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ARDESIR LIMJI v. SORA'BJI PESTANJI *et al.*

Bayley, for the defendant:—The plaintiff, by continuing his suit after the settlement of issues, has lost his right.

COUCH, *J.*:—I think that the plaintiff is entitled to the costs he claims: until the issues are settled he has no means of knowing what case his adversary intends to set up, and if he accepts the amount paid at the settlement of issues in full satisfaction, he does so at the earliest possible moment, and he is, therefore, entitled to his costs up to that time. I think that the fact of his having at first refused to accept the money does not deprive him of his right to these costs if he does so before trial. I, therefore, hold that the plaintiff is entitled to his costs up to and including the costs of the settlement of issues.

LATE SUPREME COURT, EQUITY SIDE.

Sept. 10.

GA'NGBA'I, wife of NU'R MUHAMMAD DA'TTU-BHA'I.....*Plaintiff.*

THA'VAR MULLA', Executor of RAHIMATBA'I, widow of SA'JAN MI'R ALLI' .....*Defendant.*

Will — Charity — Charitable Bequest — Dharm — *Gift in* Dharm — *Stat.* 43 *Eliz., c.* 4.

In the Will of a Khojá Muhammadan written in the English language and form, a gift of a fund "to be disposed of in charity as my executor shall think right," is a valid charitable bequest, and it will be referred to the proper officer of the Court to settle a scheme for the application of the fund to charitable objects, by analogy to Act 43 Eliz., c. 4.

Where, however, the Will is in the Native langnage, and the word "*dharm*" or "*daram*" is used, the word is held too vague and uncertain for the gift to be carried into effect by the Court, the word "*dharm*" or "*daram*" including many objects not comprehended in the word "charity" as understood in English law.

THIS was a suit instituted in the late Supreme Court for the administration of the estate of one Sájan Mír Allí, a Khojá Muhammadan of Bombay, who died in the year 1843. Under his Will, which was in the English language and form, his widow, Rahimatbái, became entitled to his residuary estate and effects for her life, with a general power of appointment by will. Rahimatbái died in the year 1851, having shortly before her death executed her Will in the English language and in English form. She thereby, after reciting the power of appointment, bequeathed and appointed the residuary estate of Sájan Mír Allí, and also her own separate property, to the defendant, Thávar Mullá, upon certain trusts therein

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mentioned for the payment of certain charitable and other bequests specially named, and ultimately in manner following:—"that is to say, one-fourth thereof to the right heirs of my said late husband, Sájan Mír Allí, for the time being, one-fourth to be disposed of in charity as my executor shall think right, and the remaining two-fourths to my own heirs and legal representatives according to the laws and usages prevalent among the Khojá Muhammadans." Among the objects specially named of the bequests for charity were the following:—the building a public room and veranda and tank for the use of the caste; the purchase of land near Mundiá, in Cutch, the produce of which was to be distributed to the indigent poor of Mundiá; the purchase of rice and cloth to be distributed to beggars and poor at certain places; the maintenance of a well for cattle to drink at; the supply of drinking water *gratis* to the public at the gate of the Custom House in Bombay in the hot weather.

The case now came before the Court on the petition of the plaintiff, Gángbái, praying (amongst other things) for a declaration by the Court that the said one-fourth of the residuary estate of Sájan Mír Allí, bequeathed by the Will of the said Rahimatbái to charity, was a void bequest, and that the petitioner was entitled thereto, as the sole next of kin and heir at law of Sájan Mír Allí.

The petition was argued before SAUSSE, C.J., August 14.

White, for the petitioner:—The will of Rahimatbái must be construed as if the word "*dharmá*" or "*daram*" had stood in the Will in place of the word "charity." It must be presumed that the testatrix, being a Khojá Muhammadan, used that or some similar word in giving instructions for her Will. The word "*dharmá*" or "*daram*," as understood by Hindús and others using the word, embraces many objects which would not be held in English law to be a valid charitable use within the Stat. 43 Eliz., c. 4, and this court has refused to enforce trusts for "*dharma*," or where an executor has a discretion given him to dispose of property in "*dharma*:" *Advocate General* v. *Damothar Madhowjee* (*a*); *Amenabebee and another* v. *Futteybebee and others* (*b*). In the present case the only difference is that the Will is in English, but the Court in construing the word "charity" should have regard to the person in whose Will it occurs, and consider what the word actually used by that

(*a*) Perry's Or. Ca. 526.

(*b*) Decided in this Court in July 1862.

person must have been. He also cited *Sreemutty Rabutty Dossee* v. *Sibchunder Mullick* (*c*).

Green (*Dunbar* with him) for the executor, Thávar Mullá:—The executor is willing to have the discretion given him by the Will controlled, and to submit to apply the fund to such uses and purposes as strictly come within the term "*charity*," as used in English law, as for instance a school or hospital. The bequests for specific purposes contained in the Will are of a nature which might be comprehended under the word "charity," and furnish some index to the intention of the testatrix in using the word.

Lewis (Advocate General) supported the validity of the gift as a good bequest to charity, and contended that it was a case in which charitable intent should be carried into effect by the Court, and that the Crown should submit a scheme. He cited *Chapman* v. *Brown* (*d*).

White, in reply:—The intention of Rahimatbái comprised objects not charitable with some that might be considered charitable. Hence the gift could not be carried into effect. The question is whether the word "charity" when used in a Will of a native is to have the technical meaning of a charitable use under the statute of Elizabeth. He applied to the Court for leave to adduce evidence (viz., the clerk who took instructions from Rahimatbái, on which her Will was prepared,) as to the word actually used by her.

The Chief Justice delivered the following judgment:—This case has been brought before the Court irregularly by way of petition. The decision which it seeks for should properly be given when the accounts have been taken, and the cause set down upon further directions; but as all the parties interested are now before the Court, and have undertaken to abide by the order upon this petition, as if it had been a decree regularly made, I will, to save expense, make my order upon the single point presented for adjudication.

It appears that Rahimatbái was a female of the Khojá caste, which, although Muhammadan in religion, has been held to have adopted, and to be governed by, Hindú customs

(*c*) 6 Moo. Ind. App. 1. (*d*) 6 Ves. 404.

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and laws of inheritance. She became possessed of very considerable property, and died in 1850, having shortly before made her Will, which was prepared in the English language, and in the office of an English solicitor of the late Supreme Court, who has recently left Bombay. Rahimatbái executed that Will, which was attested by her English solicitor and others. After some special bequests, and after nominating the defendant, Thávar Mullá, her executor, she directed the residue of the property to which she was entitled to be divided into four parts, and as to the only portion now under consideration she devised as follows : — " One-fourth to be disposed of in charity as my executors shall think right."

The object of the present proceeding is to obtain a declaration of the Court as to the validity or otherwise of that devise, upon the ground that the plaintiff, in her own right, and by deeds of assignment and compromise with all the parties in the suit, now represents the rights of the Khojá or Hindú heir-at-law in reference to this one-fourth of the residue.

It is admitted that, upon the face of the Will, the devise to charity is perfectly valid, and such as the Court under other circumstances would be bound to give effect to : but it is alleged that as the testatrix was a Khojá, and necessarily influenced by Hindú usages, the word " charity " contained in her English Will must be construed with reference to Hindú notions of "charity," which are expressed by the Hindú word " *dharm* ;" that the late Supreme Court, as well as the present High Court, have frequently declined to carry out devises to charity under the description of " *dharm*" in Hindú Wills, because it embraces many objects of benevolence not recognised as charitable, such as giving feasts to Bráhmans, &c., and consequently that this Court should refuse to carry out the present devise to "charity," declare it to be void, and the property to belong to the plaintiff as representing the heir-at-law of the testatrix.

The petitioner proposed to call the Native clerk of the solicitor who prepared the Will, for the purpose of proving that the testatrix gave instructions for her Will to him, in the Native language, and that she made use of the word " *dharm*" in expressing her wishes with respect to the present devise, and also that " *dharm*" was rendered " charity" in the English Will. I declined to receive that evidence, as it was offered for the purpose of proving by parol that the testatrix intended

something different from that which is clearly expressed on the face of the instrument which she signed as her Will, and I felt the less inclined to admit it, because such evidence was avowedly offered for the purpose of defeating the intention of the testatrix in this particular. There is no rule more strictly carried out than that which prohibits parol evidence from being allowed to *contradict, vary, add to, or subtract from,* the contents of a Will. In Jarman on Wills, p. 337, it is laid down that "the principle of that rule evidently demands an inflexible adherence to it, even where the consequence is the partial or total failure of the testator's intended disposition." The case of *Goblet* v. *Beechy* (*e*) is a clear authority to this extent, that the evidence of a person who read a codicil, and who in reading stopped to ask the testator the meaning of a particular word (which had given rise to the suit), could not be received to explain the sense in which the testator intended it to be understood. I think that case in principle rules the present, and that the evidence offered should not be received.

The testatrix was not obliged to make her Will in English, but having selected that language to convey her intentions under the safeguard of an English solicitor, the Will must, after thirteen years, and in the absence of any allegation of deception or fraud, be now taken to have intended what is clearly expressed in it. Her general object was charity, and the Court cannot be called on to speculate upon the particular views she might have had with reference to the classes of objects upon which that charity should be conferred, beyond what she has thought proper to express by the language she has employed. The Will is of considerable length, goes into great detail with reference to specific bequests to individuals and charitable and benevolent objects, and has been evidently prepared with much consideration and care.

The executor, who was empowered by the testatrix to select the objects of charity, has not made any claim to exercise that power differently from what this Court would direct, but, on the contrary, has appeared at the bar to consent to any scheme which may be settled, within the extensive range of objects defined as charity, equally by Hindú usage as by English law and judicial decisions.

The case of *Sreemutty Rabutty Dossee* v. *Sibchunder Mullick* (6 Moore Ind. App. 1) was relied upon as an autho-

(*e*) 3 Sim. 24, 6 L. J. Ch. 200; on Appeal; 2 Russ. & M. 624.

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rity that the word "charity" in this will should be construed with reference to the position of the testatrix as Khojá in caste, and consequently influenced by the Hindú notions of "charity," which are expressed by the word "*dharm.*" That case, when examined, does not appear to bear much upon the present question. The Privy Council arrived at its construction of what the intention of the parties was, not from evidence *dehors* the deed, but from recitals and statements contained within it, and thus held that the very strong words "to be her sole, absolute, and proper monies, to her separate use," were by those recitals and statements cut down to the limited interest which a Hindú widow in Bengal takes in property descending upon her, as heir to her husband. It is to be observed, that although the parties to that English deed were all Hindús, and do not appear to have been acquainted with the English language, yet no attempt was made to offer evidence of what the intentions of any of the parties were, although the instructions were most probably given in the Native language.

I must refuse the prayer of this petition, and declare the devise to charity to be a valid bequest of one-fourth of the residue of the property in the pleadings and petition mentioned, and refer it to the Master to settle a scheme for the application of that sum to charitable objects. The executor to be allowed credit, in passing his accounts, for costs of his appearance upon this petition. The Advocate General to have his costs out of the fund, the petitioner, Gângbáí, to pay her own costs; and the Advocate General and the executor to be at liberty to submit schemes to the Master for the application of the fund in charity.

NOTE BY THE REPORTER.—In accordance with the decision above referred to, in the case of the *Advocate General* v. *Damothar Madhowjee*, is a decision of Sausse, Chief Justice, in July 1859, in a case of *Prânjivandás Tulsidás* v, *Devkúvarbai and others*. The following observations occur in the Chief Justice's judgment in that case: "I called on the Chief Translator to let me know what Native word was used in the Will, and what its precise meaning is. It was '*dharma*,' and he says that the Sanscrit word '*dharm*' means religious and charitable objects in general, such as (1) religious practice; (2) another and more limited sense; (3) giving charity in general; (4) the alms themselves. The Chief Translator then states that ordinarily the word has two meanings, one general and the other more limited, and that according to the Hindú Shástris it may be any good work, such as founding any charitable institution for man or beast, &c. Since the case was at hearing I have requested Dr. Wilson (a very high authority upon Indian languages) to favour me with his views of the meaning of the word '*dharm*' generally, and also in what sense it would be made use of in a Will. He informs me that it is derived from the Sanskrit word '*dri*,' which means obligation and duty, and he then gives nine several meanings of the word '*dharm*.' The six first are not applicable to the present case, but the 7th is virtue, generosity, charity conformable to duty; 8th, justice personified; 9th, the advancement of religion, charity, and benevolence; and he states that it is in the last sense that it is used in a

Will, and conveys the idea of benevolent intention, such as feeding priests and animals, providing wells, roads, medicines, hospitals, &c., all which matters are left to the discretion of the executors by the use of the present expression. It thus appears that the word '*dharm*' used in a Hindú Will, without any qualifying expression, includes a great number of objects which come within the meaning of the English word 'benevolent,' as contradistinguished from 'charitable' in the sense in which the latter has been construed by English Courts since the 43rd Eliz. In the well-known case of *Morice* v. *The Bishop of Durham* (*a*) it was decided that a bequest to 'charitable and benevolent purposes' is too vague an indication of the testator's intention for a valid gift to charity, and that such a bequest must be held void, and be decreed to fall into the residue. The Presidency Courts in India have, I believe, without exception, adopted the construction placed upon the word 'charitable' by Courts in England, and applied it to Hindú Wills. The reason given for this line of decision has been that as Hindú Wills derive their efficacy not from Hindú law, but from English procedure in India, such Wills must submit to be governed by similar rules of construction. This is a rule of convenience, and certainly this Court would not willingly introduce a practice whereby it would be obliged to include within schemes for the distribution of such funds the feasting of Bráhmans and giving dinners to all the members of a caste, &c., which it would do if it were to carry out all the trusts included within the meaning of the Native word '*dharma*.' The Advocate General has relied on *Baker* v. *Sutton* (*b*), where a bequest for 'religious and charitable purposes' was held good, and he contended that '*dharm*' came within the principle of the decision in that case. He also relied upon a newspaper report of the case of *Ramgopal Bonnerjea and others* v. *Sibkissen Bonnerjea* (decided in Calcutta in May 1855), where a bequest in a Hindú Will for 'religious and charitable purposes' was held to be a valid bequest. It appears in that case that the Will was in English, the testator and persons interested being Hindús, and the clause in question was as follows:—'The fifth part or share is to be invested in Government securities, commonly called Company's paper, to be called religious trust fund, and the annual income thereof is to be devoted to religious and charitable purposes under the directions of my executor.' The Court in Calcutta, on the authority principally of the cases of *Baker* v. *Sutton* and *Townsend* v. *Carus* (*c*), held that a bequest for 'religious and charitable purposes' without the addition of the word 'benevolent,' or the expression of any other purpose, was a valid charitable bequest, and that in the case before it effect ought to be given to the disposition in question, by directing a scheme to be prepared within the 43rd Eliz. In that case the word '*dharm*' was not used, and the Court held the bequest good, as it would have been held in England, upon the authority of the cases referred to. In directing a scheme it ordered the Master to have regard to the fact that the testator was a Hindú. The meaning of that direction was, that the scheme should include objects from which Hindús might derive advantage as well as others. Neither of the cases relied upon governs the present, and I see no good reason for differing with the decision of this Court in the case of *The Advocate General* v. *Damothar Madhowjee*. I, therefore, hold the devise in '*dharma*' to be void, for vagueness and uncertainty. The effect will be that the property, being undisposed of, must descend upon the heirs and representatives according to Hindú Law."

In several recent cases in England the question has been discussed how far trusts for the benefit of animals are good charitable gifts. In the case of *The University of London* v. *Yarrow* (*d*) the bequest was 'for the founding, establishing, and upholding an institution for investigating, studying, and, without charge beyond immediate expenses, endeavouring to cure maladies, distempers, and injuries any quadrupeds or birds *useful to man* may be found subject to: for and towards which purpose of founding, establishing, and upholding such animal sanatory institution,' &c., and it was held to be a valid charitable bequest. In the case of *Marsh* v. *Means* (*e*) the opinion of Wood, V. C., appears to have been that the prevention of cruelty to animals, and the advocacy of humanity towards animals, would be a good charitable purpose, though unaccompanied, as in the case of *The University of London* v. *Yarrow*, by any refence to utility to or improvement of man.

(*a*) 10 Ves. 540. (*b*) Keen's Reports 224. (*c*) 3 Hare 257.
(*d*) 2 Jur. N. S. 1125; on appeal 3 Jur. N. S. 421; 1 De G. and J. 72.
(*e*) 3 Jur. N. S. 790.