Privy Council Appeal No. 18 of 1938

Pestonjee Bhicajee (Firm) - - - - - *Appellants*

v.

Patrick H. Anderson - - - - - *Respondent*

FROM

THE COURT OF THE JUDICIAL COMMISSIONER OF SIND

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 27TH JULY, 1938

Present at the Hearing:
LORD ROMER
SIR SHADI LAL
SIR GEORGE RANKIN
[*Delivered by* LORD ROMER]

By his will dated the 28th December, 1926, one John Alexander Anderson, who died in October, 1928, directed that the residue of his estate should be divided into 16 shares and he bequeathed three of such shares to his nephew C. S. Anderson and Winifred, his wife, and their issue as therein mentioned. By a codicil dated the 22nd July, 1927, the testator revoked that bequest and in lieu thereof he directed as follows:—

> "The income from these three-sixteenths shall as long as C. S. Anderson and Winifred his wife are both alive be divided, two-thirds to the wife and one-third to the husband. If one of them dies his or her share of the income shall belong to their four children or the survivors of them in equal proportions and when the remaining parent dies the capital and income shall belong to the children then living in equal proportions."

The respondent, Patrick H. Anderson, is one of the four children of C. S. Anderson and his said wife; and the question to be determined upon this appeal is whether, while both C. S. Anderson and his said wife were still living, the interest of the respondent in the income and capital of the three sixteenth shares in the said testator's residuary estate was liable to attachment and sale in view of paragraph (*m*) to the proviso to section 60 of the Civil Procedure Code, 1908. That section so far as relevant is as follows:—

> "60.—(1) The following property is liable to attachment and sale in execution of a decree, namely, lands, houses or other buildings, goods, money, banknotes, cheques, bills of exchange, hundis, promissory notes, Government securities, bonds, or other securities for money, debts, shares in a corporation and, save as hereinafter mentioned, all other saleable property, movable or immovable belonging to the judgment-debtor, or over which, or the profits of which, he has a disposing power which he may exercise for his own benefit, whether the same be held in the name

of the judgment-debtor or by another person in trust for him or on his behalf:

"Provided that the following particulars shall not be liable to such attachment or sale namely:—

"(*m*) an expectancy of succession by survivorship or other merely contingent or possible right or interest."

The circumstances that have given rise to the appeal are as follows. On the 14th January, 1932, the appellants instituted in the Court of the Judicial Commissioner of Sind (District Court Jurisdiction) a suit against the respondent and others claiming a sum of Rs.1,20,900. On the same day they applied to the said Court for attachment of (*inter alia*) the interest of the respondent in the income and capital of the said three sixteenth shares. This application was made under Order XXXVIII r. 5 of the said Code which provides for conditional attachment before judgment of property of a defendant where the Court is satisfied that such defendant with intent to obstruct or delay the execution of any decree that may be passed against him:—(*a*) is about to dispose of the whole or any part of his property, or (*b*) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court.

The application in due course came before Additional Judicial Commissioner Aston. He was satisfied that the conditions upon which an attachment could be made under the said rule had been fulfilled, but he held that the respondent's interest in the said three sixteenth shares was protected from attachment by virtue of the proviso to section 60 (1) of the Code. It was, he held, a "merely contingent or possible right or interest" within the meaning of paragraph (*m*) of the proviso. The appellants thereupon appealed to the said Court (High Court Jurisdiction). The appeal was heard on the 28th February, 1936, by Additional Judicial Commissioners Rupchand Bilaram and Dadiba C. Mehta and was dismissed. From that dismissal the appellants, having obtained the necessary leave, now appeal to His Majesty in Council.

In their Lordships' opinion the decision appealed from was plainly right. The interest of the respondent under the codicil was, during the joint lives of his father and mother, unquestionably contingent, both as to income and as to corpus. It was therefore expressly protected from attachment by the plain terms of the proviso unless there be given to the words "contingent or possible right or interest" something other than their usual meaning. Various reasons were advanced by Mr. Jopling on behalf of the appellants why this should be done. It is not, he argued, all contingent interests that are protected but only such interests as are "merely" contingent. Their Lordships, however, are unable to distinguish an interest that is contingent from one that is merely contingent. Rupchand Bilaram and Dadiba C. Mehta A.J.C.C. said that it was a distinction without a difference, and their Lordships agree with them. It was then urged that the words "or other merely contingent or possible right or interest" should be construed as applying

only to such rights or interests as are *ejusden generis* with an expectancy of succession by survivorship i.e. with a *spes successionis*. But in the first place a *spes successionis* is not in strictness a right or interest at all; and though their Lordships realize that a *spes successionis* may not inaptly be described as a "possible" right or interest, that is to say as being something that will possibly result in a right or interest being acquired (and the words "or other" in the present case seem to suggest that this was the view of the framers of the Code) their Lordships are unable to conceive of any genus of "right or interest" that will include the species "*spes successionis*" but exclude the species "contingent right or interest". For the *ejusden generis* argument is based upon the hypothesis that a "*spes successionis*" is not a genus by itself but is a species of some larger genus. Reliance was also placed by the appellants upon the principle enunciated in "Craies Statute Law" at p. 167 in these words:

> "It has always been held that general words following particular words will not include anything of a class superior to that to which the particular words belong."

Their Lordships do not desire to throw any doubt upon this principle. They fail, however, to see how it is applicable to the present case, for they see no way of determining the respective claims to superiority or precendency of a *spes successionis* and a contingent interest. If value is to be the criterion, the hope of the only child of a millionaire of succeeding to his father's fortune may properly be ranked before his prospect of attaining a vested interest in a contingent legacy of £50. If on the other hand precedence is to be awarded according to the theory of probabilities his chance of getting something in the former case may be greater than his chance in the latter. It would depend upon the nature of the contingency. Their Lordships are unable to get any assistance from the principle in question.

It was further urged on behalf of the appellants that there can be no intelligible reason for protecting contingent interests from attachment, when, as is admittedly the case, vested interests that are liable to be divested get no such protection. But, even assuming this to be true, it affords no justification for refusing to give effect to the plainly expressed intention of the legislature. Finally, the appellants sought to get some support for their contention from the fact that a contingent interest is transferable at law, whereas in view of the provisions of section 6 (1) (*a*) of the Transfer of Property Act, 1882, a *spes successionis* is not. This fact they contended afforded a reason for construing the words of section 60 (1) *m* of the Code of Civil Procedure as including nothing beyond what is described in section 6 (*a*) of the Transfer of Property Act, viz.: "the chance of an heir-apparent succeeding to an estate, the chance of a relative obtaining a legacy on the death of a kinsman, or any other mere possibility of a like nature." In their Lordships' opinion this contention is wholly untenable. The fact that a contingent interest can be made the subject of a

voluntary transfer affords no reason whatever for supposing that the Legislature must have intended such an interest to be made the subject of a forced sale in attachment proceedings. Additional Judicial Commissioners Rupchand Bilaram and Dadiba C. Mehta in course of their judgment in the present case said this:

> Section 6 (*a*) of the Transfer of Property Act and Section 60 clause (*m*) of the Civil Procedure Code are differently worded and perhaps for very good reasons. . . .
>
> It appears that from the earliest times forced sales of interests in properties which are not vested in the debtors or which are indefinite have not been countenanced.

And later on they referred to the mischief that was intended to be checked by preventing attachment of indefinite rights although such rights were assignable by acts of parties.

With these observations their Lordships find themselves in complete agreement.

In the result their Lordships are unable to find any good reason for declining to give effect to the plain words of section 60 (1) *m*. They will therefore humbly advise His Majesty that the appeal should be dismissed with costs.

(11312—3A) Wt. 8168—30 190 8/38 P. St. G. 338

In the Privy Council

PESTONJEE BHICAJEE (FIRM)

v.

PATRICK H. ANDERSON

DELIVERED BY
LORD ROMER

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