 263.

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only reproduce in concrete form the general principles of the law which are again reproduced in section 78 of the Indian Succession Act. The proposition of law laid down as the result of the joint operation of sections 24 and 27 of the Wills Act and deducible from the English authorities, the more important of which I have noticed above, is as stated in Farwell on Powers⁽¹⁾, at page 222, that "a general power of appointment may be well exercised by a will executed previously to the creation of the power, and that too, by a mere residuary gift."

I hold that the power of appointment reserved to himself by the indenture of settlement of the 29th of March 1888 was validly exercised by the settlor Nusserwanji Jehangir Wadia by his will made and published by him on the 8th of June 1885.

I answer the first question in the affirmative. I am of opinion that the Ambolee property comprised in the indenture of settlement of the 29th of March 1888 has vested in defendants Nos. 1 and 2 who are parties of the second part to the present agreement upon the trusts of the charitable bequests contained in the 17th clause of the will of their testator Nusserwanji Jehangir Wadia.

The second question in view of my answer to the first does not arise. It will be convenient if however I record my opinion in connection with that question that the defendants 3 to 7, the trustees of the funds and properties of the Parsi Panchayet, take no interest whatever in the Ambolee property.

Decree to be drawn up in accordance with the agreement recited in paragraph 13 of the agreement.

Liberty to the parties to apply as the occasion may arise.

Attorneys for plaintiffs: *Messrs. Ardeshir, Hormusji, Dinshaw & Co.*

Attorneys for defendants Nos. 1 and 2: *Messrs. Ardeshir, Hormusji, Dinshaw & Co.*

Attorneys for defendants Nos. 3—7: *Messrs. Craigie, Lynch and Owen.*

B. N. L.