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documents, i.e. the rent receipt in 1899; Exhibit 79, and the notice, Exhibit 28, in 1901, go no further than to establish, what is in fact admitted, that the defendants had as a matter of fact paid rent at an unvarying rate of Rs. 8 per annum ever since they got their tenancy. But it cannot be inferred from that that the tenancy is not annual. Therefore I agree that this appeal should be dismissed with costs.

Decree confirmed.

J. G. R.

ORIGINAL CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice.

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July 2.

BAPUJI RUSTOMJI KERAWALLA (PLAINTIFF) v. HAJI ESMAIL
HAJI AHMED (DEFENDANT) ^o.

Will—Bequest for life—Restraint on alienation—Power of appointment “by will or by any deed or writing”—Effect.

A testator by his will bequeathed a house to his nephew, the plaintiff, for his life-time and directed that the nephew should, after defraying all expenses of repair and paying assessment out of the rents of the house, appropriate to his own use the nett amount of rent. The will further provided: “He (i.e., nephew) cannot either sell or mortgage the said house and after decease of my said nephew...the house shall be received by such persons and in such manner as this my said nephew may by his will or by any deed or writing whatever appoint and if he should not have made (his) will or deed or writing as stated above I give the said house in gift after his decease to his children in equal shares”. The plaintiff entered into an agreement to convey the house absolutely to the defendant. The defendant contended that in view of the restrictions imposed upon the plaintiff in the will the plaintiff had no marketable title to convey an absolute estate. The plaintiff, thereupon, took out an originating summons:—

Held, that in spite of words of restraint, the power defined by the will was sufficient in itself to convey an absolute estate to the plaintiff, inasmuch as

^oO. C. J. Suit No. 1591 of 1921.

where there was a power to appoint "by deed or writing" that necessarily implied that the power could be exercised during the life of the donee.

Held, therefore, that the plaintiff could either convey direct to the defendant and so give him a good title, or first appoint to himself and then convey.

Barford v. Street ⁽¹⁾, *Irwin v. Farrer* ⁽²⁾ and *Archibald v. Wright* ⁽³⁾, referred to.

ORIGINATING summons.

By an agreement, dated 14th February 1920, Bapuji Rustomji Kerawalla, the plaintiff agreed to sell to the defendant in the name of his nominee, Haji Suleman Salley Mahomed two immoveable properties situate at Old Sonapur Lane and Chandanvadi respectively, for the price of Rs. 1,15,000.

Clause 4 of the agreement of sale provided, *inter alia*, that "the vendor shall make out a marketable title" to the properties sold.

Of the two properties agreed to be sold by the plaintiff, that situate at Chandanvadi had been bequeathed to him by his uncle, Behramji Dadabhai Pochkhanawalla under a will, dated 2nd April 1895, clause 12 of which ran as follows :—

"I give to my said nephew Bapuji Rustomji Kerawalla for his life-time my one house which is situated in Popani Gully at Chandanvadi in Bombay....My said nephew shall out of the rents of the said house defray all the expenses for doing repairs thereto and pay the bills for assessment thereof and he shall appropriate to his own use nett (amount of) rent. He cannot either sell or mortgage the said house and after decease of my said nephew Bapuji Rustomji, the house shall be received by such persons and in such proportions as this my said nephew may by his will or by any deed or writing whatever appoint and if he should not have made (his) will or deed or writing as stated above, I give the said house in gift after his decease to his children in equal shares".

Bapuji, the testator died on 28th June 1895, since when the plaintiff had been in enjoyment of the income of the house.

⁽¹⁾ (1809) 16 Ves. 135.

⁽²⁾ (1812) 19 Ves. 86.

⁽³⁾ (1838) 9 Simons 161.

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After the agreement of sale of the house, the defendant as purchaser sent in requisitions on title calling upon the plaintiff as vendor to explain how in view of the restraint on alienation in the will of Behramji the plaintiff could convey the Chandanwadi property absolutely. The defendant also asked whether the power of appointment given to the plaintiff by the will had ever been exercised by him.

The answer given by the plaintiff was that he proposed to convey the property to the defendant by way of appointment, or, in other words, he proposed to exercise the power of appointment by the intended deed of sale, and that he had once exercised the power by an indenture of mortgage, dated 19th September 1917.

The defendant not being satisfied that the plaintiff had a marketable title to convey absolutely the Chandanwadi property, the plaintiff took out an originating summons in which the questions submitted for the determination of the Court were: (1) whether a conveyance by the plaintiff to the defendant of the Chandanwadi property mentioned is not a sufficient compliance with clause 4 of the agreement for sale of the said property by the plaintiff to the defendant, and (2) if not, what other acts and documents should the plaintiff execute to enable him to convey the said property absolutely to the defendant.

Before the filing of the originating summons, the plaintiff by way of caution appointed to himself by a deed of appointment all the interest in the said property save and except the life interest which he already took under the will of his uncle. This was apparently done in order that the life interest should merge in the remaining interest in the said property and that the whole of the property should belong to him absolutely. The mortgage which was then subsisting

was also redeemed on the day the deed of appointment was made in his own favour by the plaintiff.

Gupte, for the plaintiff.

Billimoria, for the defendant.

Reference was made to the following authorities :—

In re Ryder⁽¹⁾; *Barford v. Street*⁽²⁾; *Irwin v. Farrer*⁽³⁾; *Archibald v. Wright*⁽⁴⁾; *Comiskey v. Bowring-Hanbury*⁽⁵⁾; *Holloway v. Clarkson*⁽⁶⁾; *In re Hancock*⁽⁷⁾; Farwell on Powers, p. 18.

MACLEOD, C. J. :—By an agreement dated 14th February 1920 the plaintiff agreed to sell to the defendant in the name of his nominee Haji Sulleman Salley Mahomed, two properties belonging to the plaintiff described in the schedule to the agreement. One of these premises was situate at Chandanvadi. A dispute has arisen between the parties as to whether the plaintiff has made out a marketable title to the said property at Chandanvadi.

The property belonged to one Behramji Dadabhai Pochkhanawalla, who died in Bombay on or about the 28th of June 1895, having, prior to his death, duly made his last will and testament dated the 2nd April 1895. By clause 12 of the said will the testator gave to his nephew Bapuji Rustomji Kerawalla, the plaintiff in this case, for his life-time, this Chandanvadi house. The testator directed that the said nephew should, out of the rents of the said house, defray all the expenses for doing repairs thereto and pay the bills for assessment thereof and should appropriate to his own use the nett

⁽¹⁾ [1914] 1 Ch. 865.

⁽²⁾ (1809) 16 Ves. 135.

⁽³⁾ (1812) 19 Ves. 86.

⁽⁴⁾ (1838) 9 Simons 161.

⁽⁵⁾ [1905] A. C. 84.

⁽⁶⁾ (1842) 2 Hare 521.

⁽⁷⁾ [1896] 2 Ch. 173 at p. 183.

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amount of rent. The clause further provided that he could not either sell or mortgage the house, and that, after the decease of the said nephew, Bapuji Rustomji, the house should be received by such persons and in such manner and in such proportions as the said nephew might by his will or by any deed or writing whatever appoint, and if he should not have made his will or a deed or writing as stated above the said house was given in gift after his decease to his children in equal shares.

The plaintiff was required by the defendant to explain under what power he proposed to convey absolutely to the purchaser the Chandanvadi property. He was also required to state whether the power of appointment given to him as aforesaid had been at any time exercised by him or not, and if so, in whose favour and by what deed.

The vendor replied that he proposed to convey the property to the purchaser by way of appointment, or, in other words, he proposed to exercise the power of appointment by the said deed and that he had once exercised the power by an indenture of mortgage dated 19th September 1917 which was still subsisting. Afterwards the mortgagees reconveyed the said property and all interest therein to the plaintiff by a deed of reconveyance dated the 23rd December 1920. On the same day, by a deed of appointment, the plaintiff appointed to himself all the interest in the said property save and except his life interest therein with intent that the life interest should merge in the remaining interest in the said property and that the whole of the said property should belong to him and his heirs absolutely.

The plaintiff when taking out the originating summons submitted the following questions for determination :—(1) Whether a conveyance by the plaintiff

to the defendant of the Chandanvadi property mentioned in the plaint is not a sufficient compliance with clause 4 of the agreement for sale of the said property by the plaintiff to the defendant ; and (2) if not, what other acts and documents should the plaintiff execute to enable him to convey the said property absolutely to the defendant ?

Under the construction of clause 4 of the will a question arises whether there was a gift to the nephew for his life with a testamentary power of appointment or whether the nephew was also given a general power of appointment, in which case he would have an absolute interest. No doubt the words in clause 12 "after the decease of my said nephew" tend to show that the testator intended that the nephew should only have a life interest with a power of appointment added to it. But I think it was not realised that a power defined by the words of clause 12 or similar words would be sufficient to convey an absolute estate, since, when there is a power to appoint by deed or writing, that necessarily implies that the power can be exercised during the life of the donee.

In *Barford v. Street*⁽¹⁾ there was a devise and bequest of real and personal estate in trust to pay the rents, &c., to the separate use of a married woman for life, and after her decease to convey according to her appointment either by deed or writing or by last will and testament. The Master of the Rolls said (p. 139):—

"What do you contend to be the nature and extent of her interest? An estate for life with an unqualified power of appointing the inheritance comprehends every thing. What induced me at first to doubt was the indication of an intention in the codicil, that the estate should remain in the trustee for the life of the plaintiff, with powers to her, inconsistent in a great degree with the supposition of her having, or being able to acquire, the absolute interest.

(1) (1809) 16 Ves. 135.

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But I do not think I can by inference from thence control the clear and express words, by which the power is given to the devisee to dispose of this estate in her life-time by any deed or deeds, writing or writings, or by her last will and testament. How can the Court say, that it is only by will that she can appoint? ... By this unlimited power she can appoint the inheritance. The whole equitable fee is thus subject to her present disposition."

In *Irwin v. Farrer*⁽¹⁾ there was a bequest to trustees of money in trust to lay out the money in stock, the dividends as they came due to be paid to A for life, and after her decease to pay the principal according to her appointment by will or otherwise. It was held that A had an absolute power of disposition, and her will was held a sufficient indication of her intention to take the whole by some document other than a will.

In *Archibald v. Wright*⁽²⁾ the testator directed that after his wife's death part of his stock should be transferred to Johanna for her sole and entire use during her life, that she should not alienate it but enjoy the interest during her life, and that at her decease she might dispose of it as she thought fit. A question then arose what were the rights of Johanna under the bequest? Whether Johanna took an absolute interest for life with power to dispose by will or whether the words "she might dispose of as she thought fit" also gave power to dispose of the stock. Did these words give Johanna an absolute interest or did the words imposing a restraint on alienation during her life show an intention that Johanna could only have power to dispose of the stock by her will? The Vice-Chancellor, in answer to the argument of counsel as to restraint on alienation, said:—

"That may be, so far as it is a limitation of the *interest*, but it appears to me available as indicative of an intention to prescribe the mode of executing the *power*, viz., by will and not by writing *inter vivos*. I think this lady was not to have a power to alienate during her life; and if not, then she took

⁽¹⁾ (1812) 19 Ves. 86.

⁽²⁾ (1838) 9 Simons 161.

a life interest, coupled with a testamentary power of appointment, and, having died intestate, *Henrietta Ann Wright Place* is entitled to...annuities in the pleadings mentioned."

This particular case falls exactly between the two cases in *Vesey* on the one hand, and the case in *9 Simons* on the other. There was a clear intention on the part of the testator that his nephew should not sell or alienate the property during his life-time. On the other hand there was an equally clear intention that the nephew should have the power to appoint by deed or writing as well as by will, so that the donee took an absolute estate, and the restraint on alienation must be considered as having no effect so as to detract from the gift of the absolute estate. I think, therefore, in spite of these words of restraint in clause 12, the nephew was empowered to appoint by deed or writing in his life-time to himself and therefore he has the power to convey the absolute estate.

The result must be that to the first question the answer is that the plaintiff can either convey direct to the defendant and so give him a good title or he can first appoint to himself and then convey. The second question is unnecessary in view of the answer to the first question.

Costs costs in the sale.

Solicitors for the plaintiff: Messrs. *Shamrao, Minochehr* and *Hiralal*.

Solicitors for the defendant: Messrs. *Chitnis, Kanga* and *Motilal*.

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