BOMBAY HIGH COURT

Subhas Chandra Bose

Vs

Gordhandas I. Patel

(John Beaumont, Kt., C.J. Kania, J.)

28.09.1939

JUDGMENT

John Beaumont, Kt., C.J.

1. This is an appeal from a decision of Mr. Justice B.J. Wadia, and it raises a question as to the validity of the gift of residue contained in the will of the late Vithalbhai J. Patel, The will was made on October 2, 1933, and the testator died on the 22nd of the same month. Probate of his will was subsequently granted by this Court.

2. By clause 9 of his will the testator appointed executors and then gave four legacies, and the only relevance of those legacies is that they are all directed to be "given" to the beneficiaries. Then in sub-cl. (5) the testator disposes of his residue in these terms-The balance of my assets after the disposal of the above mentioned four gifts is to be handed over to Mr. Subhash Chandra Bose (son of Janaki Bose) of 1 Woodburn Park, Calcutta to be spent by the said Mr. Subhash Chandra Bose or by his nominee or nominees according to his instructions for the political uplift of India and preferably for publicity work on behalf of India's cause, in other countries.

3. Then the will goes on-In the event: of my death in Europe I desire that Mr. Subhash Chandra Bose shall take charge of my body and make the necessary arrangements for sending it to Bombay for cremation on the Chaupaty Sands along side the place where the late Lokamanya Bal Gangadhar Tilak's body was cremated.

4. The question is whether or not that gift of residue is valid in law. The learned Judge held that it was invalid and that the residue was undisposed of.

5. The argument in this Court has been based on two grounds. First, it is said that on the true construction of Clause (5) the residue is given to Mr. Bose absolutely, the direction as to how it is to be spent being merely the expression of the motive for the gift, or possibly of the testator's hope or belief as to the way in which the money would be spent. It is fair to Mr. Bose to say that

his counsel disclaims on his behalf any desire to utilise the money for his own purposes; he claims to be absolutely entitled to it in order that he may apply it under the will. The argument is that if the gift had stopped after the name of Mr. Bose, that is to say, if there had been nothing but a direction that the residue was to be handed over to Mr. Bose, that would have been a good bequest to Mr. Bose beneficially, and that no doubt is so. But it is to be noticed that there are in the residuary clause no words of gift such as are contained in the case of the other legacies. The residue is not in terms given to Mr. Bose, still less is it given to him for his own use or benefit. The words are " to be handed over to Mr. Subhash Chandra Bose ", an expression apt to introduce a trust, and the whole direction being to hand the money over to Mr. Bose to be spent in a particular way, I cannot entertain the slightest doubt that the words constitute a trust, and that there is no beneficial gift to Mr. Bose.

6. Reliance has been placed on Section 138 of the Indian Succession Act, which provides-Where a fund is bequeathed absolutely to) or for the benefit of any person, but the will contains a direction that it shall be applied or enjoyed in a particular manner, the legatee shall be entitled to receive the fund as if the will had contained no such direction.

7. But that Section, to my mind, has nothing whatever to do with the creation of a trust. The condition precedent to the coming into operation of the Section is that the fund is bequeathed absolutely to, or for the benefit of, any person. That to my mind means ' is bequeathed beneficially to any person,' All that the Section does is to provide that where you have an absolute gift to a beneficiary you cannot cut that down by subsequent directions as to how the money is to be applied, either for the benefit of the beneficiary, or of anybody else; but the Section has no application to the case of a gift followed by a direction which amounts to a trust In such a case the gift is not to the legatee absolutely, but to him upon a trust, which is none the less a trust because it is introduced by the word " direct."

8. Mr. Sarat Bose has further argued that the case can be brought within Section 139 of the Indian Succession Act which seems to me to be directed to the rule, well known in England as the rule in *Lassence v. Tierney*[1] namely, that if you have a gift in the first instance absolute in terms, and then trusts are imposed upon it which do not, in the events which happen, exhaust the gift, the original gift takes effect to the exclusion of the residuary legatee, or the next of kin. But here there is no absolute gift in favour of Mr. Bose in the first instance. The only gift to him is upon a trust specified in the latter part of the clause. That disposes of the first question raised.

9. The second contention of Mr. Sarat Bose is that the trust, if there be one, is a valid charitable trust. The essence of the trust is that the moneys are to be spent for the political uplift of India. It is argued by Mr. Sarat Bose, and also by Mr. Joshi on behalf of the Advocate General, that the political uplift of India is something quite different from the advancement of certain political

purposes. It is said that the political uplift of India necessarily denotes a political advance or improvement, the raising of India to a higher political level by improving the methods and machinery of Government, or possibly by advancing the knowledge of the people on political subjects. At any rate, it is said that the gift is for the improvement of India ; and having got so far, Mr. Sarat Bose says that the gift is really equivalent to a gift for general public utility in India, or possibly for the people of India, and he refers to the definition of "charitable purpose" contained in Section 2 of the Charitable Endowments Act of 1890, which is that "charitable purpose" includes relief of the poor, education, medical relief, and the advancement of any other object of general public utility, but does not include a purpose which relates exclusively to religious teaching or worship. There is a similar definition of " charitable purpose " in the Indian Income-tax Act, 1922, except that it does not refer to religious trusts.

10. Mr. Bose argues that in India a trust for general public utility would be valid, and that the Courts are not bound by the English cases which exclude such a purpose from charitable trusts, and he contends, secondly, that even if we are bound by the English cases, nevertheless this gift is equivalent to a gift to India and falls within the line of cases which may be referred to as " the locality cases."

11. We have been referred to a great many of the English cases, and I think, not for the first time in my life, that they are not by any means in a satis, factory condition. In Commissioners for Special *Purposes of Income Tax v. Pemsel*[2], Lord Macnaghten ventured on a definition of charity in the legal sense, that is as falling within the Statute of Elizabeth. He says this (p. 583):-Charity' in its legal sense comprises four principal divisions : trusts for the relief of poverty ; trusts for the advancement of education; trusts for the advancement of religion ; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads.

12. That definition, except in relation to religion, which is obviously not in the same position in India as in England, where there is only one religion, is very much the same as the definition in the Indian Charitable Endowments Act. Now, very soon after Pemsel's case had been decided the Courts in England unfortunately, as I venture to think, held that the fourth class in Lord Macnaghten's definition, viz., trusts for other purposes beneficial to the community was not really a definition at all, that all that Lord Macnaghten meant was that charity in the legal sense might embrace purposes beneficial to the community, but that all purposes beneficial to the community were not charitable. That was laid down as early as I*n re Macduff : Macduff v. Macduff*[3] and the result was largely to destroy any practical utility in the definition given by Lord Macnaghten, because instead of having merely to enquire whether a particular gift fell within one of the four classes, if such gift fell within the fourth class the Court had to go further and enquire whether it was charitable or not. However, undoubtedly under English case law a gift for general

public utility is not a good charitable gift, because it might be employed for purposes which are not considered charitable. But side by side with cases of that nature there exists another line of cases which have been referred to as " the locality cases " in which it has been held that a gift for the benefit of a particular place, whether a parish, a city, a county, or a country is charitable, although the purposes of the gift are not specified and the gift could apparently be applied for the general purposes of the locality. I need not refer to the cases in detail, because they are all collected and discussed in the case of Smith, In re : *Public Trustee v. Smith*[4] in the English Court of Appeal. Those cases undoubtedly exist and show that a gift for the benefit of a locality is good. I must confess that I feel great difficulty in seeing how those cases can be brought within the purview of the law relating to charitable trusts. It is very difficult to see why if a gift for the general purposes of the community is not charitable, because it might be applied for purposes which are not charitable, a gift to a particular place is charitable, though that also might apparently be applied to non-charitable purposes in the locality. And this difficulty is not diminished where the locality is extended to the whole of England as it was by the case in In re Smith (supra) where the gift was to England. Lord Justice Lawrence, at the end of his judgment pointing out the principle on which the judgment was based, says (p. 173) :-The conclusion I have arrived at, after considering all the authorities to which our attention has been drawn, is that the present case falls within the principle of the cases in which the gift is for the benefit of a particular class and, therefore, for a specified public puipose, and not within the line of cases in which the gift is for public purposes of a general and wholly unrestricted nature.

13. I do not myself see why a gift to a class if it be regarded as being for a specified purpose should be any more for a charitable purpose than a gift to the community or to an individual. However, there the cases are, and if we had in this case a gift to India, or a gift to the people of India, we should have to consider whether the principle of those cases should be applied in India, and if so whether that principle which has been gradually extended from a parish to a country should now be extended to a sub-continent. However, as we have not got a gift to India, or the Indian people, that interesting question does not arise for decision.

14. With regard to the more general argument of Mr. Bose that what we have got here is in effect a gift for the general public utility of India, I would only say that if we really had such a gift, I should approach the argument of Mr. Bose that a gift for general public utility is a good charitable gift in India, with much sympathy ; and if the authorities were not too strong for me I should be glad to hold in favour of the argument, relying on the statutory definitions of " charitable purpose " in India, and also having regard to the rather unsatisfactory state of the English authorities. But again we have not got here a gift for the general public utility of India, and therefore that question also does not call for decision.

15. What we have got here is a gift for the political uplift of India, and one cannot possibly disregard the adjective " political". Assuming that the meaning of those words is that for which Mr. Bose contends, i.e., that they denote improvement in the political system of India, and therefore to that extent must be beneficial to India, the difficulty is that the words are too vague. Every trust must be expressed in sufficiently clear language to enable the Court to ascertain what are its purpose and object. This is so under English law and also under Section 6 of the Indian Trusts Act, and that the principle applies to charitable trusts was laid down as long ago as the case in *Morice v. Bishop of Durham*[5] The test must ultimately be whether, if the Court be called upon to administer the trust, the Court would be able to do so. Here, it seems to me impossible for the Court to determine what is embraced in the term political uplift of India. To take an obvious test. Suppose this trustee honestly considered that it would be for the political uplift of India that India should sever her connection altogether with the British Empire, and proposed to apply the funds for that purpose, and suppose that the Advocate General, representing the public, were to take the opposite view and were to allege that the trustee was misapplying the funds, and supposing the question was brought before the Court, how could any Court possibly determine judicially whether the separation of India from the British Empire was for the political uplift of India. It is a question on which Judges may have their own private opinions, but it is not a question on which it would be possible to obtain evidence on which a judicial decision could be based. This trust is so worded as to make it impossible for any Court to say which of two contradictory lines of conduct properly comes within the terms of the trust.

16. This is not a case, as Mr. Sarat Bose has argued, of a general charitable purpose and a defect only in the expression of the testator's particular intention. Where a testator shows a general charitable intention, but the particular charitable purpose indicated for some reasons fails, the Court will give effect to the general charitable intention and will get over the defect in the particular intention by framing a scheme. But here there is no general charitable intention ; there is no intention whatever expressed, except that the money is to be used for the political uplift of India, and if that is too vague to be enforced, there is nothing left.

17. Mr. B.J. Desai on behalf of some of the beneficiaries has challenged the view that political uplift of India in this will does indicate a desire for the general improvement of the political status in India. He argues that political uplift in this will means the advancement of India's claim to independence, that is the advancement of a particular political purpose and in support of that contention he relies on the position of the testator. Unfortunately the affidavit in support of the summons does not state any facts relating to the testator, but we can, I think, take judicial notice of the fact that he was a well known Indian leader and had been President of the Legislative Assembly, and indeed the direction he gives as to the disposal of his body indicates to anybody with local knowledge that he was an Indian nationalist leader. Mr. Desai contends that political

uplift in the mouth of an Indian national leader would mean the advancement of India's claim to independence, and that view of the matter derives support from the words which follow-" preferably for publicity work on behalf of India's cause in other countries." It is difficult to see what India's cause means, if the political uplift of India denotes the general raising of the political status or conditions of India ; it is easy to see what the words mean if political uplift denotes advancement of a claim to in-dependance. A trust to advance a political purpose is clearly bad on the ground given by Lord Parker in *Bowman v. Secular Society, Limited*[6] that a trust for the attainment of political objects is invalid, not because it is illegal, but because the Court has no means of judging whether any proposed political change will or will not be for the public welfare or benefit. Mr. Sarat Bose has drawn our attention to the fact that that dictum is criticised by the learned authors of the 5th Edition of Tudor on Charities, but the dictum was accepted by the Privy Council in the case of Trustees of Tribune Prdss v. Commissioner of Income-tax, Punjab . I think the Privy Council in that case were definitely of opinion that if the Tribune newspaper was employed for the advancement of particular political purposes the trust under which it was managed would not be charitable. In my opinion, whatever meaning one attaches to the expression " political uplift of India," it is impossible to give effect to it as a valid trust, because it is too vague for the Courts to enforce.

18. In my opinion, therefore, the judgment of the learned Judge was right and the appeal fails.

19. With regard to costs we direct the appellant to pay one set of party and party costs of the executors and one set of party and party costs for all the beneficiaries, between them two counsel certified. The difference between party and party and attorney and client costs of the executors to come out of the estate.

20. With regard to the Advocate General, he was a necessary party and we think that his costs must be provided for. He supported the appellant but failed. We think that a reasonable order-though perhaps not a very logical one-is to direct that half his costs should be paid by the appellant and the other half should come out of the estate.

Kania, J.

1. Two points have been urged before us by the learned counsel for the appellant. The first is that the clause in question amounts to an absolute bequest in favour of the appellant. In support of that contention he pressed the argument that the Court should lean against a construction leading to intestacy, and where possible two clauses or two sentences in the same clause should be so construed as to avoid a conflict. There is no dispute about the principle of construction. The first point is whether in fact there is a gift at all, and if so, an absolute gift in favour of the donee. The Judical Committee of the Privy Council in *Norendra Nath Sircar v. Kamalbasini Dasi*[7] observed

as follows (p. 26):-To construe one will by reference to expressions of more or less doubtful import to be found in other wills is for the most part an unprofitable exercise. Happily that method of interpretation has gone out of fashion in this country. To extend it to India would hardly be desinable. To search and sift the heaps of cases on wills which cumber our English Law Reports, in order to understand and interpret wills of people speaking a different tongue, trained in different habits of thought and brought up under different conditions of life, seems almost absurd.Bearing these observations in mind if the present will is approached, it is noteworthy that when the testator wanted to bequeath property to his legatees he deliberately used the word "give". This is seen in the preceding four sub-clauses of clause 9. It was urged that if the sub-clause in question stopped after the name of the donee that would have been an absolute bequest, in favour of the donee. Without contesting that proposition it must however be conceded that when words in fact find place in the same sentence or clause they have got to be taken into consideration in giving the proper meaning to the preceding words. Here the words following the name of the donee clearly control the preceding words, and it is not possible to construe the clause as one amounting to a gift or an absolute gift in favour of the donee. The first contention of the appellant must therefore fail.

2. The next question is : Is there a valid trust ? In that connection three positions appear clear from the decided cases and the Acts in force in India. If a general intention of charity is found in the deed, the law does not allow the trust to fail because of the failure of a particular charitable object named in the deed. The reason is that because of the judicial decisions it can now be definitely stated what charity means. The other position is where a specific charitable bequest only (without a general charitable intention) is given and the Court is called upon to inquire whether that should be enforced. The third position is when there is no charitable bequest, general or specific. Section 6 of the Indian Trusts Act provides that in order to constitute a valid trust the beneflcieries must be indicated with reasonable certainty. Turning to the facts here it has first got to be ascertained whether there is any general charitable intention found in this will. On behalf of the appellant it was contended that the words political uplift of India are words of general charitable bequest. It is significant that in this will the word " charitable " is nowhere found. In this connection the appellant relied on cases which may for convenience be described as locality cases. In those cases the bequest was either to a parish or to a town or to England. Those cases are recognised as occupying a class by themselves. No case has been pointed out which shows that a general charitable intention should be read into a deed or a will where the word " charity " has not been used at all.

3. It was urged that " political uplift of India" was an object of " general public utility" and therefore was covered by the definition of " charitable object" as found in Section 2 of the Charitable Endowments Act, and Section 4(3) of the Indian Income-tax Act. Section 18 of the

Transfer of Property Act was also relied upon in this connection. Relying on those Section s it was urged that the Courts should not adopt in India the narrow meaning of " charitable object" as found in the English) decisions. I am unable to accept that contention. The definitions contained in the aforesaid Acts are expressly for the purposes of those Acts only. It should be noted that " religion " is omitted in those definitions. Moreover the Judicial Committee of the Privy Council in *Runchordas v. Parvatibai*[8] in construing the word " dharam " has adopted the meaning given to charitable objects in England to interpretation of wills in India. The word "dharam" was held to be vague because it included objects which were not necessarily charitable but also philanthropic and benevolent. That decision was given when all the aforesaid three Acts were in force in India.

4. It was urged that as in the locality cases if the gifts were for the " benefit of India " the gift would be good. The difficulty of reconciling these cases with the accepted definition of the word " charity " in English cases has been stated by Lord Sterndale in Tettley, In re : National Provincial and *Union Bank of England, Ld. v. Tetley*[9]. I do not propose to attempt to reconcile the principle found in these locality cases with the restrictions otherwise put on the word " charity " as understood in the decided cases. It is sufficient here to distinguish these locality cases from the present one on the ground that the words used in the clause in question are not general, i.e., for the benefit of India. It is recognised in England that gifts or bequests for furthering the principles of particular political parties are not charitable bequests : *Bowman v. Secular Society, Limited*[10]. This principle, if there was any doubt about its applicability to India, has been accepted by the Judicial Committee in Trustees of Tribune Press v. Commissioner of Income-tax, Punjab

5. It is clearly stated there that if the dominant purpose of the trust was a political purpose it would not be upheld as a charitable trust. The question therefore is whether political uplift of India is not a political object under the trust intended to be created by the clause in question. In answer to Court the learned counsel for the Advocate General stated that that was the result which was to be attained by modes to be selected by the donee but that was not the object. Speaking for myself, I entirely fail to notice any distinction between result and object thus attempted to be made. If the result to be obtained by the steps to be selected by the donee is the political uplift of India, in my opinion, it is the same as stating that the object of the steps was the political uplift of India. I am unable to construe the words as equivalent to " benefit of India ", because " benefit of India " would include several heads such as educational uplift, social uplift, religious uplift. In order to succeed the appellant must establish that every one of the component parts which make the whole (the benefit) and not only a particular part in question, is charitable. It is therefore obligatory on the applicant to satisfy the Court not only that ' benefit of India' is a charitable object but the particular component part, viz., political uplift of India, is also charitable, if his argument has to be upheld. No authority is cited in support of it. On the other

hand, as I have pointed out, their Lordships have held that if the dominant object is political it is not charitable. In my opinion, therefore, the contention that by the words " political uplift of India " a general charitable intention was disclosed must fail. It is clearly not a specific charitable object. The reasons for rejecting that contention have already been given just above.

6. That leaves the question whether the clause fulfils the requirements of Section 6 of the Indian Trusts Act. In order to fulfil the conditions it is necessary that the objects of the trust, i.e., the beneficiaries, must be indicated with reasonable certainty. It is obvious that different objects would be included under the heading " political uplift" as understood by different people and it is open to dispute whether they are of such a specific kind as to be capable of being definitely enumerated. If it is not possible, the Court when called upon to determine whether there was a breach of trust will be unable to decide the question. On that ground starting with the decision of *Lord Eldon in Morice v. Bishop of Durham*[11] it has been held that when the objects of the trust are not capable of being sufficiently denned so as to enable the Court to enforce them, the trust must be held bad on the ground of vagueness. In my opinion the attempt of the testator falls in that category and under the circumstances the trust must fail. As the bequest does not fall within any of the recognised classes of valid bequests it must fail and it must be held that there is an intestacy in respect of the property covered by the clause in question. The appeal must therefore fail.

Cases Referred.

1(1849) 1 Mc. & G. 551,
2[1891] A.C. 531
3[1896] 2 Ch. 451
4[1932] 1 Ch. 153
5(1805) 10 Ves. Jun. 522
6[1917] A.C. 406
7(1896) L.R. 23 I.A. 18
8(1899) I.L.R. 23 Bom. 725 : S.C. 1 Bom. L.R. 607, P.C
9[1923] 1 Ch. 258, 266
10[1917] A.C. 406, 442
11(1805) 10 Ves. Jun. 522