(1878) 04 PRI CK 0001

Privy Council

Case No: None

Parmanandas Jivandas		APPELLANT
	Vs	
Venayek Rao Wassudeo		RESPONDENT

Date of Decision: April 26, 1878

Citation: (1883) 7 ILRPC 19

Hon'ble Judges: B. Peacock, R. P. Collier, R. Couch, A. Hobhouse, JJ.

Judgement

A. Hobhouse, J.

1. The suit which gives rise to this appeal is founded on the will of one Ranchordas Chattur who was a merchant carrying on business in the city of Bombay. By his will he devoted a lakh of rupees to the establishment and maintenance of a dharmshala in Bombay for the benefit of Sadhus and Sants. The plaintiff and the present respondent is one of the trustees named in the will, though he appears never to have acted in the trusts until he came forward to institute the present suit. His plaint is very brief. It consists substantially of a statement of the will; and a further statement that the directions of the testator were carried out by the acting executors, and that the dharmshala was founded and endowed in compliance with those directions. Then he shows how it is that new trustees are wanted, and he prays that a new trustee or trustees be appointed under the order and direction of the Court to carry out the trusts "hereinbefore mentioned", meaning the trusts of the will. He prays no other specific relief; and the Court, in granting the relief that he prays for, have only made such declarations and given such, consequential directions as are necessary for the purpose of that relief.

2. The appellant, who was defendant in the suit below, is the on of the testator''s only brother, who was dead at the date of the will; and the testator mentions the appellant as being to him as a son. Either as heir or as the residuary devisee and legatee of his uncle the testator, he is entitled to the whole residue of the testator''s

property. He resisted the appointment of new trustees, and in his written statement he grounded his objection on the allegation that the will of the testator is void and inoperative under the Hindu law. He contended that no effect should be given to the provisions thereof except to such extent and in such manner as he, the appellant, might consent and agree that the same should be effective. The meaning of that plea is further explained in the written statement, and by the evidence and arguments in the case. In effect the appellant contends that the property, of which the testator was in possession during his life-time, was joint family property, and that under the provisions of the Mitakshara law the testator had no power of disposing of it to the dharmshala or other charitable objects indicated by his will.

3. In the decree pronounced at the hearing by Sir Charles Sargent the High Court has declared that the charitable trusts in the will of the testator Ranchordas are well established, and that certain sums of money ought to be applied for the several charitable purposes mentioned in the will. It then goes on to order the appellant to deliver to the Accountant General certain notes and securities which have been earmarked as the property belonging to the charitable trust, and it appoints two person to be trustees jointly with the respondent, and declares that the appellant is entitled to share with the trustees in the management of the charity. That is substantially the whole of the decree. The question is whether it is right. The appellant was dissatisfied with it, and he appealed to the Court of Appeal. His appeal there was dismissed, and he is now appealing to Her Majesty in Council.

4. There has been a considerable amount of argument, both in the Courts below and at the Bar here, upon the question whether or no the testator Ranchordas had such an ownership of this property as entitled him to devote a lakh of rupees to the charity in question. Their Lordships are not disposed to express any opinion upon that point, because they consider that if it were held that the power of the testator was doubtful, or even that it did not exist, the case must still turn upon the effect of transactions which have taken place since his death.

5. Those transactions are partly stated in, and partly summed up and completed by, a deed which was executed on the 11th of May, 1870. For the purpose of seeing the exact effect of that deed it will be desirable, to state what are the provisions of the testator''s will. The will was made on the 12th of May, 1859. The testator recites that his only brother, Jivandas, is dead, and has left a son of the age of about eight years, and that the testator himself has no issue. Therefore he says that the appellant, being considered by him as a son, has a right of inheritance to the whole of the moveable and immoveable property; and when he attains the age of 21 years the executors appointed in the will shall entrust to the appellant the whole of the testator''s property, moveable and immoveable, that may remain after defraying the expenses agreeably to all the conditions stated in the will. Then, after certain provisions for members of the family, he provides for the dharmshala as follows: "One month after my death a piece of ground shall be purchased in Bombay, and a

dharmshala be erected thereon to serve as a lodging for the Sadhus and Sants. A sum to the extent of Rs. 25,000 shall be expended thereon, and Government notes for Rs. 75,000 shall be purchased for the maintenance of these Sadhus and Sants, and that the maintenance expense shall be defrayed out of the amount of interest that may be realized therefrom; and all the executors appointed in my will shall, up to the time Bhai Parmanandas attains the age of 21 years, conduct the management of this dharmshala, and they shall, as long as the sun and moon exist, defray the expenses of the said dharmshala out of the above-mentioned fund; and even after Bhai Parmanandas shall have attained the age of 21 years, these executors and said Bhai shall jointly conduct the management of this charity. Perchance should any one of these executors die, so long as three of those persons are alive, they and Bhai Parmanandas shall jointly continue to conduct it, and even should any of them die, such of these executors as may be surviving shall appoint a respectable and good man of my caste as a vakil; and they shall conduct the management of the said dharmshala". It seems that by the word "vakil" there the testator meant a representative or an executor. It appears that the will was written in the Grujarati language.

6. The testator died two days after the date of his will. The executors named in the will are five persons: Bhai Lakmidas Damji, who has been the principal acting executor, and who acted up to and after the year 1874, but who is now dead: Shah Bhanabhai Dwarkadas, who also acted in the trusts of the will, but he became blind and desired to be discharged in the month of September, 1874; Bhai Jairaz Champsi, who also acted in the trusts of the will, and died on the 6th of June, 1873; and the other two are, one Parsi Dhanjibhai Framji, who has never acted at all, and the respondent, whose position has been mentioned before.

7. It appears from the deed of the 11th of May, 1870, that the affairs were managed by the three acting executors up to that time, and at that date the appellant had attained the age of 19 years. He had not attained the age of 21, at which time the testator said the property was to be transferred to him; but he was some years past his majority, and as there was no contingency in the gift on his attaining 21 and no gift over, he could clearly be entitled upon his majority to have the affairs of the estate adjusted, and to have so much as was attributable to dear residue handed over to him. The adjustment was made by this deed of the 11th of May, 1870, and it is necessary to state it with some particularity. The parties to it are the three executors who proved and acted of the first part, and the appellant of the second part. First come several recitals of the state of the family and the property previous, to the testator''s will. Then the will is recited, and it is stated that the executors have acted in execution of the different trusts of the will. Then follow these recitals: "And whereas the said, Parmanandas Jivandas, being satisfied with the management and administration of the aforesaid estates and property by them the said parties hereto of the first part and the said parties hereto of the first part being willing to make over and assign to him, in manner hereinafter mentioned, the said estates and

property remaining in their hands, not subject to charitable and other trusts, has agreed to execute the release and covenant hereinafter contained. And whereas the said parties hereto have in their possession as such executors as aforesaid the several particulars of moveable and immoveable estate mentioned in the several schedules hereto;"--then the deed goes on to make some statements concerning the schedules, and amongst them is this, that in part 6 of Schedule A. are "certain Government promissory notes and shares and sums of cash which have been appropriated to the respective trusts and purposes in the same part 6 of the same schedule respectively mentioned". Turning to part 6 of the schedule, it is found that the promissory notes, shares, and cash therein mentioned are all appropriated to certain charitable trusts. They are headed as being "appropriated to trust". There are several trusts, but with reference to the dharmshala occurs the following passage: "The following charitable places and charities to be carried on by the parties to these presents jointly: (Sadavut) charitable place at Cowasji Patell tank of Ranchordas Canji, where at present the Sadhus, Bhattas, and Brahmins are feasted. Promissory notes and ready cash and documents of properties relating to this account are now in possession of the three executors". Then the schedule goes on to mention another charity, which has been spoken of as the Parshotam Charity. Returning to the body of the deed, we find further recitals as to certain amounts advanced on two mortgages, and then comes the witnessing part. That consists of the formal transfer of the various properties, excluding those contained in part 6 of Schedule A. After that has been effected, comes a release by the appellant of the three executors, which is in these terms: "And this indenture also witnesseth that, in consideration of the premise, he the said Parmanandas Jivandas doth hereby release the said Lakmidas, Damji, Dhanabhai Dwarkadas, and Jairaz Champsi, their and every of their heirs, executors, administrators, assigns, and effects, from all and all manner of sums of money, actions, suits, account''s, claims, and demands for and in respect of the administration, disposition, and application of the property, estate, and effects of the said Kahanji Chattur, Ranchordas Kahanji, and Jivandas Kahanji, or any part thereof, or for or in respect of any sale, loan, investment, act, or thing made, done, or executed, or neglected or omitted, by the said Lakmidas Damji, Dhanabhai Dwarkadas, and Jairaz Champsi, or any of them, in or about, the property, estate, effects, or affairs of the said Kahanji Chattur, Ranchordas Kahanji, and Jivandas Kahanji, or any of them, or any part thereof, or in execution of the said recited wills or either of them, or in relation thereto, and for or in respect of any other thing in anywise relating to the premises". Then follows this proviso, on which the appellant greatly relies: "Provided always that nothing herein contained shall operate to release the said parties hereto of the first part, their heirs, executors, administrators, assigns, or effects, from any liability arising either under any covenant herein contained",--that refers to covenants against incumbrances and for further assurance,--"and on their part to be observed and performed, or under any of the trusts appertaining to the property, estate, and effects respectively mentioned and described in the 6th part of Schedule A. to these presents, or

otherwise relating to the same property, estate, and effects respectively".

8. It does not appear to their Lordships that that proviso has any effect in cutting down the general ratification, by the appellant, of those actions of the executors with which he is said to be entirely satisfied. It seems to them that it is the ordinary case of a property not wholly administered, but so far administered that the executors are entitled to a release from the residuary legatee. In point of fact this property cannot be wholly administered at any time, because some of the trusts are perpetual. But it was administered so far as this, that the executors found themselves in a position to hand over the residue, which seems to have been very large--eight or nine lakhs of rupees, to the residuary legatee, he undertaking to answer all remaining legacies and trusts for private persons to which the property was liable, and the executors retaining so much as was necessary to answer the purposes of the permanent or charitable trusts which remained to be performed. From these trusts of course the appellant could not possibly release the executors; and it appears to their Lordships that this proviso, of which so much has been made, is the ordinary proviso which conveyancers, perhaps needlessly, are apt to put into a deed of release of this kind, merely for the purpose of showing that the residuary legatee does not release, and does not affect to release, the executors from those trusts which yet remain to be performed. Therefore the effect of this deed is that the testator''s estate is up to this point settled. Certain specific property is set apart to answer the charitable trusts, and by reason of its being set apart the executors find themselves in a position to put the appellant in possession of the residue. Not only is the specific property set apart and earmarked as applicable to the trust, but the appellant himself becomes the trustee of it. By the words of the schedule he undertakes to act jointly with the executors as a manager of the charities: "The following charitable places and charities to be carried on by the parties to these presents jointly".

9. The effect of this is to make a valid dedication to charitable purposes of the property which is specified in the 6th part of Schedule A. It has been said in argument that all that this deed amounts to, is only a statement of what the executors have done, and it is suggested that they have done it against the will of the appellant. All that their Lordships can say to that is, that it is directly contrary to the expressions of the deed. According to the deed the appellant is perfectly satisfied with what has been done, and he is glad to have this property set apart and to receive all the residue himself; and he undertakes to join in the management of the dedicated property for the benefit of the charities. Whether the appellant conceived that he was legally bound to acquiesce in the executors setting apart this property owing to Ranchordas power over it; or whether he considered that it was doubtful whether he was legally bound, but that, owing to that doubt and owing to the respect due to his uncle, he ought to have the property set apart; or whether he considered that he was under a moral obligation only; it is clear that in point of fact he did join in an arrangement by which there, was a perfectly good dedication to

charity. Now that arrangement cannot be altered; nobody has the power to alter it. It is said that the execution of this deed amounts only to that which is technically called an estoppel, which operates only between parties and privies to the deed. The absurdity of that position was exposed at once by the supposition that Lakmidas, who is a party to this deed, should have lived up to the present moment instead of dying. In that case Mr. Fooks was fain to admit that an estoppel would operate; but it is impossible that the true owners of this property can be damnified by the accident of Lakmidas having died before the institution of the suit. The true owners of this property are not Lakmidas or the plaintiff, but the objects of the trust, the Sadhus and the Sants for whose benefit the fund is given. Such acknowledgment as there is, operates not to the benefit of Lakmidas and his two co-executors alone, but for the persons whom they represented--that is to say, the charity at large.

10. That, in their Lordships'' opinion, disposes of the case; and the only importance of the subsequent transactions is to show exactly how the dispute arises, because attempts have been made to appoint new trustees and to alter the management of the charity. On the 6th of November, 1873, another deed was executed between Lakmidas of the first part, certain widows entitled to maintenance of the second and third parts, and the appellant of the fourth part. In the recitals of that deed there is no sort of dissatisfaction shown with the arrangement that was made 3 1/2 years before, but, on the contrary, there is a recital to this effect: "Whereas there is now in the hands of the said Lakmidas Damji Certain promissory notes of the Government of India of a nominal value of rupees one lakh thirty-nine thousand and five hundred, with the unexpended interest accrued thereon as appears by the account relating thereto and kept by the said Lakmidas Damji, being the amount set aside by the executors of the said Ranchordas Canji for the purchase, erection, and maintenance of a dharamshala in Bombay for Sadhus, as directed by the will of the said deceased". The is a distinct reference to the will of Ranchordas as directing the maintenance of the dharamshala, and a statement that there is now in the hands of Lakmidas, who appears to have assumed the sole management to the exclusion of his two co-executors, this sum of Rs. 1,39,500. The operative part of the deed is mainly for the purpose of settling disputes which had arisen between the widows and the appellant; but it also relates to the charitable trusts; and the first clause of it is to this effect: "The said sum of Rs. 1,39,500, together with the interest accrued due thereon as aforesaid, shall be set apart in trust for the benefit of the said Sadhu dharamshala, in compliance with the direction in that behalf contained in the said will of the said Ranchordas Canji, and shall be endorsed in the joint names of the said Lakmidas Damji, Parmanandas Jivandas, Venayekrao Wassudeo, Khattao Macconji, and Sunderdas Modji, who shall be the trustees of the charity, and that the said Lakmidas Damji shall during his life be the sole managing trustee and keep the account of the said charity, and that after his death or resignation the said Parmanandas Jivandas shall be the managing trustee, in like manner and with the like powers, but that the said promissory notes shall be kept in the custody of the

said Parmanandas Jivandas". Now nothing is clearer there than that the parties conceived that they were acting under the will, though they did more than the will authorized. The power to appoint new trustees had not arisen. Neither had they power to make any binding appointment of a sole manager. If, indeed, all they meant was,--the trustees shall be responsible for the management, but we will agree that one shall do the work, then they would be making an arrangement inter se which is common enough among trustees; but if they meant that which is now relied upon by the appellant, if they were intending to constitute a wholly new basis for the trust, then they were departing from the provisions of the will, which they evidently intended to abide by.

11. There is one subsequent deed of the 9th of September, 1874, made between Lakmidas the appellant and the respondent of the first part, Bhanabhai of the second part, and the three parties of the first part with Khattao Maconjee and Sunderdas Modji of the third part. The object of that deed was to appoint five trustees of the charity. Bhanabhai was then blind and desired to retire; Jairaz Champsi was dead; and the consequence was that the trust was not sufficiently manned. The appointing parties'' are the three remaining executors and the appellant who was recognized by the testator as entitled to act with the executors in the management of the trust. They assume that they have a power of appointment which under the terms of the will they really have not. But they still wish to act in accordance with the will, and in the recital which immediately precedes the witnessing part of the deed it is said that the parties of the first and second parts, in execution of the power reserved to them in the will of Ranchordas Canji and of all other powers, have proposed to nominate and appoint two new persons to be trustees in the room and stead of Jairaz who was dead and Bhanabhai who was blind; and they effect the appointment accordingly. Then they provide in a subsequent part of the deed that one trustee for the time being shall be the manager; that Lakmidas shall be the first manager, and that when he ceases to be a trustee, the appellant shall be the manager. They may have thought that they had power to appoint one of their own body to be manager, taking the responsibility for the whole. It is not an unreasonable arrangement from the point of view of the trustees inter se; but that they intended at this time to depart from the trusts of the will, is conclusively negatived by the recital which has just been read. If they did intend it, their intention could not take effect.

12. That being so, it is difficult to see on what point the decree is wrong. Once establish the will and all the rest follows. It is quite right to constitute the trust fully; and the Court has not gone beyond its proper discretion in appointing two new trustees. It is quite right that all the notes and securities shall be put in proper custody; and that the Court has ordered.

13. With reference to the question of costs, it is suggested that an injury is done to the appellant by the order that though the costs of the other parties shall be paid

out of the charity fund, he shall be left to bear his own costs. On considering that matter, their Lordships do not see their way to alter the decree of the Court below. It would be departing from the general rule that the discretion of the Court below with respect to costs is not altered when there is no substantial alteration made in the decree itself. It is not a universal rule, but it is a general rule and a sound one In this case their Lordships see no reason to depart from the rule. If the appellant had on attaining age disputed the right of the testator to establish this charity, there would undoubtedly have been a suit instituted for the administration of the trusts of the will and the establishment of the charity by setting apart a proper portion of the testator''s estate to answer it; and the costs would have fallen on the residue of the estate. By the arrangement made in 1870 the appellant himself comes forward to assent to the appropriation of a proper sum to answer the charitable trusts, and he takes all the residue clear of that liability. He, therefore, has, by not disputing the will at that time, escaped the liability to costs which would certainly have fallen on the residue of the estate. Their Lordships entirely acquit the appellant of any covetous or sordid motives in this litigation. He has been willing to part with the money and to establish the charity which his uncle desired; but he has also desired to get that which the will did not give him,--the entire control over it, and that is the cause of the dispute. Their Lordships think his own costs must now be borne by himself. He does escape the costs of the suit so far as the plaintiff and the Advocate General have incurred any, for those are to come out of the fund; and their Lordships think that he has obtained quite sufficient advantage by the decree as it stands in respect to costs.

14. The result is, that their Lordships will humbly advise Her Majesty to dismiss the appeal, and the appellant must pay the costs of the appeal.