

Privy Council Appeal No. 78 of 1913.

Jehangir Dadabhoy and another - - - *Appellants,*

v.

Kaikhushru Kavasha and others - - - *Respondents.*

FROM

THE HIGH COURT OF JUDICATURE AT BOMBAY.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 26TH NOVEMBER 1914.

Present at the Hearing.

LORD DUNEDIN.

LORD SHAW.

SIR JOHN EDGE.

MR. AMEER ALI.

[*Delivered by* LORD SHAW.]

This is an appeal from a decree of the High Court of Judicature at Bombay, dated the 9th December 1910. The High Court affirmed a decree of the Subordinate Judge of Thana, dated the 2nd April 1910.

The case has reference to the construction of a will executed by one Dadabhoy Byramji on 8th August 1866. By this will the testator narrated that of his three sons then living he has given one in adoption to a paternal uncle. His other two sons were named Pallonji and Jehangirji. The material portions of the will disposing of the "estate" are these :—

"The said two sons are proprietors, half and half alike,
"and in equal (shares), of my whole 'estate,' outstandings,
"debts, title, and interest. . . . Both the heirs are to
"take care of the said 'estate' and look after it, and both

“ the heirs living together, are duly to enjoy the balance
 “ which may remain after payment of the Sarkar's assess-
 “ ment. . . . In this my testamentary writing, I the
 “ testator have appointed my two sons as (my) heirs.”

The will then states that Pallonji, the elder, a man then of about 39 years of age, was in a confused state of mind, and that the other son Jehangirji was accordingly entrusted with the management of the “estate”

“ by his true and pure integrity, and both the heirs are to
 “ equally enjoy half and half alike the whole ‘estate’ with
 “ unanimity with my elder son Pallonji in such a way as
 “ not to injure his (Pallonji's) rights.”

Up to this point in the will there can be no doubt whatsoever that the property of the estate was effectually and equally divided between these two sons. There then follow, however, the clauses which are said to create difficulty. They are these:—

“ At present my elder son Pallonji has no male issue
 “ of his body. (He) has only a daughter. Therefore, if
 “ my elder son Pallonji gets a male issue, half of the
 “ ‘estate’ is to be made over to him, on his attaining
 “ (his) full age.”

And it may be proper that the 11th clause of the will should be quoted in full. It reads thus:—

“ I, the testator, have in the second clause of this will
 “ appointed my two sons Pallonji and Jehangirji as my
 “ heirs. The wife of Pallonji, the elder of them, has
 “ now gone to her father's house. On her return, if she,
 “ by instigating her husband, or by any (other way) cause
 “ to be mortgaged, sold, given in gift, charity, etc., or
 “ disposed of, whatsoever in any way to any one, any
 “ immoveable and moveable ‘estate’ etc. appertaining to
 “ the half share during the lifetime of my son Pallonji
 “ or, after his death, which God forbid, my son Pallonji
 “ or his wife, or daughter, or any (other) person (shall)
 “ as stated in the third clause of this will have no
 “ authority, power and right so to do. If my son
 “ Pallonji does not get a son, my son Jehangirji is to
 “ give away his son as Pallonji's Palak (or his adopted
 “ son). All the clauses of this will are applicable to the

“ said adopted (son). If a son be born of the body of
 “ Pallonji he (shall) on his attaining (his) full age be the
 “ owner of half share in the whole of the immoveable
 “ and moveable ‘ estate ’ belonging to me. My heir (and)
 “ Vakil (or executor) Jehangirji, or his heirs shall raise
 “ no objection to give him the share. If they raise any
 “ objection, the responsibility arising therefrom is on their
 “ heads. All the clauses written in this will are applicable
 “ to the said son of (his body).”

The material facts of the case are that the testator having executed this will on 8th August 1866 died within a fortnight thereafter, viz., on 21st August 1866. He was survived by his two sons. Pallonji, the elder, was of weak intellect as the will indicates. Jehangirji entered upon the management of the whole estate, having obtained probate of the will in 1867. This state of matters lasted for 30 years, viz., till 1897, when Pallonji died. Pallonji was twice married but had no son. He left a widow and other representatives who are respondents in this appeal and are his heirs according to the Parsi Intestate Succession Act. The nature of the suit by these heirs is for an account for an ascertainment of the rights and interests of the parties in the estate and for partition, and the claim is grounded on the right of Pallonji as, it is contended, the owner of one half of the estate from the date of the testator Dadabhoy's death.

One other fact may now be mentioned, viz., that it is alleged that on 3rd December 1886 Pallonji adopted, as his Palak, Byramji his nephew, and son of Jehangirji. Jehangirji and his son Byramji resist the suit, maintaining that Byramji as Palak, or adopted son of Pallonji, succeeds in terms of the settlement to the half of the estate which Pallonji so long enjoyed.

It is, of course, also maintained that under the terms of the settlement Pallonji never was owner of the one half of the estate, or, as it would be expressed in English phraseology, the terms of the will were such as to prevent vesting in Pallonji.

The learned judges of the court below have not only dealt with this question but with certain others, including the special situation of Byramji as Palak of his uncle. The points among others discussed were (1) whether such a Palak could ever take under the will, looking to the fact that it remained uncertain until Pallonji's death that the condition of a Palak taking could ever be purified, viz., that Pallonji should die without a son, and (2) the peculiar point as to the office of a Palak to a Parsi becoming effectual only three days after the adoptive father's death. (3) A further question was keenly argued, viz., whether the will contained in itself sufficient words of grant or gift to the Palak.

In the view taken of this case by their Lordships these questions, however interesting, are not necessary for the decision about to be pronounced. For their Lordships are clearly of opinion that under the terms of Dadabhoy Byramji's will one half of the estate conveyed vested in Pallonji *a morte testatoris*. The result of the argument presented would be that if Pallonji had had a son who reached 21 during his father Pallonji's life, then in that event that son would have taken so as to cut out Pallonji from all rights under this will. The right of Pallonji would accordingly be restricted to that of enjoyment, not even for life, but until the majority of his own son.

Their Lordships cannot agree with such a construction.

The destination over to a son who should take upon attaining 21 years of age, would appear to their Lordships to be language appropriate to the events of the death of Pallonji during the lifetime of the testator and of his having left a son—the situation also being provided for of that son being at that period of time under 21.

But when the father Pallonji himself survived the testator it does not appear to their Lordships that there are any words in the will sufficient to cut down the right of Pallonji to one half of the estate to a tenancy for life therein, or for a less period, according to the argument. On the contrary, the words employed seem to fit the case of the entire estate being on the testator's death divided into two portions, and of each portion becoming then the absolute property of one of the two sons.

While these are the general principles which would be applicable in the construction of such a will, in their Lordships' opinion the same result is precisely reached by the application of Section 111 of the Indian Succession Act. Their Lordships agree with the view that has been taken as to the applicability of that section in the courts below. No further question, this being so, need be dealt with.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed, and that the appellants will pay the costs.

In the Privy Council.

JEHANGIR DADABHOY AND ANOTHER

v.

KAIKHUSHRU KAVASHA AND
OTHERS.

DELIVERED BY LORD SHAW.

LONDON:
PRINTED BY EYRE AND SPOTTISWOODE, LTD.,
PRINTERS TO THE KING'S MOST EXCELLENT MAJESTY.

1914.