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April 6.

Regular Appeal under Act X. of 1865, No. I. of 1869.

In the matter of the Will of N. P. VAKI'L.

HAMA'BA'I and BEHRAMSHA' NASARVA'NJI ...*Appellants.*
BAMANJI NASARVA'NJI .....*Respondent.*

Will—Probate—Executrix by Necessary Implication—Act X. of 1865, Sec. 182.

The testator by his Will appointed Hamábái, his wife, guardian of his infant children, "*in order that of all his property she should carry on the management* (until his youngest son should attain twenty-two years of age), *and in the testator's name the management of his firm.*" He appointed his brothers, R and M., his *vakils* to settle any quarrels that might arise, and directed them not to give unjust advice, but should the *vakils* give unjust advice Hamábái was not to act upon it. Upon certain contingencies Hamábái and the *vakils* were to separate, and make over to the sons their shares.

Held that Hamábái was by implication appointed sole executrix, and that she alone, to the exclusion of the testator's brothers, was entitled to probate.

THIS was a regular appeal, under Sec. 263 of Act X. of 1865, from an order of C. G. Kemball, District Judge of Súrat, in the matter of the application for probate of the last will and testament of Nasarvánji Pestanji Vakíl.

Nasarvánji Pestanji Vakíl, a resident of the city of Súrat, died on the 2nd day of March 1869, leaving him surviving a widow, Hamábái, and five sons, Bamanshá, Behramshá, Barjorji, Dinshá, and Hormasji, all of whom except Bamanshá were at their father's death minors.

Nasarvánji left a Will, bearing date the 18th of April 1867, the material portion of which for the purpose of this report was as follows:—

"Out of my five sons now living, only one son, Bamanji aforesaid, is of mature age, and the other four sons are minors. I have, therefore, appointed my wife, the said Hamábái, as the guardian of all, that is, the said four sons, and any other son and daughter that may be born to me hereafter, in order that of all my property of all kinds (she may carry on) the management until my last son becomes mature of 22 years,

(and) in my name the management of my firm; I have appointed my brothers, Ratanshá and Moṭhábhái, my *vakíls*, in order that should there be mutual quarrels between, they shall settle the same, and direct to act justly. Likewise the office of guardianship my wife aforesaid shall duly carry on. But the said *vakíls*, out of partiality to any one, shall not give unjust advice to the said guardian. Should the *vakíls* give unjust advice, she shall not act thereupon."

On the 13th of April 1869 Hamábái, the widow, and Behramshá, the second son, of the testator (Behramshá having then attained his majority), applied for probate of the Will.

Bamanshá, the eldest son of the testator, entered a caveat.

The District Judge made the following order:—

"Having carefully heard the Will read over, and listened to the arguments, I am of opinion that no probate can be granted, for I can find nothing in support of the application, either under express appointment or according to the tenor of the Will. While, however, rejecting the application, I would state that looking to the contents of the Will, this court will be prepared, in the event of an application being made, either by the widow, Hamábái, in conjunction with her late husband's two brothers, Ratanshá and Moṭhábhái, who are styled by the testator as his *vakíls*, or by the widow alone in the event of the brothers refusing to join her, to grant letters of administration, in the face of any objection the present caveator may think fit to make."

Against this order of the District Judge Hamábái and Behramshá appealed, and the appeal was argued before COUCH, C.J., and GIBBS, J.

Anstey and *McCulloch* (with them *Nánábhái Haridás*), for the appellants:—The testator's intention evidently was to appoint his wife as executrix, the *vakíls* being joined to her as legal advisers to settle any disputes that might or may arise. In the succeeding clauses the guardian and the *vakíls* are mentioned together, as in paragraph 6, which provides that upon a certain contingency occurring they (the wife and the *vakíls*) are to separate and make over (to the sons)

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their shares." Further on, in the same paragraph, the Will says that "she is duly to execute her guardianship, with the instructions of the aforesaid *vakíls*, until my last son shall attain the age of 22 years." These directions do not make the *vakíls* co-executors. When an executor is appointed, and other persons are appointed as overseers or advisers, that does not make the latter co-executors. In this case the testator appoints the *vakíls* expressly to settle disputes and make a fair distribution. The wife, who is appointed to manage all the estate and the business of the firm, is not to be controlled by the *vakíls*, who have only to advise her and give her proper instructions:—*In the goods of Manley* (*a*); *In the goods of Baylis* (*b*); *In the goods of Oliphant* (*c*); Cootes' Practice, p. 23; Williams on Executors, Part I., Bk. III., Ch. 2.

Shántárám Náráyaṇ, for the opponent:—The lower court refused to grant probate because neither by express direction, nor by necessary implication from the terms of the Will, can it be collected that the testator intended his wife to be executor. The clause is too uncertain to have that effect. The widow has only been appointed guardian of the minor sons, which may perhaps enable her to obtain a certificate under Act XX. of 1864, Sec. 6. [COUCH, C. J.:—Who do you say ought to have the probate?] The *vakíls* may be appointed executors. [COUCH, C. J.:—They are only named as advisers, and the widow is not bound to follow their advice. And the words "should there arise mutual disputes" show that the *vakíls* were meant only for the purpose of advising. You must look to the context.]

COUCH, C.J.:—Sec. 182 of Act X. of 1865 appears to be compiled almost verbatim from cases collected in the work of Mr. Williams on Executors, as are many more sections of the Act framed upon cases decided in the English courts. This shows that the Indian Legislature thought that the Indian law of succession might be fitly illustrated by English precedents. Sec. 182 says that the appointment of an executor may

(*a*) 3 Sw. & Tr. 56. (*b*) Law Rep. I. P. & D. Ca. 21.
(*c*) 1 Sw. & Tr. 525.

be express or by necessary implication, and if by any word or circumlocution the testator recommend or commit to one or more the charge and office, or the rights which appertain to an executor, it amounts to as much as the ordaining or constituting him or them to be executors: (I. Williams on Executors 230, 6th ed.). This is what is meant by "necessary implication."

The question here is whether the rights appertaining to an executor have been given to the widow. Cl. 5 of the Will appears to amount to this, that the wife is appointed guardian of the four minors, and the testator commits to her not only the management of the estate of these minor sons, but of all his property and effects of all descriptions, and also of the business of the firm. And he appoints two persons as *vakils*, not to act as co-executors, but to advise the executrix in all questions between her and her sons. It is true two Wills are never likely to have the same expressions. The Native writer of the Will was probably not conversant with English forms; and, therefore, the cases decided at home cannot be understood as decisive here, but they may be used as illustrations. The word *vakil* must, therefore, be understood with reference to the context, and I think the fair construction is that the widow was to perform the duties and have the rights of an executor. It is a very informal clause, but it is sufficiently indicative of the testator's intention to appoint her executor during the minority of the sons. The joining together of the wife and the *vakils* in paragraph 6 is not inconsistent with this construction of the previous paragraph, as she is only directed to act with their advice; the wife and the two *vakils* mean nothing more than the executrix acting with the advice of the two *vakils*. The 14th clause appears to have a limited application. I do not think the testator intended to give Behramshá anything more than a power to obtain such a certificate as would enable him to draw dividends. This is certainly not the same power which the testator gave to the widow. My conclusion, therefore, is that probate ought to be granted to the widow only.

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GIBBS, J.:—I entirely concur with my Lord as to the construction to be placed upon paragraph 5 of the Will. Mr. Nasarvánji, when he made it, was doubtless in happy ignorance of the Indian Succession Act, for I find no Gujaráthi translation of it had been published in 1867, and I remember Mr. Nasarvánji, who was a pleader in my court at Súrat, did not understand English. From a consideration of the whole Will, I believe he meant his wife, in whom he seems to have had great confidence, to have full power to administer the estate, and he appointed the *vakíls* only as advisers to assist her in case of disputes. He was aware that some certificate was required to get dividends paid, and doubtless, considering his widow would not be able to go to Bombay for such purposes, he joined his son Behramshá with her for this purpose only.

We have to apply an Act to this Will of which the testator was ignorant, and we must place a liberal interpretation on his words, and not allow the estate to be managed by other than the person he wished to have charge thereof. There is no doubt that the opponent, Behramshá, was never intended to have any share in the management, and I feel convinced the fair construction of paragraph 5 is, that it was the testator's intention to appoint his widow the executrix of his Will; to her, therefore, probate should be granted.

Order reversed. Probate to go to the Widow.
Costs on Respondent.