Stanley Ezra Vs Seemah Luddy

Court: Calcutta High Court

Date of Decision: Nov. 19, 1965

Acts Referred: Transfer of Property Act, 1882 â€" Section 19, 21, 28

Citation: (1966) 2 ILR (Cal) 470

Hon'ble Judges: Ray, J

Bench: Single Bench

Advocate: D.K. De and S.K. Lahiri, for the Appellant;D.K. Sen and M.K. Bannerji for Defendant No. 1, for the Respondent

Judgement

Ray, J.
The following questions arise for determination:

(a) Which of the parties are entitled to the trust property, namely No. 9, Grants Lane (also known as Grant Lane), Calcutta, after the death of Ezra

Samuel Arakie?

(b) What are the shares of the parties hereto in the said premises No,. 9, Grants Lane (also known as Grant Lane), Calcutta, upon the death of

Ezra Samuel Arakie?

(c) Any other question which Court may think fit to decide on the facts and circumstances of this case;

(d) For administration of the trusts created by the deed dated July 24, 1900; and

(e) for costs of and incidental to these proceedings.

2. In order to appreciate the questions it is necessary to refer to the relationship between the parties. Raamah Samuel Ezra Arakie made a

postnuptial settlement on July 24, 1900, with the consent and approval of her husband Samuel Ezra Arakie and conveyed to Ezekiel Solomon and

Ezra Solomon Yahyah Gubboy as trustees of the land and premises known as No. 9, Grants Lane, Calcutta.

3. Raamah Samuel Ezra Arakie had five children. They are Ezra Samuel Arakie, Seemah Luddy, Rachel Ezra, Hannah Ezra and Emma Joshua.

Ezra Samuel Arakie died on June 11, 1963. Rachel Ezra died in 1920 leaving two children, Charlie Ezra and Flora Barook. Hannah Ezra died in

1942 leaving behind her Stanley Ezra, Ellis Ezra and Flora Gubboy. Emma Joshua died in 1962 leaving Joshua Joshua.

4. Raamah Samuel Ezra Arakie had died on August 19, 1943.

5. The following provisions of the settlement are relevant for the purposes of the present summons:

(a) If Raamah Samuel Ezra Arakie shall leave two or more sons her surviving upon trust as to the said messuage and premises and the rents, issues

and profits thereof for such sons, in equal, shares absolutely to be divided between them upon the youngest of such sons attaining majority.

(b) But if Raamah Samuel Ezra Arakie shall leave her surviving only one son then the said trustees shall pay rents, income and annual produce only

of the trust premises to such son for the terms of his natural life and from and after his death the said trustees shall hold the messuage and premises

and the rents and profits thereof upon trust for the children of such son in equal snares absolutely to be divided between them upon the youngest of

such children attaining the age of majority.

(c) But if there shall be no such children of the said son then upon trust for the daughters of the said. Raamah Samuel Ezra Arakie in equal shares

absolutely.

6. The Plaintiff contends that upon the death of the settlor''s only son, Ezra Samuel Arakie without issue, all the daughters of the settlor would be

equally entitled to the said trust property and in the case of any daughter being dead, her children would be entitled to her share equally.

7. The only affidavit filed is of Samuel-Luddy. He is the son of Seemah Luddy, Defendant No. 1. In that affidavit it is contended that upon the

death of Ezra Samuel Arakie the trust property passed on to the surviving daughter alone, namely, Seemah Luddy.

8. The rival contentions between the parties are that according to the Plaintiff the daughters of the settlor were given a vested interest in the

remainder after the prior life interest of the son subject to being divested in case the son had issue; whereas, according to the Defendant, the

settlor''s daughters, in case the settlor had only one son, as was the ease here, were given a contingent interest and it was contingent both upon

there being no issue to the said son and upon the daughter or daughters surviving the son.

9. Sections 19 and 21 of the Transfer of Property Act deal with vested and contingent interests Section 28 of the Transfer of Property Act deals

with ulterior transfer conditional on happening or not happening of a specified event where on a transfer of property an interest therein is created in

favour of a person without specifying the time when it is to take effect, or in terms specifying that it is to take effect forthwith or on the happening of

an event which must happen, such interest is vested; unless a contrary intention appears from the terms of the transfer. A vested interest is not

defeated by the death of the transferee before he obtains possession. When an interest is vested the transfer is complete, but when an interest is

contingent the transfer depends upon a condition precedent. When that condition is fulfilled the transfer takes effect and the interest is then vested.

If the condition refers to an event, which is certain to occur, the interest dependent upon it is not contingent but is vested. On the other hand, if it is

an uncertain event it is contingent, for the condition may never be fulfilled and the transfer may never take effect. Thus a gift to A on the death of B

creates a vested interest in A even during B''s life time, for there is nothing more certain than death. But a gift to A on the marriage of B creates

only a contingent interest, for B may never marry. But that contingent interest becomes vested if and when B marries.

10. An interest may be vested and yet there may not be possession. For instance, there may be a provision postponing enjoyment or there may be

a prior interest or there may be a provision for accumulation. If a sum is bequeathed to a person to be paid to him upon attaining the age of 18, the

enjoyment of interest is postponed. Again, if a fund is bequeathed to A for life and after his death to B, on the testator''s death the legacy to B

becomes vested in interest in B. This is a case where prior interest intervenes, but the legacy is vested as the determination of that prior interest is a

certain event.

11. Where on a transfer of property, an interest therein is created in favour of a person to take effect only on the happening of a specified uncertain

event, or if a specified uncertain event shall, not happen, such person thereby acquires a contingent interest in the property. Such interest becomes

a vested interest, in the former case, on the happening of the event, in the latter, when happening of the event becomes impossible. If a legacy is

bequeathed to D in case A, B and C shall die under the age of 18, D has a contingent interest in the legacy until A, B and C all die under 18, or

one of them attains that age. If a transfer is subject to a condition precedent, then there is no transfer at all until that condition is fulfilled and till then

the interest is contingent on the condition being fulfilled. If an estate is bequeathed to A for life and after his death to B if B would then be living; but

if B shall not then be living to C and if A, B and C survive the testator B and C each take a contingent interest in the estate until the event which is

to vest it in one or in the other has happened. But if on the other hand in that case B dies in the life time of A and C, upon the death of B, C will

acquire vested right to obtain possession of the estate upon A''s death. The first illustration shows the condition precedent which is to be satisfied

before the interest can take effect and that is why it is a contingent interest. Whereas in the other case upon the death of B in the life time of A and

C, C would acquire a vested right to obtain possession of the estate upon A''s death because there is no longer any contingency and there is no

longer any condition precedent to be fulfilled.

12. A condition precedent, when followed by a gift over, is sometimes construed to mean that the interest dependent on it is not contingent but

vested. In a devise to A ''if or ''when'' he attains the age of majority with, a gift over in the event of his dying under that age it will amount to the

condition subsequent so that A takes a vested interest liable to be divested by his, death under the age specified. This is known as the rule in

Edwards v. Hammond (1684) 3 Lev. 132. Similarly a devise to A if or when he shall attain a given age, with a limitation over on his death under

that age without issue, confers a vested estate on A defeasible only in the event of his death without issue under the specified age.

13. Counsel on behalf of the Plaintiff relied on Section 28 of the Transfer of Property Act and contended that a transfer of property an interest

therein may be created in favour of any person with the condition superadded that in case a specified uncertain event shall happen the interest shall

pass to another person or that in case a specified uncertain event shall not happen such interest shall pass to another person. He relied on the

decision of the Judicial Committee in Umes Chunder v. Mt. Zahoor Fatima (1889) L.R. 17 I.A. 201 and the decision in Vithalbhai Gokalbhai and

Others Vs. Shivabhai Dhoribhai and Others, . In (1889) L.R. 17 I.A. 201 (Privy Council) by a deed of settlement the husband granted the lands in

suit to his wife on condition that if she had a child by him, the grant should be taken as a perpetual mokurruri and in case of no child being born as

a life mokurruri with remainder to the settlor''s two sons by another wife. The Judicial Committee held that the two sons by the first wife took

definite interest under the deed similar to vested remainders though liable to be displaced by the birth of a child to second wife. These conditional

limitations speak of vested interest being divested by the happening of events. In Vithalbhai Gokalbhai and Others Vs. Shivabhai Dhoribhai and

Others, the relevant provisions in the deed stated that if the testator''s wife gave birth to a son or daughter after his death then the child would be

the owner of the properties. The other provisions were that after the death of the settlor''s wife the property should be taken possession of by his

two sisters as owner and they would enjoy the same as owner by right of ownership. It was held in Vithalbhai''s case that the sisters were to take

possession of the properties after the death of the widow which in the course of nature was to occur sooner or later and the object of the

postponement of their rights was obvious that the widow might enjoy the income during her life time. Such postponement would enable and

interpose the life interest to be enjoyed and it could not exclude the vesting of the properties on the death of the testator. (1889) L.R. 17 I.A. 201

(Privy Council) and Vithalbhai Gokalbhai and Others Vs. Shivabhai Dhoribhai and Others, indicate that a provision that if a particular event shall

happen the interest shall pass to another person is, what is called in English Law, a conditional limitation. A conditional limitation divests an estate

which has vested and vests it in other person. A conditional limitation does not prevent any estate from vesting, on the contrary the condition

implies that the estate which has preceded it had vested. The reason is that the condition affected the retention of the interest and not its acquisition.

If the acquisition of any estate is dependent upon any condition it becomes a different matter and questions arise as to whether it is a contingent

interest or not.

14. Counsel for the Plaintiff relied on the meaning of vested and contingent interest given in Jarman on Wills, 8th ed., vol. II at pp. 1341, 1346,

1353, 1356, 1358, 1360, 1361 and 1364 in support of the contention that the law is said to favour the vesting of estates and where a remainder is

limited "in default" or "for want of" object or objects of the preceding limitation, these words mean on the failure or determination of the prior

estate or estates and do not render the ulterior estate contingent on the event of such prior object or objects in coming into existence. In other

words, it is said that the word remainder comprehends a series of limitations and the ulterior estate is a vested remainder expectant on the failure or

determination of the prior estate.

15. Among the other passages in Jarman on Wills on which counsel for the Plaintiff relied reference may be made to the case of Browne v. Lord

Kenyon (1818) where the testatrix gave Ã¯Â¿Â½ 1000 to Mad. 410 which she was entitled by virtue of a deed of settlement upon trust for several

persons successively for life and after the death of the survivor, upon trust to pay the principal to C; but if he were then dead (which event

happened) then to his two brothers in equal shares, or the whole to the survivor of them, both the brothers survived the testator and died pending

the prior life interest. It was held that they took vested interest at the death of the testator, subject to being divested if one only should survive the

tenants for life.

16. Counsel for the Plaintiff also relied on the decision in Doe d Cadogan v. Ewart (1838) 7 Ad. And El. 636 where a testator devised his real

estate to trustees upon trust for his wife during widowhood and after her decease or marriage again, upon trust to apply the rents towards

maintenance of his daughter, only she should attain the age of 25 years and from and after her attaining that age, then upon trust for his said

daughter, her heirs and assigns for ever, but in case his said daughter should depart this life without leaving issue then the testator devised the said

real estate over. The daughter, after the decease of the widow and before she attained the age of 25 years suffered a common recovery and it was

held that such recovery was effectual to acquire equitable fee simple, she having a vested estate tail" in equity at that time.

17. The decisions on which counsel for the Plaintiff relied illustrate that the presence of a gift over may indicate whether it is a vested or a

contingent interest. In the decision in Rajes Kanta Roy Vs. Santi Debi, , the Supreme Court considered the effect of Sections 19 and 21 of the

Transfer of Property Act in relation to certain provisions in a document. The Supreme Court said that in determining the question as to whether

estate was vested or contingent the intention was to be gathered from all the terms of a document and that the Court would approach the task of

construction with a bias in favour of a vested interest unless the intention to the contrary was definite and clear. In the case before the Supreme

Court the eldest of the sons was appointed as the sole trustee to hold the property subject to certain powers and obligations. A and his brother B

got an interest. The provisions showed that some of the properties ultimately went to A and one of the properties went to B. The interest which

either of these was to get in the properties allotted was expressed to be one which each would get after the trust came to an end. Two events were

to happen before A and B were to get the properties. First, the discharge of all the debts specified in the schedules and second, the death of the

settlor himself. The question was whether the interest was contingent or vested. It was contended that the discharge of the debts was an uncertain

event in the sense that neither the factum nor the time of such discharge was one that could be predicted with any certainty. As to the debts it was

held that the liquidation of debts was a matter of considerable importance to the settlor of the properties and the Supreme Court came to the

conclusion that the interest taken was vested and not contingent. The distinction between vested and contingent interest was pointed out by the

Supreme Court with the observation that it had to be found out as to whether there was an immediate transfer of an interest or whether such a

transfer was contingent upon the happening of uncertain events.

18. In the present case the provisions in the deed indicate that Samuel Ezra Arakie was to have a son. The trustees were to hold the properties for

the son for his natural life and upon the death of the son for children of such son in equal shares to be divided between them and if there was no

children of the said son then on trust for daughters in equal shares absolutely. It is not a case of prior interest, for there is no vested prior interest.

The birth of a son is an uncertain event. The birth of a son''s son is equally an uncertain event. This is also not a case of gift over for the properties

have already been given to the son and thereafter to the son''s son. The conditional limitations which speak of vesting of the property and retention

of the property do not apply to provisions of the present case. The acquisition of the property is in present case dependent upon uncertain events.

Taking into consideration all these principles I am of opinion that the contention on behalf of the Defendant fails. I, therefore, answer the questions

as follows:

(a) Seemah Luddy Defendant No. 1 is entitled to the trust property.

(b) Costs of the parties will come out of the estate as of a defended suit. Certified for two counsel.