(1875) 03 CAL CK 0007

Calcutta High Court

Case No: None

Broughton		APPELLANT
	Vs	
W.J. Mercer and Others		RESPONDENT

Date of Decision: March 31, 1875

Judgement

Phear, J.

In this case questions of some nicety have arisen, and I feel it unfortunate that I have not had the advantage of advice from parties possessing conflicting interests. This Court is asked to construe the trusts of the will of Mercer, and to administer so much of his estate as now remains according to the provisions of that will. I have already expressed my opinion that the annuity payable to the daughter is not forfeited by her leaving Australia, and the consequence is that the only property about which there now remains any question is the real property, if I may so call it,--landed property which was devised by the testator to hospitals in the North-West Provinces. Eventually there will be some portion of the personal property set free from other trusts and available for the purposes of the hospitals, but at present, according to the statements of facts in the plaint, there is nothing involved in the gift to the hospitals except immoveable property.

2. I understand that Mr. Mercer was an Englishman by birth and domicile and the law which affects the disposition of this property must be so much of the English law as is in operation in India.

3. The first question then that suggests itself is the question whether the devise of immoveable property for such a purpose is a good devise. Now I apprehend that the principal rule of English law which comes into operation with regard to this part of the case, is the rule against perpetuities, which says that all dispositions of real property must take effect, if at all, within the period which is limited by that rule. And beyond that period the taker of property, whether real or personal, cannot generally be in any degree controlled in the enjoyment of the property by the will of the original disposer.

4. In this case, the devise has taken effect amply within the period so limited; but can the application of the property be still longer controlled according to the wishes of the testator? Can the taker be compelled to carry the trusts of the will into effect? Although in England this cannot generally be done, yet when the purpose for which property is given falls within the scope of 43 Eliz., c. 4, the Court of Chancery has authority to establish the trust and to take all requisite measures, as by appointing trustees and framing a scheme, and so on, when necessary to give effect to the trust, subject however to the qualification, that if the trust is such as to possess the character of a superstitious use, the gift is void and cannot have effect given to it, and subject also to the further large qualification that devises of real property to such charitable uses as are not privileged, or excepted by Statutes, are void. I need hardly say, that the Statutes which deal with and are applicable to these devises are commonly, though not very correctly, called the Statutes of Mortmain.

5. The particular charitable purpose to which the property has been devised in this case is a hospital, and it has been decided in England that a hospital comes within the scope of 43 Eliz., c. 4--Attorney-General v. Kell 2 Beav., 575 and University of London v. Yarrow 3 Jur., N.S., 421--the latter a somewhat remarkable case, inasmuch as it was there held that a hospital for the cure of domestic animals was within the scope of the Statute. So that the charitable purpose to which the testator has devoted his property is one to which the Court of Chancery in England would take care that it was devoted in perpetuity notwithstanding the ordinary rule against perpetuities; and the High Court as successor of the Supreme Court inherits the powers of the Court of Chancery in this respect, if these powers are to be attributed to the forum rather than to Common Law. Probably, however, it would be right to say that the Statute of Elisabeth is declaratory of the Common Law, and does not merely endow the Court of Chancery with special powers. But, however this may be, both this Court and the late Supreme Court have, in very many cases, acted under the authority of the Statute of Elizabeth and given effect to charitable trusts in the nature of perpetuities within its scope.

6. It is hardly necessary for me to add that the Mortmain Acts are not operative in India: for that has been laid down authoritatively in more than one case--The Mayor of Lyons v. The East India Company 1 Moore''s., I.A., 175, Attorney-General v. Stewart 2 Merivale, 143, and Mitford v. Reynolds 1 Phil., 185, 192. This being so, it must follow that this Court will carry out a trust of this kind when the subject is immoveable property just as it would if it had been merely personal property. It, therefore, seems to me, that the devise of this property to the hospital is good, and ought to have effect given to it.

7. The next question, and the all-important one in this case, is, whether any portion of the property can be sold; for, if it cannot, and if I understand the facts aright, then it is almost valueless to the charities in their present state. It does not and cannot be made to produce income, and the hospital buildings are falling into ruin for want of repairs. The testator has, however, expressly forbidden that the property or any portion of it should be sold, and if this condition thus imposed is valid and operative, I think the Courts cannot

order a sale merely because it would be advantageous to the charity that the property should be sold. A Court of Equity will no doubt in all cases brought before it oblige an owner, who is of full age, to sell or to do all that he ought to do with regard to property in order to discharge his liabilities to other parties in respect of it; and under similar circumstances the Court will order a sale to be made on behalf of a minor which shall be binding on him when he comes of age: but it has been expressly laid down, that the Court has no authority to order a sale merely because it would be beneficial to the owners--Calvert v. Godfrey 6 Beav., 97, and also that the Court could not sanction a sale by trustees for the benefit of the minors before the occasion for the existence of the power of sale had arisen--Johnstone v. Baber 8 Beav., 233. If then the trustees in the present instance have no power to sell, that is are in the same position as that of trustees whose power has not arisen, this Court cannot sanction a sale merely because it would be beneficial to the charity.

8. But in my opinion, after the best consideration I can give to the matter, the prohibition of the testator against selling is void. It is, I may say, repugnant to the gift. It is an endeavour on the part of the testator to limit the incidents of the property beyond the period authorized by the rule against perpetuities to a greater extent than is needed for the charitable purpose to which he has devoted the property. I may almost venture to say that the only restraint which the testator could have imposed with regard to dealing with the property was the restraint involved in the purposes to which it is devoted. To use English technical language the fee went for that purpose, and it is repugnant to that estate that the holder of it should he forbidden to sell. And I may add that there is nothing intrinsic to a charitable purpose, certainly not to one of this kind to prevent property from being sold on behalf of the charity, if there is any necessity for the sale. In the case of The College of St. Mary Magdalen, Oxford, v. Attorney-General 3 Jur., N.S., 675, the Lord Chancellor said: "There is no positive law which prohibits the sale of charitable lands." So I apprehend that the founder of a charity like this cannot forbid a sale when absolutely necessary for the purposes of the charity to which he devotes his property, though he might, no doubt, if he thought fit, have given the trustees a larger discretion with respect to selling than would be involved in the purposes and needs of the charity itself. It seems to me then, on the whole, that the property has been given by the testator for a specific charitable purpose, and that the trustees have all the powers of an owner over it which are necessary to make it effective for the purpose. The principles which were lately laid down by the Privy Council as to debutter property in the case of Prosunno, Kumari Debya v. Golab Chand Baboo Post, pp. 458, 459 seem to apply very aptly here. The words of the judgment are:--"But notwithstanding that property devoted to religious purposes is as a rule inalienable, it is in their Lordships" opinion, competent for the sebait of property dedicated to the worship of an idol, in the capacity as sebait and manager of the estate to incur debts and borrow money for the proper expenses of keeping up the religious worship, repairing the temples or other possessions of the idol, defending hostile litigious attacks, and other like objects. The power however to receive such debts must be measured by the existing necessity for incurring them. . . . . It is only in an ideal sense

that property can be said to belong to an idol, and the possession and management of it must in the nature of things" be entrusted to some person as sebait or manager. It would seem to follow that the person so entrusted most of necessity be empowered to do whatever may be required for the service of the idol, and for the benefit and preservation of its property, at least to as great a degree as the manager of an infant heir. If this were not so, the estate of the idol might be destroyed or wasted, and its worship discontinued for want of the necessary funds to preserve and maintain them."

9. If "charitable" be read for "religions" and "hospital" be pat for "idol," these passages become exactly in point, and the ground of the reasoning would seem to be the same in both cases.

10. On the whole then, I am prepared to declare that the devise of this immoveable property to the purpose of the hospitals is valid and ought to be carried into effect: and also that the trustees have authority on the state of facts given in the plaint to sell so much of this property as may be needed for the repairs of the hospital. With these views I think I must declare that the trustees under this will have power to sell or mortgage the immoveable property devoted to the hospital, to such an extent as may be necessary for keeping the hospital in efficient operation. Attorneys for the plaintiffs: Messrs. Berners, Sanderson and Upton.