

PRIVY COUNCIL

G.H. Hook

Vs.

Administrator General of Bengal and others
(Lords Buckmaster, CJ, Phillimore, Sir John Edge, Sir Lawrence Jenkins and Mr.
Ameer Ali JJ.)

10.2.1921

JUDGMENT

Lord Buckmaster J.

1. On the merits of this controversy their Lordships are not called upon to decide, for in their opinion the respondents are stopped from raising the contention they desire to advance by reason of the judgment that has already been given between themselves and the appellant upon the points.
2. The dispute arises under a will and four codicils made by one Dr. Henry Wilkin Jones, who died on the 8th July, 1909.
3. By his will the testator appointed the Administrator-General of Bengal as executor and trustee, and bequeathed to him his real and personal estate upon trust for sale and investment, and directed, after payment of debts, funeral expenses, and legacies, that the residue should be held to apply the income as therein provided, during the life of his wife. On the death of his wife, he directed payment of certain legacies and then created trusts of the income of the fund to endure during the lifetime of certain named persons. By paragraph 17, he directed that on the death of the survivor of these named persons - and such survivor was Miss Eliza Humphreys - a further trust should be imposed upon his trustees to sell and convert his real property, apparently forgetting that that had already been done. He also again provided for the investment of the proceeds of sale and declared that the trustees should hold the same:-

"For the full sum of 30,000 rupees if the said trust funds shall amount to so much or exceed that sum but not otherwise and if the said trust funds shall not amount to so much then to hold the whole thereof upon trust to pay the income thereof quarterly to two of the deacons for the time being of the Circular Road

Baptist Church to be by them applied in manner following namely as to a moiety thereof for the Poor's Fund in connection with the said Church for the sustenance and support of the poor belonging to the said Church or the congregation usually worshipping in the said Baptist Chapel and as to the other moiety for the General Fund in connection with the said Church for the following purposes namely the support of the Past or for the time being, the expenses of the religious services held in the said Chapel, repairs to the Chapel Pastor's dwelling-house and out-offices connected therewith and also for keeping my grave in decent order which shall be a duty imperatively incumbent on the deacons for the time being of the said Church to perform."

4. If the trust fund exceeded the sum of 38,000 rupees, and this in the event has happened, he declared that as to all the balance thereof the trustees were to hold the same on the trusts declared in respect of the sum of 30,000 rupees.

5. By his first codicil (22nd May, 1901) the testator revoked a number of provisions in the will, gave new directions with regard to the payment of the income, and provided that if Miss Eliza Humphreys should survive her sister, Miss Anne Humphreys, her annuity should on her death be paid by two deacons of the Lower Circular Road Baptist Church to be applied by them in the manner mentioned in paragraph 17 of his will and by clause 20 of this codicil he gave the balance of the income in the same terms.

6. By his second codicil, dated the 2nd March, 1903, the testator imposed certain conditions upon the gift made in favor of the Lower Circular Road Baptist Church, and provided that if the conditions should be broken

"then, and in that case one-half of the interest, dividends, and O., that I have set aside for the said Lower Circular Road Baptist Church shall be made over and paid to the Pastor for the time being of the Howrah Baptist Church for the benefit of the said Church generally and the other half thereof to the Reverend Arthur Jewson's Faith Orphanage at present at No. 117, Dharamtalla Street (if then existing) or if not in existence to the Pastor of the Lal Bazar Baptist Church for the benefit of the said Church and of the poor of the Church."

7. His third and fourth codicils are no material for the purpose of this appeal.

8. The testator's wife predeceased him, and died on the 25th July, 1907.

9. The Lower Circular Road Baptist Church did not comply with the conditions set out in the codicil and on the 17th February, 1911, the Administrator-General of Bengal

instituted a suit asking among other things what would be the destination of the funds in the event of the provisions in favor of the Circular Road Baptist Church being forfeited and whether the gift over in the second codicil would take effect or whether there would be an intestacy. To this suit the present respondents Joseph Henry Jones and Emma Adelaide Jones were parties as representing the next of kin of the testator and they contended in favor of the intestacy on the ground that the period in which the gift over might take effect would be beyond the period in which vesting must occur.

10. The case was heard on the 16th July, 1912, before Mr. Justice Choudhuri. He decided that the Baptist Church had not conformed to the conditions, and he held that the gift-over to the other charities was valid. He then dealt with the contention which he said was strenuously urged on behalf of the next of kin that the whole gift to the Baptist Church and other charities failed for the reasons already mentioned. He carefully examined the authorities and held that the contention was unsound. He concluded this part of his judgment in these words:-

"The vesting in this case is immediate, but the Lower Circular Road Baptist Church is divested because certain conditions cannot be fulfilled by them."

11. He then continued:-

"I also hold there is no intestacy as to the surplus income or any part of it during the lifetime of Eliza Humphreys."

12. Finally he dealt with the question as to whether a gift of income, without more, was a gift of corpus, and he stated that that question did not then arise as Miss Eliza Humphreys was still alive, but he stated definitely that the question would arise upon her death. In the same way he dealt with the contention that the Lower Circular Road Baptist Church might finally comply with the conditions, and that also was left over. The decree that was drawn up contained an express declaration that the gift-over in the 8th clause of the second codicil was valid, and concluded by a provision in these words:-

"And this Court doth not think fit at present to determine the destination of the income of the said Residuary Trust Funds or of the corpus thereof or the rights of parties therein and thereto respectively after the death of the said Eliza Humphreys and doth defer the determination of the said questions until after the death of the said Eliza Humphreys" - and liberty to apply was reserved.

13. Miss Eliza Humphreys died on the 10th April, 1917, and on the 8th September, 1917, the Administrator-General of Bengal presented a petition for the further

construction of the will and codicils.

14. Upon the hearing the respondents, representing the next of kin, contended that the reservation in the decree enabled them to re-raise all the questions that had formerly been discussed. They urged that the gift of the surplus income during the life of Miss Eliza Humphreys must be treated as distinct from the gift after her death and that as to the former no question as to perpetuity could possibly arise, and that such question was consequently one of the matters that was left over for subsequent decision.

15. The learned Judge held that this matter had already been definitely settled and in addition gave reasons why he adhered to his former opinion. This was, in fact, superfluous. The question as to the perpetuity had been definitely and properly before him on the former hearing, and was, in fact, decided without any reservation, as is made plain by the terms of the judgment itself, which show that the determination of the dispute as to the perpetuity was the foundation of the whole judgment and that the questions left over were those to which attention has been directed and which themselves are abundant to explain the meaning of the passage in the decree on which reliance is placed. It is not, and indeed it cannot be, disputed that, if that be the case, the matter has been finally settled between the parties, for the mere fact that the decision was given in an administration suit does not affect its finality (see *Peareth v. Marriott*¹.) ¹The Court of Appeal, however, took a different view, and regarding the question as still open decided it against the appellant, but the error in their judgment is due to the fact that they regarded the question as completely governed by section 11 of the Code of Civil Procedure. That section prevents the re-trial of issues that have been directly and substantially in issue in a former suit between the same parties, and this question obviously arises in the same and not in a former suit, but it does not appear that the learned Judge's attention was called to the decision of this Board in *Ram Kirpal Shukul v. Mt. Rup Kuari* ² which clearly shows that the plea of *res judicata* still remains apart from the limited provisions of the Code, and it is that plea which the respondents have to meet in the present case In the words of Sir Barnes Peacock (at p. 41) -

"The binding force of such a judgment in such a case as the present depends not upon Section 13, Act X of 1877" (now replaced by Section 11 of the Code of Civil Procedure) "but upon general principles of law. If it were not binding there would be no end to litigation."

16. Their Lordships are therefore of opinion that the appellant in this case is right, and that this appeal must be allowed. They have accordingly humbly advised His Majesty

to this effect and also that the appellant should receive his costs here and in the Court of Appeal out of the estate; the Administrator-General and the 4th Respondent also to have their costs in the Court of Appeal out of the estate, and the order of the Judge in the Court of first instance as to costs to remain undisturbed.

Appeal allowed.

Cases Referred.

1. (1882) 22 Ch. D, 182 : 48 L.T. 170
2. (1884) 11 I.A. 37 : 6 All. 269 : 1886 A.W.N. 286 (P.C.)