Privy Council Appeal No. 19 *of* 1943

Sopher and another – – – – – – – – *Appellants*

v.

The Administrator-General of Bengal and another – *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 6TH MARCH, 1944

Present at the Hearing:
VISCOUNT MAUGHAM
LORD MACMILLAN
LORD WRIGHT

[*Delivered by* VISCOUNT MAUGHAM]

The questions raised in this appeal relate to the construction of the will of Edward Abraham Sopher, a resident in Calcutta, domiciled in British India, who had carried on the business of a stock and exchange broker in that country.

His will was dated the 16th April, 1926. He died on the 24th February, 1939, leaving him surviving a widow, the second respondent, and two sons, the appellants. The sons were of age at the date of his death but unmarried. On the 1st May, 1939, probate of the will was granted to the first respondent, the sole executor and trustee of the will.

By his will the testator, after certain bequests of the goodwill of his business and of other property not material to the present appeal, proceeded to dispose of his residuary estate by some very elaborate and somewhat confusing clauses. After the usual trusts for conversion, the trustee was directed to stand possessed of the residuary estate upon trust out of the income to pay the testator's widow a monthly sum of Rs.1,500 for her own use and benefit during the term of her natural life. As to the balance of the income the trustee was directed to hold and stand possessed of the same:

> " Upon trust during the life-time of my said wife to pay the balance of the net income thereof (after payment of the said monthly allowance of Rupees One thousand and five hundred to my said wife) to my children; if more than one, in shares such that each male child shall take double the share of each female child, and if there shall be only one such child the whole of such balance of income shall be paid to such one child. And if any child of me shall die in my life-time or in the life-time of my said wife leaving children or a child him or her surviving the share of the said balance of income which would have been payable to the child so dying had he or she been living, shall during the life-time of my said wife be paid to his of her children, if more than one, in shares such that each male child take double the share of each female child and, if there shall be only one such child the whole of such share of the said balance of income shall be paid to such one child. And if any child of me shall die in the life-time of my said wife without leaving any children or child him or her surviving the share of the said balance of income which would have been payable to the child so dying had he or she been living shall during the life-time of my said wife be paid to such of my children as shall survive the child so dying and the child or children of such of my children as

shall have predeceased the child so dying in shares such that males shall in all cases take double the shares of females and the child or children of any such predeceased child shall take only the share his her or their deceased parent would have taken, if living and, if there shall be only one child or one grandchild of me who shall be entitled to the benefit of this provision then the whole of such balance of income shall during the life-time of my said wife be paid to such one child or grandchild as the case may be."

The testator has been dealing in this clause with an annuity to the widow and the surplus income which will remain after its payment until her death. The testator proceeded to deal with corpus as follows:—

"I further declare and it is my express desire that the corpus of my residuary estate shall not be divided until the death of my said wife and I will and direct that upon her death my Trustee shall hold and stand possessed of my residuary estate corpus as well as income upon trust to divide the corpus thereof into as many parts or shares as there shall be children of me living at my death or who shall die in my life-time leaving children or a child living at my death and designate the said several shares by the name of the said several children respectively each share designated by the name of a male child, to be double of each share designated by the name of a female child, and if there shall be only one such child then to designate the whole of the said corpus by the name of such one child and to hold and stand possessed of the several shares or the whole of the said corpus, as the case may be designated by the names or name of any children or child of me who shall be living at my death and shall also survive my said wife upon trust to pay the net income thereof to the respective children or child by whose names or name the same shall be so designated for and during the term of their respective lives and after the death of each such child to hold and stand possessed of the share or the whole of the corpus as the case may be designated by the name of such child upon trust to pay the income thereof, to his or her children until they shall respectively attain the age of eighteen years and on their respectively attaining that age upon trust as to the corpus as well as the income thereof for such children absolutely in shares such that each male child shall take double the share of each female child, and if there shall be only one such child then in trust as to the whole for such one child absolutely and if any child of me shall die without leaving any children or child him or her surviving then I will and direct that the share designated by the name of the child so dying shall after the death of such child be held by my Trustee as to the corpus as well as the income thereof upon trust for such of my children as shall survive the child so dying and the child or children of such of my children as shall have predeceased the child so dying absolutely in shares such that males shall in all cases take double the shares of females, and the child or children of any such predeceased child shall take only the share which his her or their deceased parent would have taken if living and if there shall be only one child or grandchild of me who shall be entitled to the benefit of this provision then as to the whole, in trust for such one child or grandchild as the case may be absolutely."

The will then continues as follows:—

"And as to the shares or the whole of the said corpus as the case may be designated by the names or name of any children or child of me who shall die in my life-time leaving children or child living at my death or who shall survive me and shall die in the life-time of my said wife I will and direct that my trustee shall hold and stand possessed of the same upon the same or the like trusts as are hereinbefore declared concerning the shares or the whole of the said corpus as the case may be designated by the names or name of children or a child of me who shall be living at my death and shall also survive my said wife and expressed and intended to take effect after the death of such last mentioned children or child. I further will and direct if and so long as any child of me shall be under the age of eighteen years then and in every such case my trustee shall out of the income payable to such child during the life-time of my said wife pay to my said wife the sum of Rupees five hundred per month for the maintenance and education of my same child and after the death of my said wife my trustee shall out of the income payable to any such child pay to his or her guardian or guardians the sum of Rupees five hundred per month until he or she shall attain the age of eighteen years for the maintenance and education of such child and in every case my trustee shall upon any child of me attaining the age of eighteen years pay to such child all and any balance of accumulation of income that there might be in his hands payable to such child. And as regards my grandchildren so long as any grandchild of me entitled to any income under this my will shall be under the age of eighteen years it shall be lawful for my trustee to pay the whole or any part of such income to the guardian or guardians of such grandchild for his or her maintenance and

education I declare that my trustee shall not be bound to see to the application of any moneys which he shall pay for the maintenance and education of my children or grandchildren or any of them under the provisions hereinbefore contained nor shall he be liable for any misapplication thereof."

Two sections of the Indian Succession Act, 1925, on which the case mainly depends, must now be stated.

" 113. Where a bequest is made to a person not in existence at the time of the testator's death, subject to a prior bequest contained in the will, the latter bequest shall be void, unless it comprises the whole of the remaining interest of the testator in the thing bequeathed.

Illustrations

" (i) Property is bequeathed to A for his life, and after his death to his eldest son for life, and after the death of the latter to his eldest son. At the time of the testator's death, A has had no son. Here the bequest to A's eldest son is a bequest to a person not in existence at the testator's death. It is not a bequest of the whole interest that remains to the testator. The bequest to A's eldest son for his life is void.

" (iii) A fund is bequeathed to A for his life, and after his death to his daughters, with a direction that, if any of them marries under the age of eighteen, her portion shall be settled so that it may belong to herself for life and may be divisible among her children after her death. A has no daughters living at the time of the testator's death, but has daughters born afterwards who survive him. Here the direction for a settlement has the effect in the case of each daughter who marries under eighteen of substituting for the absolute bequest to her a bequest to her merely for her life; that is to say, a bequest to a person not in existence at the time of the testator's death of something which is less than the whole interest that remains to the testator in the thing bequeathed. The direction to settle the fund is void.

" (iv) A bequeaths a sum of money to B for life, and directs that upon the death of B the fund shall be settled upon his daughters, so that the portion of each daughter may belong to herself for life, and may be divided among her children after her death. B has no daughters living at the time of the testator's death. In this case the only bequest to the daughters of B is contained in the direction to settle the fund, and this direction amounts to a bequest to persons not yet born, of a life interest in the fund, that is to say, of something which is less than the whole interest that remains to the testator in the thing bequeathed. The direction to settle the fund upon the daughters of B is void."

The second illustration is omitted as not being material.

" 120 (1) A legacy bequeathed in case a specified uncertain event shall happen does not vest until that event happens.

" (2) A legacy bequeathed in case a specified uncertain event shall not happen does not vest until the happening of that event becomes impossible.

" (3) In either case, until the condition has been fulfilled, the interest of the legatee is called contingent.

" Exception—Where a fund is bequeathed to any person upon his attaining a particular age, and the will also gives to him, absolutely the income to arise from the fund before he reaches that age, or directs the income, or so much of it as may be necessary to be applied for his benefit, the bequest of the fund is not contingent."

Two questions were raised by the Originating Summons issued by the appellants.

" (*a*) Whether the dispositions in regard to the residuary estate made by the said Will are void save and except the life interests given thereby to the plaintiffs and the defendant Susan Sopher.

" (*b*) Whether subject to the life interests given in the residuary estate to the plaintiffs and the defendant Susan Sopher the said plaintiffs and the defendant Susan Sopher have succeeded to the residuary estate of the testator as on an intestacy."

Section 113 of the Act raises or may raise questions of very great difficulty, and their Lordships do not propose to attempt to express their views on questions of construction which are not relevant to the present appeal, and on which they have not the advantage of knowing the opinions of the learned Indian Judges. It may be observed that in the present case the attention of the Judges was not called to some of the points arising on the section which were argued on this appeal, and if the Board differs from the judgments under discussion the circumstance may well

be due to that fact. The section must, of course, be read and construed in connexion with the illustrations to be found in the Act (see *Ariffin* v. *Gark*, 43 Ind. App. 256, p. 263); and these must now be considered. The first illustration to the section shows that a bequest by a testator to his children for their respective lives and after their deaths to their children respectively, unborn at the testator's death, is void; for it is not a bequest of the whole interest that remains in the testator, since it is not certain that there will be any grandchildren. A bequest to a son for life and after his death to his children who shall survive him must be bad for the same reason, since there may be no such children. The second and third illustration would seem to show—what is not very clear from the language of the section—that however complete may be the dispositions of the will, the gift after the prior bequest may not be a life interest to an unborn person, for that would be a bequest to a person not in existence at the time of the testator's death of something less than the remaining interest of the testator. How far this rule applies it is not necessary to determine in the present case; but the two illustrations show the strict sense in which the legislature has used the words " a bequest is made, etc., subject to a prior bequest." It may be that a particular bequest must compromise all the testator's remaining interest, if the legatee under it is not in existence at the testator's death; and it is clear that in cases like those two illustrations further gifts, however complete in their operation, do not save " the bequest ". Partial intestacy under the will as a whole is not the point. The question is whether " the later bequest " (whatever that means in a particular case) is a complete disposition of the testator's interest.

The construction of sect. 113 of the Act does not appear to have been much considered in reported cases, and the diligence of counsel has only resulted in the Board being referred to a single case which will now be referred to. The case is that of *Putlibai* v. *Naoroji*, and it is reported in 28 Calcutta Weekly Notes, p. 737 after it had come to this Board on appeal. It was decided in 1923 and related to sections 99, 100, 101 and 102 of the Indian Succession Act (X of 1865) then in force. Section 100 is reproduced in the modern Indian Succession Act as sect. 113. The case is valuable as deciding that in interpreting wills with reference to sects. 113, 114 and 115 of the present Act, which are applicable to several different systems of jurisprudence, it is necessary to bear in mind that the words used must be understood with reference to the current meaning of the words apart from such technical considerations as are only appropriate in English law. Their Lordships propose in accordance with this view to construe the words of sect. 113 in the light, so far as that may be proper, of the various sections contained in Chapter VII of the Act relating to " void bequests " (where sect. 113 is found) according to their natural meaning without regard to the numerous decisions of the Courts in this country. Section 113, it will be noted, relates to cases where two factors exist, first, that the bequest is made to a person not in existence at the time of the testator's death (e.g., to unborn persons at that date), and secondly, that there is a prior bequest contained in the will. The case cited referred to the very elaborate will of a Parsi. Clause 11 of the will gave interests for life to his five sons and provided that if a son died the persons presumptively entitled to the corpus of the estate were to have the income till the death of the last survivor of the five sons. Clause 12 contains special powers of appointment which were given to each son. Clause 13 provided for the event of default of the exercise of the powers of appointment and contained a gift to sons of each son or his issue as therein mentioned. There were also two clauses, 15 and 16, which provided for the forfeiture of the interests of the unborn beneficiaries in certain contingencies. It was decided in the High Court of Judicature at Bombay that the limitations to take effect under clauses 11, 12 and 13 after the death of each son were all void under sect. 100, as the bequests did not comprise the whole of the testator's interest in the thing bequeathed. The Court took the same view as to the result of clause 16. The Board did not consider it desirable to decide all the points raised in the Court of Appeal, but they did affirm the decision of the Court as to clauses 11, 12, 13 and 16 of the will. In effect the Board thought it sufficient to decide

that the bequests to the sons, daughters, widows and issue were void because they did not in all possible instances dispose of the subject matter to which they apply. The bequests failed to comprise the whole of the testator's remaining interest, because " there were contingent rights which might well prove to be of value ". It is at least consistent with that decision to hold (as was argued in that case) that if under a bequest in the circumstances mentioned in section 113 there is a possibility of the interest given to a beneficiary being defeated either by a contingency or by a clause of defeasance, the beneficiary under the later bequest does not receive the interest bequeathed in the same unfettered form as that in which the testator held it and that the bequest to him does not therefore comprise the whole of the remaining interest of the testator in the thing bequeathed. That is the conclusion at which their Lordships have arrived on the words of the section read in conjunction with the other sections relating to void gifts.

If we now turn to the clause in the will relating to the surplus income during the widow's lifetime, their Lordships are of opinion that the interests of a grandchild in that income during the period until the death of the widow is contingent on his surviving his parent. The language shows clearly that no grandchild is to receive any income unless and until he survives his father. Further, if no child or grandchiid survives the widow there will be an intestacy as regards the surplus income.

It seems to their Lordships that the " thing bequeathed " in the circumstances of this case is the residuary estate of the testator, and none the less that the clause above dealt with relates only to the income of that fund until the death of the widow. The three illustrations to sect. 113 above set out support that view. If this be correct, all the bequests or dispositions after the death of the widow would appear to be rendered void by the section.

It was, however, also argued that the gifts to the grandchildren of shares in the corpus are contingent on their respectively attaining the age of 18 and also on their surviving their respective fathers. If correct, this would be a further ground for holding that section 113 applied. The suggested answer to this contention was based on section 120 of the Act, or, to be more precise, on the " exception " contained in that section, which must now be considered. It must be observed that the exception applies only to the case where a fund is given to any person " on his attaining a particular age ". It has no relation to any other contingency, e.g. to his surviving a named person. In that case the legacy bequeathed does not vest until the legatee survives the named person (see sect. 120 (1)). What then happens if the legacy is given subject to a double contingency, e.g. that the legatee must survive a named person and must also attain a particular age? In the present case that is the position, for on the words of the will the children of either son of the testator are not given any interest in the corpus merely on attaining the age of 18, they also have to survive their father. It is true that if a son dies leaving no children who survive him his share is the subject of a gift over to the other son if he survives the son who has so died; but plainly there may be an incomplete disposition of the subject of the bequest if both sons die without isssue or if one son dies without leaving issue and the other son is then dead. The material point is that the gifts of corpus to grandchildren are subject to the double contingency unless the exception to sect. 120 applies and makes them vested.

Their Lordships are of opinion that the exception does not apply because it cannot be said that the fund or any part of it is given to any grandchild " upon his attaining the age of 18 ". He may attain that age and yet will get no interest in the corpus if he predeceases his father. The gifts of corpus to the grandchildren are therefore contingent, and on the view expressed above as to the true construction of section 113 it must follow that the bequests to them are void, since these bequests do not comprise all the interest of the testator. Their Lordships must observe that this point on sect. 120 does not appear to have been argued before the Indian Courts.

In the result, and on the grounds stated, the decrees of the Courts below should be set aside except as to costs and the two questions raised in the case must be answered in the affirmative. In the circumstances the costs of all parties as between solicitor and client should be paid out of the estate.

Their Lordships will humbly advise His Majesty accordingly.

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In the Privy Council

SOPHER AND ANOTHER

v.

THE ADMINISTRATOR-GENERAL
OF BENGAL AND ANOTHER

DELIVERED BY VISCOUNT MAUGHAM

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