


## Original Civil Jurisdiction.

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*Suit No. 319 of 1863.*

1865.  
 July 21.

SIR JAMSETJI JIJÍ'BHA'I and others ..... *Plaintiffs.*  
 SONÁ'BA'I, widow of J. S. Páťak, and others. *Defendants.*

*Trust—Creation of—Subsequent Dispositions by Settlor—Income.*

*Held* that where a trust has been once perfectly created, although there may have been no transmutation of possession, it cannot be defeated by any subsequent act of the settlor ; and apparent dispositions of portions of the property afterwards made by him to particular members of a family, the individuals constituting which have as a class a beneficial interest in the whole, must be regarded, not as gifts to them, or creations of new trusts in their favour, which he had no power to make, but as the acts of a trustee, and available only to the extent of the shares to which such persons may be entitled.

. But this applies only to dispositions out of the principal of the fund ; and not to payments made out of its income to particular members of the family, for their maintenance or other expenses : as there may be circumstances which would render it inequitable to take an account of the latter, so as to charge such persons with what they may have received beyond their respective shares.

THIS suit was brought by Sir Jamsetji Jijíbhái, Bart., and others, the executors of the late Sir Jamsetji Jijíbhái : stating the circumstances (which sufficiently appear from the judgment of the Court) under which certain property had been set aside by the late Sir Jamsetji for the benefit of the late Sorábji Pestanji Páťak, and after his death continued for the benefit of his family, the surviving members of which were the defendants ; and asking to have the respective rights and interests, if any, of the defendants ascertained and declared by the decree of the Court ; and to have proper directions given for the vesting in them respectively, of such shares or interests as they may appear to be entitled to, and for the release of the estate of the late Sir Jamsetji from all liability in respect thereof.

The case was heard by COUCH, J., in a Division Court.

*Green and Hayllar* for the plaintiffs.

*The Advocate General (Lewis) and Dunbar* for the defendants Sonábái, widow of J. S. Páťak, and P. J. Páťak.

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*Bayley* for the defendant Hírábái, widow of D. S. Páťak.  
*White* and *Scoble* for the defendants Dinbái and Dosíbái,  
widows, daughters of S. P. Páťak.  
*Marrriott* and *McCulloch* for Ratanbái, widow, daughter of  
S. P. Páťak.

*Cur. adv. vult.*

COUCH, J.:—The plaintiffs in this suit are the executors of the late Sir Jamsetji Jijíbhái, and the suit has been brought by them in order to have certain property, to which they admit the defendants, or some of them, are entitled, distributed under the direction of this court; and the real question in the suit arises between the several defendants, who have by their written statements set up claims to different portions of it.

Although this case came before one of the other Judges of this Court, according to the provision in the Code of Civil Procedure, for the settlement of issues, no issues were settled; but an order was then made that the parties should proceed to trial upon the plaint, and the written statements of the several defendants, by which the case was left in the same state as it had been; and when it came on for hearing before me, I had to deal with it as if there had not been any previous hearing. It then, however, appeared that the main question was, what was the effect of the acts of the late Sir Jamsetji Jijíbhái with regard to the property in dispute, and what rights had been thereby conferred upon the defendants.

The defendants are severally members of the family of Sorábji Pestanji Páťak, who died intestate on the 17th of July 1829. He left him surviving, as his sole next of kin, a widow, Ratanbái, two sons, Dinshá Sorábji and Jahángír Sorábji, and three daughters, the defendants, Ratanbái, Dinbái, and Dosíbái.

Sorábji Pestanji Páťak was for many years, and until the time of his death, in the service of Sir Jamsetji Jijíbhái, and conducted the English correspondence for him. He had also married one of his nieces.

It appears from the evidence of the present Sir Jamsetji Jijibhai that it was his father's practice not to pay any fixed salaries to the persons in his employment, but to give them the benefit of certain trading adventures. In accordance, apparently, with this practice, Sir Jamsetji Jijibhai opened an account in his books in the name of Sorabji Pestanji, and various entries in this account have been put in evidence. The earliest is an entry, at page 423, in a Gujarati journal for Samvat 1875 (A.D. 1818-19); and is as follows:—"Credited to the account of Parsi Sorabji Pestanji Patak, under date the 30th of A'so Vad, the day of the week Tuesday (the 19th of October 1819), on account (as follows): Your wages from the . . . of S. (Samvat) 1874 (A.D. 1818) to the 30th of A'so Vad S. (Samvat) 1875 (the 19th of October 1819), the day of the week Tuesday, months 18, at the rate of Rs. 500 for one year, amounting to Rs. 750, are debited as by (your) hands to the profit and loss account—p. 93....p. 171." And at page 445 of the same journal is the following entry:—"Credited to the account of Parsi Sorabji Pestanji Patak, the 30th of A'so Vad (the 19th October 1819), on account (as follows): at page 423 (of this) journal Rs. 750, for your wages for 18 months, are credited to your account, and debited to the profit and loss account. In regard to that you have caused (the entry of) the money for (your) wages to be set aside (or cancelled). Therefore, these Rs. 750 are again debited to your account. The same are debited to your account, and credited as by your hands to the profit and loss account."

Sorabji Pestanji died, as I have stated, on the 17th of July 1829; and at page 157 of a Gujarati journal for the Samvat year 1886 (A. D. 1829-30) is the following entry:—"Credited to the account of Parsi Sorabji Pestanji Patak, on A'so Vad the 30th, day of the week Saturday (as follows): You used to do the work of writing English for our firm: and during your lifetime you spoke to Shet Jamsetji Bhai about a house to live in. Therefore the respected Shet, of his own accord, sent you word, during your lifetime, by Nakhuda Muhammad Ali Rogay, as follows:—"I will pay you Rs. 20,000." After

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that you died. Therefore, the said Rs. 20,000, namely, twenty thousand, by order of Shet Jamsetji Bhái and Mirzá Sáheb Muhammad Alí Rogay, are debited to the partnership account of Bhái Jamsetji Jijibhái and Co., and credited to you: the same are debited to the partnership account of Bhái Jamsetji Jijibhái and Co., p. 25, credited p. 10.....p. 1."

On the 1st of October 1826 there was a balance due from Sorábji Pestanji upon the account in the book of Sir Jamsetji Jijibhái of Rs. 68,773, and which had increased at the time of his death. On the 8th of November 1828 it amounted to Rs. 39,912, and on the 28th of October 1829 to Rs. 1,10,549; but, as the proceeds of shipments made to China were received and carried to the account, the balance was reduced, and ultimately was found on the other side of the account.

A short time after the death of Sorábji Pestanji an account was opened in the name of his son Dinshá; but this account appears to have been closed after a few years; and on the 5th of November 1831, as appears by an entry at page 52 of a journal for Samvat 1888, a sum of Rs. 3,693-1-6½ cents, found claimable from him, was, by order of Sir Jamsetji Jijibhái, transferred from that account, and debited to the account entitled "the account of Pársi Sorábji Pestanji Pátak." Also, on the 28th of July 1832, Rs. 5,561-1-14½ cents, stated in the entry as the share of Dinshá Sorábji (apparently of the proceeds of a shipment of cotton and opium to China, the particulars of which are given in an entry under the same date, at page 106 of a journal), are credited to the same account.

This account was continued under the same title, in the lifetime of Sorábji Pestanji; and in 1867 a house was purchased,—the contract being made in the name of Dinshá Sorábji, but the conveyance being to Sir Jamsetji Jijibhái,—and the purchase-money and expenses of the conveyance &c. were debited to Pársi Sorábji Pestanji Pátak, as appears from entries in the books which have been put in evidence. The nature of the account kept by Sir Jamsetji Jijibhái, and the dealings with the property, as well as

the way in which additions were made to it, appears in a series of accounts in the ledgers for the Samvat years 1906 to 1918 (both inclusive), and headed "the account of Pársí Sorábji Pestanji Pátak," or "Pársí Sorábji Pestanji Pátak's account." It is unnecessary to go into the particulars of these accounts, from which, as well as from other evidence, it appears that Government notes, shares in the Bank of Bombay and in the Apollo Press Company, and other securities, were purchased by Sir Jamsetji Jijíbhái out of the money in his hands, under circumstances, and accompanied by acts on his part, such as making the purchase in the name of, or directing the interest to be paid to, a particular individual of the family of Sorábji Pestanji, which, it is contended, amounted to a gift or appropriation, in favour of such person, of that portion of the property. It is upon these that the case of the defendants Sonábái and Pestanji, who claim a larger share of the property than the other defendants, mainly depends.

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It is necessary, in the first place, to determine whether Sir Jamsetji Jijíbhái, in opening the account in his books in the name of Sorábji Pestanji, and in from time to time placing on the credit side of that account the various sums of money which—whether derived or not from the profits of a share in trade—were the result of his bounty to Sorábji Pestanji, and, after his death, to those whom Sir Jamsetji Jijíbhái considered as standing in Sorábji Pestanji's place, intended to create a trust: for if he did, and the trust was once perfectly created, although there was no transmutation of possession, it could not be defeated by any subsequent act, and it will be supported by this court: *Ellison v. Ellison* (a), *Pulvertoft v. Pulvertoft* (b), *Ex parte Pye*, *Ex parte Dubost* (c), *Hughes v. Stubbs*. (d) If he did not mean to create a trust, or if there was an intention to do so, but he contemplated some further act for the purpose of giving it completion, the Court will not raise one up: *Cotteen v. Missing* (e), *Gaskell v. Gaskell*. (f)

(a) 6 Ves. 656.

(b) 18 Ves. 99.

(c) *Ibid.* 140.

(d) 1 Hare 176.

(e) 1 Madd. 176.

(f) 2 Y. &amp; J. 502.

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In considering what was his intention, we may look to the manner in which he dealt with the money, which had been placed on the credit side of the account; but in doing so it is most important to bear in mind the relative positions of the parties. Sorábji Pestanji was not only an old and faithful servant of Sir Jamsetji Jijibhái, but was connected with him by marriage. The fund was derived from his bounty, and though the bounty may not have been undervalued, the fruits of it exceeded what might have been justly claimed. Sir Jamsetji Jijibhái, in this as in other cases, took a lively interest in the welfare of Sorábji Pestanji and his family; and, considering his great experience in business and the position he occupied, it was natural that he should assume to deal with the property, of which he had converted himself into a trustee, in the manner which he thought would be most beneficial for the persons who were interested in it, and in a way in which an ordinary trustee would not have done: nor were the parties interested likely to do otherwise than acquiesce in what their benefactor thought it right to do. All that was done was for the benefit of those who were interested in the property; and in no single instance, after a sum of money had been placed on the credit side of the account, does Sir Jamsetji Jijibhái appear to have dealt with it in any way for his own benefit.

I think the conclusion to be justly drawn from his acts is that he intended to create a trust, and that a trust was created, and the only dominion which he retained over the property was that of a trustee.

Sorábji Pestanji was the original object of the trust, but after his death the account was continued in his name. Entries from the ledgers for the years Samvat 1883 to 1889 inclusive (A.D. 1826-27 to 1832-33) have been put in evidence, in all of which it is headed "the account of Pársi Sorábji Pestanji Pátak; and I think the intention was to continue the trust for the benefit of his family, in the same manner as if he had been living.

Where a trust has been once perfectly created, it cannot

be defeated by any subsequent act of the settlor; and the apparent dispositions of the portions of the property by Sir Jamsetji Jijibhái to different members of the family must be regarded, not as gifts to them, or creations of new trusts in their favour, which he had no power to make, but as the acts of a trustee, and only available in favour of the parties to the extent of the shares to which they may be entitled. But I think this should apply only to dispositions of the principal; and that payments which have been made to any of the family out of the income of the property, for their maintenance or other family expenses, ought not to be disturbed, or the parties made to account for what they have received. To that extent I think it should be taken that the dispositions of the property by Sir Jamsetji Jijibhái have been acquiesced in by the parties interested; and there may be many circumstances which would now render it inequitable to take an account of the income from the death of Sorábji Pestanji, apportioning it amongst the different parties, and charging any one of them with what he or she may have received beyond his or her share of the income.

I have said that Sir Jamsetji Jijibhái had no power to make a gift or create a new trust of any part of the property in favour of any particular member of the family; and I do not think it was his intention to do so. In the letter of the 31st of July 1850 to Messrs. Remington and Co., from the firm of Jamsetji Jijibhái, Sons, and Co., by which they were directed to carry a sum of Rs. 35,000 to the credit of the parties therein named, amongst whom was Jahángír Sorábji Pátak for Rs. 10,000, there is a direction to Remington and Co. not to honour the drafts of any of the parties against the respective amounts [at their credit] without the counter-signature of the firm on such drafts, which indicates an intention to retain a dominion over the fund. So also, on the 13th of November 1850, Sir Jamsetji Jijibhái writes to Remington and Co. :—“ I beg you will be good enough to pay Jahángír Sorábji Pátak every month, commencing from the first proximo, until further orders, the sum of one hundred

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(100) rupees, which you will please place to the debit of his account with you." In the letter of the 13th of November 1850 from Sir Jamsetji Jijibhai to Mr. John Stuart, Secretary and Treasurer of the Bank of Bombay, the interest on the note for Sicca Rs. 5,000 is directed to be paid to Jahangir Sorabji Patak *until further orders*; and the account with the Bank of Bombay was headed "Sir Jamsetji Jijibhai for Sorabji Pestanji Patak's family." And although the share in the Apollo Press Company was apparently purchased by Jahangir Sorabji, the cost of it was, according to the evidence of Ramchandra Keshav, charged by Remington and Co. in the account of Sir Jamsetji Jijibhai, and was debited by him to the account of Sorabji Pestanji, as appears by an entry which has been put in evidence, dated the 31st of July 1850; and the certificate for the share, although in the name of Jahangir Sorabji, remained in the custody of Sir Jamsetji Jijibhai. The purchase would appear to have been made in the name of Jahangir Sorabji for the purpose of keeping that share distinct from others purchased at the same time by Sir Jamsetji Jijibhai and appropriated to other accounts; and the fact that Jahangir Sorabji was the only male member of the family may account for his name having been used in making investments of the funds in that instance, as well as in the case of the others in the Bank of Bombay.

In the will of Sir Jamsetji Jijibhai there is the following passage (para. 12):—"And whereas I have caused certain other relations of mine to be credited with monies in the books of the said firm, now I will and direct that such monies shall belong to such relations respectively, and that where the interest or income of any estate or security is so credited, such estate or security shall belong to the party to whom the interest or income thereof is so credited."

The Advocate General, who appeared for the defendants Sonabai and Pestanji, stated that he did not rely upon the will; nor could he, because they were not individually credited in the books of the firm, and the will would also be inoperative where a trust had been already perfectly created.

Upon a consideration, therefore, of all the circumstances, I am of opinion that the defendants are severally entitled to the messuage and the property mentioned in the plaint, and admitted by the plaintiffs to be in their hands as executors and executrix of the late Sir Jamsetji Jijíbhái, in the shares and proportions in which they, or the persons whom they represent, would have been entitled thereto, if the same had formed part of the estate of Sorábji Pestanji Pátak at the time of his death, and it must be so declared by the decree; but the decree will direct that, in ascertaining the amount to which each of the defendants is entitled, he or she shall not be charged with any excess of interest or income, over and above what would have been derivable from his or her share, which may have been received by him or her during the lifetime of the late Sir Jamsetji Jijíbhái, nor be liable to make good or refund the same.

The decree must order the messuage, and such parts of the property as do not consist of money, to be sold under the direction of the court; and the proceeds of the sale, together with such parts as consist of money, to be divided according to the above declaration; and that the share which Jahángír Sorábji Pátak would have been entitled to, if living, is to be paid to the defendant Pestanji Jahángír.

Plaintiffs' costs and the costs of the several defendants to be paid out of the estate.

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