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Court : Kolkata

Decided On : May-03-1881

Reported in : (1881)ILR7Cal218

Judge : Wilson, J.

Appellant : Ballin

Respondent : BallIn and ors.

Judgement :

Wilson, J.

1. This is a suit brought to determine the construction of the will of Mrs. Anna Maria Ballin.
2. The will is prior to the Succession Act; and has, therefore, to be construed according to the rules of English law without reference to that Act.
3. The will is somewhat informally framed. It commences by certain specific bequests and devises. It proceeds:---'I bequeath the residue of my personal estate to the Administrator-General, upon trust, to stand possessed of my dwelling-house and premises situate No. 30, Theatre Road,' and another dwelling-house, and the residue of the personal estate, upon trust, till a mortgage-debt was paid off, to pay a monthly sum to the testatrix's daughter Mary Margaret, and subject to that

payment to apply the rents and profits in satisfaction of the mortgage. 'And after satisfaction of the said mortgage-debt as to my said house and premises situate No. 30, Theatre Road, upon trust, to pay the rents and profits thereof to my said daughter Mary Margaret during her life, with remainder to the use of the children of my said daughter Mary Margaret, who being a son or sons shall attain the age of twenty-one years or being a daughter or daughters shall attain that age or marry, in equal shares in-fee-simple. But in the event of there being no child of my said daughter Mary Margaret, or no such child being a son or sons who shall attain that age, or being a daughter or daughters who shall attain that age or marry and have issue, to the use of the children of my daughter Esther Handley Eliza, the wife of William Hamilton Bartlett, and the children of my son John Graham Ballin, who being a son or sons shall attain the age of twenty-one years, or being a daughter or daughters shall attain that age or marry, in equal shares in-fee-simple.' Mary Margaret, the testatrix's daughter, died about 1860 ; unmarried. Mrs. Bartlett has had two children, both still living: William Pigott, born the 8th of February 1860; and Maud Mary, born the 23rd February 1862, and married the 26th January 1881.

4. John Ballin has had three children who are still living: Florence, born the 5th December 1865 ; Herbert Askin, born the 1st June 1867 ; and Cecil James, born the 18th October 1868.

5. The heir-at-law of the testatrix was her eldest son, the defendant Samuel Ballin, a lunatic. The plaint in this suit was filed on the 17th of February 1879.

6. The points for decision are, whether the gifts to the children of Mrs. Bartlett and John Ballin were vested or contingent upon their attaining twenty-one; and in the latter case, who is entitled to the rents and profits in the meantime.

7. A number of cases were referred to, in which words apparently importing a contingency have been held not to prevent the vesting of the estate; cases of gifts to a class of persons 'on their attaining twenty-one,' or 'when they shall attain twenty-one,' or 'if they shall attain 21,' in which, by reason of the context, the words, apparently of contingency, have been held only to apply to the period of enjoyment, not to the vesting, or else to create a condition subsequent, divesting

the estate if the age be not reached. The earliest of these was Boraston's case (3 Rep., 19). Among the latest are Andrew v. Andrew (L. R., 1 Ch. D., 410, and Muskett v. Eaton (L. R., 1 Ch. Div. 435).

8. On the other hand, a series of cases have decided that where the words of contingency form part of the description of the class of persons to take, where, as in this case, the gift is to those 'who shall attain the age of twenty-one,' the words must receive their natural construction, and no estate vests in any one till he attains the prescribed age. Of this class of cases, Festing v. Allen (5 Hare, 573) and Bull v. Pritchard (5 Hare, 567), are leading cases. It is true that in Browne v. Browne (3 Sm. and G., 568), Stuart, V. C, refused to follow Festing v. Allen (5 Hare, 573) ; and in Jull v. Jacobs (L. R., 3 Ch. D. 703), Malins, V. C., expresses disapproval of the same case. I think it clear, however, upon all the authorities, that in such cases there must, at any rate, be something, in the context pointing to a different construction, or something in the will inconsistent with the literal construction, to justify a Court in adopting any but the literal construction. This seems to be the view taken by Lord Hatherley in interpreting analogous words in Williams v. Haythorne (L. R., 6 Ch., 782). In the present case, looking only at the actual devise in question, that to the children of Mrs. Bartlett and of John Ballin, there is no gift over, and nothing in the context which can in any way control the natural meaning of the words of contingency.

9. The only doubt I felt during the argument arose in this way. The prior gift to the children of Mary Margaret Ballin is in the same terms. And in the case of that devise there is a gift which, it was argued on the authority Browne v. Browne (3 Sm. and G., 568), is sufficient to vest the prior gift. And it was argued that the testatrix, using the same words twice in her will, must be presumed to use them in the same sense. I do not think this reasoning sound. If words acquire a special meaning by reason of their context, I do not think that meaning can safely be given them when used in a different context. Moreover, in my judgment the foundation of the reasoning fails. For I think the weight of authority is strongly in favour of the proposition, that in the case of words of contingency occurring in the description of the persons to take, a mere gift over is not sufficient to change their meaning.

10. I hold, therefore, that the gift to the children of Mrs. Bartlett and John Ballin was contingent, and that no son takes any interest till he attains twenty-one, and no daughter till she attains that age or marries. That being so, it is clear that, after the death of Mary Margaret Ballin, and so long as no child had reached twenty-one and no daughter was married, the rents and profits of the house in question belonged to the heir-at-law by reason of intestacy. The rule is clearly laid down by the House of Lords in *Countess of Bective v. Hodgson* (10 H. L. C, 656). Upon Mr. Bartlett's daughter marrying, she became entitled to the rents. On the son attaining twenty-one, he became entitled to an equal share, and each of the children of John Ballin who reaches twenty-one, or in the case of a daughter, who marries, will become entitled to share equally with those already in enjoyment.

11. The costs of all parties will come out of the estate ; and may be paid out of the estate which has been accumulated.