

*Privy Council Appeal No. 38 of 1932.*

Bai Krishnabai - - - - - Appellant

v.

Framroz Edulji Dinshaw and another - - - Respondents

FROM

THE HIGH COURT OF JUDICATURE AT BOMBAY.

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE  
PRIVY COUNCIL, DELIVERED THE 3RD FEBRUARY, 1933.

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*Present at the Hearing:—*

LORD BLANESBURGH.

LORD RUSSELL OF KILLOWEN.

LORD MACMILLAN.

SIR JOHN WALLIS.

SIR DINSHAH MULLA.

[*Delivered by* SIR DINSHAH MULLA.]

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The main question involved in this appeal is as to the effect of a decree passed by the High Court at Bombay, dated the 26th January, 1931, under the following circumstances.

Puranmal G. Shinghanee, a very wealthy Marwadi Hindu (hereinafter called the testator), died on the 20th December, 1928, leaving him surviving a widow, who is the appellant before the Board, and no issue. He left a will dated the 6th May, 1925, and a codicil thereto dated the 23rd March, 1928, whereof he appointed the respondents executors and trustees. The will and codicil have been duly admitted to probate.

The testator by his will directed his executors to allow the appellant during her widowhood to reside in his house at Fatepur in the Jeypur State, and to pay her the relatively small sum of Rs. 200 per month during her widowhood for her maintenance.

Probably by reason of his belief in the truth of a charge made by him against the appellant in his will but no longer maintained, the testator declared that he was unwilling that the appellant should have a larger allowance than that sum and he required

his executors and trustees to resist any claim she might make for anything more than what was directed by his will to be given to her.

He bequeathed, among other legacies, Rs. 5 lacs, increased by the codicil to Rs. 8 lacs, to the University of Bombay. Clause 8 of the will was as follows :—

“ I devise and bequeath the residue of my immoveable and moveable property whatsoever and wheresoever situated unto and to the use of my said executors and trustees and their heirs, executors and administrators, upon trust to expend such portion of it as they shall think fit in erecting a building suited for a hospital for Hindus, upon such site to be acquired by them in Bombay as to them shall seem fit, and shall stand possessed thereof in trust to permit persons of the Hindu community to use the same as a hospital, and shall stand possessed of the balance upon trust to invest the same as authorised by Section 20 of the Indian Trusts Act II of 1882, and to expend the income thereof in maintaining and conducting the said hospital. I declare that my said executors and trustees shall settle in their absolute discretion the scheme for conducting the hospital hereby declared to be founded.”

On the 7th March, 1929, the appellant brought the suit out of which the present appeal arises, in the High Court at Bombay, against the respondents, claiming that she should be paid Rs. 5,000 per month for her maintenance, and should be allowed the use of the house at Narayan Dabholkar Road, where she had been residing for twenty-five years, for her residence during her widowhood. The respondents as doubtless still in duty bound in view of the direction to that effect contained in the will strongly contested the appellant's claim. Finally, however, a Report by a Commissioner to whom the claim was referred for inquiry was made and although excepted to by both sides was upheld by the Court which on the 26th January, 1931, passed a decree by which the appellant's maintenance was fixed at Rs. 1,700 per month, and the following declarations and orders were made as to her claim to residence :—

“ And this Court doth further order and declare that the upper floor of the Bungalow at Narayan Dabholkar Road, bearing D ward No. 3351, Street No. 26, together with four rooms, including kitchen, one stable and one cowshed of the outhouse thereof, now in the occupation of the plaintiff, is a suitable residence for her, and that the defendants do set apart the same for her residence, free of all rates and taxes and costs of maintenance and repairs, which shall be paid and borne by the defendants out of the estate of the said deceased. And this Court doth further order and declare that in case it becomes necessary for the executors to sell the said premises or in case the said premises are not available for any reason for the plaintiff's residence, the defendants do out of the estate of the said deceased in their hands pay to the plaintiff a further sum of Rs. 400 per month in lieu of such residence.”

By the decree liberty was given to the parties to apply as and when occasion arose. It is upon the effect of this decree that the decision of the question before the Board depends.

The Narayan Dabholkar Road property was valued for probate at Rs. 1,34,000. In the month of May following the

decree the appellant was asked to permit the premises in her possession to be inspected by an intending purchaser. By him subsequently an offer of Rs. 1,95,000 for the property was made which the respondents accepted, and on the 21st August, 1931, they entered into a contract in writing for the sale of the property, and agreed to deliver possession to the purchaser within three months from that date. It was not disputed that in the matter of price the offer was an advantageous one.

On the 31st August, 1931, the respondents wrote to the appellant that they had agreed to sell the property, and calling upon her to vacate it by the end of November, 1931. The appellant declined to do so, and on the 27th October, 1931, the respondents, under the liberty reserved by the decree, served a notice of motion upon the appellant asking for an order against her for possession of the premises.

The learned Judge of first instance was of opinion that the respondents had failed to make out a case of necessity within the words of the decree, and made an order dismissing the motion, but his order was reversed by the High Court in its appellate jurisdiction.

The Appellate Court considered that a case of necessity was made out, and passed an order in terms of the notice of motion. It is from that order that the present appeal has been brought to His Majesty in Council.

The question for determination in the appeal is whether the sale was necessary within the meaning of the decree dated the 26th January, 1931. The purchaser, so their Lordships were informed, has now abandoned his contract, but the question remains one of first importance as a test by which the rights of the appellant under that decree may be defined.

The testator left forty-one immovable properties, out of which only one that was situated at Poona had been sold before the date of the decree. The whole estate was valued for probate at Rs. 39,28,273, out of which Rs. 18,85,868 represented cash, Government securities, and shares of joint stock companies. Upon these facts the learned Judge of first instance found that the executors had sufficient cash in hand for the payment of the legacy to the University and for all immediate purposes in connection with the hospital, and that therefore there was no necessity to sell the property for the purpose of carrying out the trusts relating directly to the hospital. This finding was accepted by the learned Judges on appeal. The learned Judges were also of opinion that although there was a general trust to sell imposed upon the executors by the will, this particular property the executors were not bound to sell until a necessity for sale arose as provided by the decree, but they considered, differing from the learned Judge of first instance, that immediately the executors received an offer that was advantageous, a necessity for sale of the property arose within the terms of the decree.

It was urged before their Lordships on behalf of the appellant that the terms of the decree completely superseded during the widowhood of the appellant the directions of the will as regards the property in question, and that no obligations imposed on the executors by the will could constitute a necessity, within the meaning of the decree. On the other hand, it was maintained for the respondents that clause 8 of the will imposed a duty on the executors to realise the immovable properties and invest the proceeds of sale in authorised securities, and that an advantageous offer made to executors who were under an obligation to sell raised a case of necessity as contemplated by the decree. It was also argued that if the executors had not accepted the offer now in question, they would have been guilty of a breach of duty, and there being a legal obligation to sell, there was a legal necessity for sale.

Their Lordships are unable to accept either of these extreme views. They are clearly of opinion that the effect of the decree was to withdraw this particular property from the residue and to release it from the trust to sell, during the widowhood of the appellant or until such time as it became necessary for the trustees to sell in order to effectuate some immediately operative purpose of the will. To this extent this property was differentiated from all other properties comprised in the residue. To those properties the trust to sell attached irrespective of any necessity for sale. To this property it did not so long as there was no necessity to sell. If in respect of those properties the executors received an offer representing the fair market value thereof, they would normally be under an obligation to sell. But there would be no such obligation if such an offer were received in respect of this particular property. To have accepted such an offer in respect of this property with no further justification, and to have sold the property, would have been to nullify the decree. The decree says in express terms that the property shall be set apart for the appellant's residence and that she shall have the right to reside in it until "it becomes necessary for the executors to sell it." The direction in the will to resist claims by the appellant must not in this matter be allowed to influence the attitude of the respondents. Now that the decree has supervened, the primary duty of the executors is to maintain for the appellant her full rights thereunder. For them to sell the property without a necessity for sale, merely because a fair offer is received would be in direct contravention of the terms of the decree. But it was argued that the offer received in the present case was not merely fair, but advantageous to the estate, and that this circumstance raised a necessity for sale within the meaning of the decree. Their Lordships are unable to accede to this argument. They think that the trust to sell from which the property was released by the decree did not re-attach merely because an advantageous offer was received. A sale in those circumstances might, no doubt, be one for the benefit of the estate, but it would

not be a sale compelled by necessity. Their Lordships are, therefore, unable to accept the view taken by the Appellate Court that because the executors had received an offer for the premises which was advantageous a necessity had arisen within the meaning of the decree. At the same time, their Lordships are not prepared to go the length of saying that the necessity contemplated by the decree must be one *dehors* the will. It might arise under the will, as where the trusts relating to the hospital could not be carried out unless the property were realised.

Their Lordships will therefore humbly advise His Majesty that this appeal should be allowed, the order of the Appellate Court dated the 14th December, 1931, should be set aside, except as to costs, and the order of the Judge of first instance, dated the 5th November, 1931, restored. The costs of all parties before the Board will come out of the estate, those of the respondents as between solicitor and client.

In the Privy Council.

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BAI KRISHNABAI

v.

FRAMROZ EDULJI DINSHAW AND ANOTHER.

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DELIVERED BY SIR DINSHAH MULLA.

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