

Dwarkadas Damodar Vs. Dwarkadas Shamji

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Court : Mumbai

Decided On : Sep-27-1915

Reported in : AIR1915Bom267; (1915)17BOMLR938

Judge : Basil Scott,Kt., C.J. and ;Davar, J.

Appeal No. : O.C.J. Appeal No. 16 of 915

Appellant : Dwarkadas Damodar

Respondent : Dwarkadas Shamji

Disposition : Appeal dismissed

Judgement :

Basil Scott, C.J.

1. This appeal comes before us on a judgment of Mr. Justice Macleod upon an originating summons for the purpose of deciding certain questions with regard to a settlement executed by one Hakoobai on the nth of December 1873. The summons was taken out by one of the trustees of the settlement who also claimed to be a beneficiary entitled to the trust property in the events that had happened. The other parties to the summons were the other trustees and all persons who could conceivably be supposed to be interested as the heirs of the settlor or her daughter Gomtibai.

2. The question concerning the plaintiff's beneficial interest was raised in the plaint in these terms:-

The plaintiff says that he was born at the date of the said indenture and is the nearest heir of the said Gomtibai according to Hindu law, capable of taking any benefit under the said indenture, and submits that under the terms of the said indenture and a true construction thereof the plaintiff has become absolutely entitled to the aforesaid trust property.

3. The plaintiff was represented in chambers upon the summons and had his case fully argued by Mr. Setalvad, but after argument it was decided against him by the learned Judge; and having regard to the fact that the matter has been fully considered and that no appeal has been preferred on behalf of the plaintiff, we must take it that the question of his interest is finally settled against him. That question having been settled by the learned Judge, there remained for decision Question 8 : 'In the events that have happened, who is the person entitled to the property.' It was conceded by all the parties to the summons except the unsuccessful plaintiff that in the events that had happened, there was an intestacy and a resulting trust in favour of the settlor. Then the question arose who were or was the heirs or heir of the settlor entitled to take the property. On the one hand it was contended that the heir of the settlor at the time of her death was Gomtibai, her surviving daughter, and that since Gomtibai was dead at the date of the summons, her children, the respondents, were entitled to the property. On the other hand, the tenth defendant claimed that the heir of the settlor could not be ascertained until the extinction of the beneficial interests which were validly created under the settlement, and that at the date of such extinction he was the nearest heir of the settlor.

4. Now the law as to what are known in ordinary legal language as 'resulting trusts' is stated in Section 83 of the Indian Trusts Act;-'Where a trust is incapable of being executed or where the trust is completely executed without exhausting the trust property, the trustee, in the absence of a direction to the contrary, must hold the trust property, or so much thereof as is unexhausted for the benefit of the author of the trust or his legal representative.' Section 191 of the Indian Succession Act

provides that 'Letters of Administration entitle the administrator to all rights belonging to the intestate as effectually as if the administration had been granted at the moment after his death.' Similarly, the Probate and Administration Act, Section 4, says :-'The executor or administrator, as the case may be, of a deceased person, is his legal representative for all purposes, and all the property of the deceased person vests in him as such.' That would include property falling into possession at the time of the testator's death or many years afterwards, for all interests vest in the personal representative. The executor or administrator as the case may be holds all property not validly disposed of for the persons beneficially entitled at the moment of the death of the deceased owner.

5. In the present case we have to deal with the estate of a deceased intestate for which no administration has been granted. We have only to find the beneficiary. The Succession Certificate Act does not on the facts necessitate a grant of administration. The term 'legal representative' in Section 83 of the Trusts Act must in such a case include the person or persons beneficially entitled who represent the interests of the deceased by virtue of inheritance.

6. The heirs then are the 'legal representatives' and they represent the estate of the deceased for the purpose of interests established by way of a resulting trust just as would the executor or administrator. Their representation dates from the same period and the reversion under the resulting trust whether foreseen or unforeseen having vested as a transferable interest in the deceased vests on her death in her representative. The representative by inheritance is to be found according to law at the moment of the death of the deceased, the maxim being 'solus deus haeredem facere potest, non homo.' On behalf of the appellant it was argued that there could be no vested reversion till the 'succession opened'. This expression is appropriate where there is a claim on the death of a Hindu widow enjoying her husband's estate but its use in the present case indicates the fallacy underlying the argument for the appellant. To use the words of the Judicial Committee in *Moniram Kolita v. Keri Kolilany* I.L.R. (1880) Cal. 776 the widow's 'estate is an anomalous one, and has been compared to that of a tenant-in tail. It would perhaps be more correct to say that she holds an estate of inheritance to herself and the heirs of her husband. But whatever her estate is, it is clear that,

until the termination of it, it is impossible to say who are the persons who will be entitled to succeed as heirs to her husband. The succession does not open to the heirs of the husband until the termination of the widow's estate.'

7. Here, the valid life interest of Gomtibai under the settlement was merely a 'particular' estate by-reason of which the reversionary interest of the settlor remained to fall into possession at some future time although capable of immediate transfer or inheritance.

8. As Gomtibai was at the death of the settlor both the sole heir and the sole beneficiary capable of taking under the settlement, her life interest under the settlement merged in her reversion on the principle that 'whenever a greater estate and a less coincide and meet in one and; the same person without any intermediate estate, the less is annihilated or in the law phrase is said to be merged, that is, sunk or drowned in the greater.' 2 Blackstone's Commentaries, 177.

9. This question of merger was not, however, argued and it is sufficient for the disposal of the appeal to say that Gomtibai and not the appellant was the settlor's heir. If that had been the only question in appeal we should dismiss it with costs. But it is not the only question. There remains a question of costs.

10. The question which we have dealt with in the foregoing remarks appears to have occasioned considerable difficulty in the lower Court. It was argued on the 21st of November after the decision of the case against the plaintiff and was then adjourned for further argument into Court under the rule which permits a Judge to adjourn a case where he thinks fit for argument into Court.

11. The tenth defendant had been brought before the Court by one of the trustees who for his own reasons wished to have all possible claims adverse to his claim disposed of in the originating summons, and it was also a matter of much interest and importance to the other trustees because they had to decide whether or not they held for their co-trustee or whether there was a resulting trust for the heirs of the settlor. The case,' therefore, falls within the authorities which have been cited to us, *Rivers v. Waidanis* (1907) 97 L.T. 707 and *Buckton v. Bucklon* [1907] 2 Ch.

406 both of which appear to us to justify the conclusion that the tenth defendant ought to be allowed his costs upon this summons, and that being so, he is entitled to his costs of this appeal also.

12. We affirm the decree of the lower Court except in this respect that the tenth defendant is entitled to his costs out of the estate. We dismiss the appeal ordering all parties to the appeal to have their costs out of the estate.

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