

IN THE HIGH COURT OF JUDICATURE AT BOMBAY.

O. O. C. J.

Suit No. 220 of 1908.

HAJI MAHOMED ALARAKHIA AND OTHERS. --- - Plaintiffs.

vs.

HEERBAI widow AND OTHERS. --- - Defendants.

9th April 1908.

Coram: Russell Ag. C.J.

J U D G M E N T. The pedigree herein annexed

to the plaint shows the relationship of the parties and I may say that the Plaintiffs are the son and the two daughters of Rehmatbai, the Defendants being Jainabai the sister of Rehmatbai and daughter of the settlor, and -- Heerbai the widow of the step-grandson of the settlor -- and the two children of that widow, and ^{or} grand-step-son, and the Trustees of the settlement.

The first question that was submitted to me was whether Alibhoy should be treated as the sole settlor or whether he and his daughter Rehmatbai, who purport to be the executing parties of the cestui qui trust, were the settlors. ~~The~~ ^{my} mind I need only say that in my --

opinion the sole settlor is this man Alibhoy. *the* ^{by it appears} I should mention that Rehmatbai the daughter of the settlor married one Alarakhia Shivji, and she died in August 1903. But Alarakhia Shivji had previously married another Rehmatbai who died in 1870 and they were

father

nature ^{have} ~~had~~ been brought to my attention and I have not been able to find any myself. I ^w could say that I ~~foresee~~ ~~that~~ it would be a very interesting ~~point~~ and a very - difficult point; but in my opinion I am saved the --- trouble of considering ^{it in the case} that ~~difficult~~ point.

The first thing to be considered is on what principle is the deed to be construed. I think the judgment of Bacon V. J. in the case of Olivant v. Wright reported in 9 Ch. Div., 650, is in point. I dare say there are many other cases also; but here it is said: "In construing a deed, you must also ascertain what was the -- intention of the party." The intention here is perfectly obvious and distinct, and I do not believe that any man alive, lawyer or layman, could read this instrument and doubt what the meaning of the words there contained ought to be held to be".

Now here it appears to me when you read the -- last clause of the settlement it is ~~explained~~ that the settlor intended to exclude all females from any right to this property at all; and if he did so (and in my opinion ~~he intended to do it~~) the property is to be treated just as if it were joint family and undivided property of ^{as Hindu} Sher Mahomed Allarakhiabhai and Haji Mahomed Allarakhiabhai. ^{the} If that was ^{the} intention of the ^{settlor} testator then it appears to me that in accordance with the judgment of the Privy -- Council in L.R. 10 I.A, 51, he has attempted to create an estate which is void upon the ground that he has --- excluded the females from any right to the property. In that case after citing the judgment of the Calcutta Court which referred to the well known passage out of the Tagore case where the Judicial Committee observed: "It follows strictly from this, that a private individual, who attempts by gift or will to make property inheritable otherwise than the law directs, is assuming to legislate,

and

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and that the gift must fail, and the inheritance take place as the law directs." And at page 58 in giving -- their judgment in the case before them they say: "But the attempt to confine the succession to males, to the entire exclusion of females, is, though not so great, yet a distinct departure from Hindu Law, 'excluding' in the terms of the judgment quoted, 'the legal course of inheritance.' "

So, the Settlor when he attempted to confine the rights of his property to males, thereby entirely excluding the females, attempted, it seems to me, to create an estate which the law does not allow him to create. This being so I am of opinion that it follows that the ultimate trust is void.

Then the question arises: How does the matter stand? *is the rest of the deed to be considered?*

I need not read the former portions of the deed but I take them as read for the purposes of this --- judgment. The effect of the deed is that the settlor gives the residue to Allarakhia Shivji in the first -- instance. That is the man who married Rehmatbai. And after him he directed one-third to be given to the --- second Rehmatbai, one-third to Haji Mahomed Allarakhia and another third to Sher Mahomed Allarakhia. Sher Mahomed Allarakhia died. Consequently that share lapses, and *must be divided among the children of H. M. Allarakhia* that life estate of Sher Mahomed Allarakhia, who is dead, Rehmatbai got or would have got had she survived, that is, one-third plus one-sixth or half of the property. That being so Haji Mahomed Allarakhia must be held entitled to half of the income that is to say to one-third of the income since the death of Allarakhia and one-sixth of one-third of the income since the death of Rehmatbai for his life. The other one-third plus one-sixth or one-half not dealt with must it appears to me go to Jainabai the fourth Defendant.

It is not actually stated in the plaint whether the settlor left a Will but I gather that to be so ---- because it says Ajbai was his heir. That ~~is~~^{being} so it -- appears to me from page 765 of Mayne's Hindu Law that Jainabai being the daughter of the settlor takes --- precedence over ^{her} Mahomed Allarakhia who is the son of -- another daughter, namely of Rehmatbai, of the settlor.

Therefore, Mahomed Allarakhia is entitled to half of the income in accordance with what I have said, and Jainabai is entitled to half of this property in her own right.

That being so the costs of all parties should come out of the estate as between attorney and client.

I hold the ultimate trust to be void. The male parties to be entitled to life estate in half the estate. The parties intend to confer as to consent decree in respect of this.

I understand the parties propose to come to terms so, if necessary I must be called in before me by either of them.

At Souza,
 Shorthand Writer,
 High Court, O. J.

11. 4. 08.

High Court, Bombay

O. O. C. J.
—

Suit No 220 of 1908

Haji Akhomed Akh-
rakhia & others... } ...

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Akerbai Widow & others... } ...

Oral judgment delivered by Russell J. on the 9th April 1908

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Munir B. ...
11.4.08