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[537] APPELLATE CIVIL.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, and Mr. Justice F. D. Melvill.

ERASHA KAIKHASRU ALIAS KHARSEDJI, MINOR, BY HIS GUARDIAN KAIKHASRU ALIAS KHARSEDJI DOSABHAI (*Caveator*), *Appellant v.* JERBAI, WIFE OF RATANJI RASTOMJI (*Applicant*), *Respondent.**

[28th June, 1880.]

Intestacy—The Indian Succession Act (X of 1865), ss. 25, 74, 92, 178, 201, 213, 214—Letters of Administration—The Parsi Succession Act (XXI of 1865)—Will—Effect of words excluding from inheritance—Heir-at-law.

A., a Parsi inhabitant of Surat, died there on the 13th February 1879 leaving him surviving the following relations, *viz.*:—a daughter J. (the respondent) by his first wife, who had predeceased him; his second wife, Dhanbai, who lived apart from him, his third wife, who had been divorced by him, and whose son A. did not recognize as his own; and his three sister D., S., and G., the first named of whom had been married to K., and whose son E., was the appellant. By his will, A. expressly directed that neither his daughter J., nor his widow Dhanbai, should take any share of his property the whole of which he bequeathed to his brother R., who however, predeceased him. On the 6th September, 1879, J. applied to the District Court of Surat, that letters of administration to A.'s estate might be granted to her husband as her attorney, alleging that A. died intestate. Her application was opposed by E., D., and S., (the nephew and two sisters of A.) on the ground that J. was expressly excluded by A. from inheriting his property, and that neither she nor her husband resided permanently within the Presidency of Bombay. The District Judge granted limited letters of administration to J.'s husband as her attorney, under s. 214 of Act X of 1865. On an appeal to the High Court by E. alone—

Held that A had died intestate, not having made any bequest or devise of his property which could take effect, inasmuch as his sole devisee (R.) had predeceased him, and that the estate must, therefore, go in accordance with the law of succession.

The use of mere negative words, unaccompanied by any effective disposition of his property, could not exclude his daughter J. or his widow Dhanbai from succeeding to their shares of the estate.

Under the Parsi Succession Act (XXI of 1865) widows and children rank before brothers and sisters.

[538] Section 7, sch. II, art. 2, of the Parsi Succession Act is applicable only where the deceased leaves neither lineal descendants, nor a widow or widower.

THIS was an appeal, under the Indian Succession Act (X of 1865), against the order of H. Birdwood, Judge of the District Court at Surat.

A Parsi, named Ardesir Bezanzi, died at Surat on the 13th February, 1879. He left behind him, Jerbai (the respondent) who was his daughter by his first wife Pirozbai, who pre-deceased him; a widow (Dhanbai) who was his second wife, but who had lived apart from him with her father at Kurrachee; a third wife (Gulbai) whom he had divorced; and three sisters named, respectively, Dhanbai, Sonabai and Gulbai. Ardesir's third and divorced wife had a son, but Ardesir did not recognise him as his own. His sister Dhanbai was married to Kaikhasru, and had a son by him named Erasha (the appellant). On the 6th September, 1879 Jerbai applied to the District Court of Surat that letters of administration of her father's estate might be granted to her husband Ratanji Rastomji as her attorney, alleging that, Ardesir had died intestate,

* Appeal No. 3 of 1879 under Act X of 1865.

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Three caveats were filed against her application, one by Kaikhasru on behalf of his minor son Erasha (the appellant) to whom it was alleged the deceased, shortly before his death, had made an oral bequest of all his property; and two by Ardesir's two sisters Dhanbai and Sonabai. They alleged that Ardesir left a will, dated the 1st May, 1871; that the applicant Jerbai was expressly excluded by him in that will from succeeding to his property, all of which was devised to the deceased's elder brother Ratansha; that, in consequence of the pre-decease of Ratansha, the inheritance passed to Ardesir's three sisters under Acts X of 1865, s. 106, and XXI of 1865, s. 7, sch. II, cl. 2; and they contended, that letters of administration be granted either to Erasha or to the sisters jointly or separately and not to Jerbai or her husband, because they did not permanently reside in the Presidency of Bombay.

The District Judge raised three issues, namely: (1) whether Ardesir died intestate; (2) whether Jerbai was entitled to letters of administration; and (3) whether a limited grant could be made [539] to her attorney under s. 214 of Act X of 1865. He found these issues in the affirmative, and made an order accordingly.

Of the three caveators, Erasha alone appealed to the High Court by his guardian Kaikhasru.

Nagindas Tulsidas, for the appellant.—Jerbai has been expressly excluded by her father in his will from all right of inheritance or succession to his property. The District Judge therefore was wrong in granting letters of administration of his estate either to her or to her husband as her attorney, more especially as they did not permanently reside in this Presidency. Section 74 of Act X of 1865 provides that the testator's intention should not be set aside, because it cannot take effect to the full extent. Effect should be given to it as far as possible. Reference was also made to s. 196 of the Act.

Gakladas, for the respondent.—The sections that apply to the present case are ss. 25 and 92 of the Act. According to the former section a man is considered to die intestate in respect of all property of which he has not made a testamentary disposition which is capable of taking effect. Ardesir's will has become completely inoperative by the death of Ratansha, to whom he had bequeathed the whole of his property. The estate thus lapses to the heir-at-law Jerbai under s. 92, because the will does not contemplate any appropriation of the property contingent on this event. In *Gatindra Mohan Tagore* v. *Ganendra Mohan Tagore*(1) the Privy Council held the testator Prasanna Kumar Tagore to have died intestate, because certain trusts made by him in his will were considered null and void, and the heir-at-law, who was expressly declared by the testator not to take anything under the will, was held entitled to the real and personal property of the testator, subject to the operation of the valid trusts of the will. According to that case, even disherison by itself is not sufficient to deprive the heir-at-law of his rights without an appropriation of the property. The learned pleader also referred to Williams on Executors and Administrators, pp. 1210, 1488, (7th ed).

The will is fully set out in the following judgment.—

JUDGMENT.

WESTROPP, C. J.—This is an appeal against a grant of letters of administration made, under Act X of 1865, to the attorney of Jerbai,

(1) 9 B. L. R. 377=M. I. A. Supp. Vol. page 47=18 W. R. 359.

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the daughter of Ardesir Bezanji, a Parsi, who died at Surat [540] on the 13th February, 1879. He had been married three times. His first wife Pirozbai predeceased him. His second wife Dhanbai lived apart from him at Kurrachee. His third wife Gulbai, he was alleged on both sides to have divorced. He left no son by his wives Pirozbai or Dhanbai, but was survived by his daughter Jerbai (the applicant for letters of administration by her attorney, her husband, Ratanji Rastomji), his widow Dhanbai, his divorced wife Gulbai, who had a son (denied, however, by Ardesir Bezanji to be his son), and three sisters Dhanbai, Sonabai and Gulbai. Of these sisters, Dhanbai was married to Kaikhasru Dosabhai, and had by him a son named Erasha.

The widow Dhanbai was cited, but did not oppose the grant of letters to Jerbai, her step-daughter.

Kaikhasru Dosabhai entered a caveat on behalf of his minor son Erasha, to whom he alleged that Ardesir Bezanji, shortly before his death made an oral bequest of all his property. Kaikhasru's wife Dhanbai (sister of Ardesir Bezanji) also entered a caveat, and alleged that by his will (presently to be stated) Ardesir Bezanji had excluded Jerbai from all right of succession or inheritance to his property, and had devised to his brother Ratansha, who predeceased him; and that Ardesir Bezanji's three sisters, *viz.*, herself, Sonabai and Gulbai, under s. 7 and sch. II, art. 2, of the Parsi Succession Act (XXI of 1865), (which, however, is applicable only where the deceased leaves neither lineal descendants nor a widow or widower), and s. 106 of the Indian Succession Act (X of 1865) (which does not appear to have any bearing upon the case), are entitled to succeed to his property.

Sonabai entered a caveat similar to that of her sister Dhanbai.

Neither the divorced wife Gulbai, nor her son, or the third sister Gulbai entered any appearance or offered any opposition to Jerbai's application.

The alleged will of Ardesir Bezanji, bearing date the 1st May 1871, and registered, was produced by Kaikhasura Dosabhai, and when translated into English is as follows:—

"I, Parsi Ardesir Bezanji Viajkhorana, make my last will as follows:—And I have made this will in my life-time, and in a sound state of mind.

"1. I have a daughter, named Jerbai, by my deceased (first) married wife Bai Pirozbai. As she has in no way done me any [541] service, nor rendered me any assistance, I have excluded, that is, precluded, her from inheritance.

"2. My second wife named Dhanbaiji, is the daughter of Hormasji Dadabhai Ghadiali, of Kurrachi. Within a few months only after her marriage with me, she quarrelled with me and went away to Kurrachee. And as she, also, has done me no service and given me no comfort whatever, I have excluded, that is, precluded her also from inheritance.

"3. My third wife, named Gulbai, is of extremely bad character. And there is a son by her named Sorabji. But he is not of my seed (1). But, be what it may, this wife has molested me and made me miserable in a variety of ways. And she even brought actions against me in the Police and Civil Courts. Consequently, I have given her a lump sum (in relinquishment) of her and her son's rights, and have obtained a release.

(1) *i.e.*, not begotten by him.

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For these reasons both of them have now no claim whatever. However, (? and) by this my will I have excluded, that is, precluded, both (my) above-mentioned wives and the said son [from inheritance ?]

"4. Having excluded, that is, precluded, all the persons mentioned in the first, second and third clauses above, and other persons who may be connected (with me) I appoint my elder brother, Parsi Ratansha Bezanji Viakhora, the sole heir of all my property after my existence (shall have ended), that is to say after my decease. Of all my property, (*viz.*) cash, ornaments lands and gardens and of all the household furniture, which I have now in my possession, I have appointed my said brother Ratansha the heir. No one can raise any objection to the same. And if any objection be raised, the same shall duly be null and void.

"5. The expenses of [and ceremonies after] my death shall also be defrayed by my said brother. And at the '*uthamna*' (ceremony) my said brother also shall duly become my son. This will I have made of my free will and pleasure and in sound mind, understanding and consciousness. The same shall duly be agreed to by the whole of the Parsi community and by the British Government."

For the applicant Jerbai it was contended that, assuming the will to be genuine, yet Ratansha having died previously to Ardesir [542] Bezanji, the latter must be regarded as having died intestate, and that, notwithstanding what was said in the will as to Jerbai, she was entitled to succeed to his property, and therefore, to a grant of letters of administration; that his sisters, neither under the will, nor under the law of succession, took any interest in his property, and that the alleged oral bequest to Erasha was not made under such circumstances as to be valid.

The caveators objected to the eligibility of Ratanji Rastomji, the husband of the applicant Jerbai, to be her attorney, as he only occasionally resided in the Presidency of Bombay, and generally resided at Lucknow with the applicant.

The District Judge held, 1, (referring to s. 25 of the Indian Succession Act) that Ardesir Bezanji died intestate as to his property, inasmuch as his will, of the 1st May, 1871, became completely inoperative by the death of his brother Ratansha in the life-time of Ardesir Bezanji. 2. That the so-called oral bequest to Erasha could not exclude Jerbai from the right to letters of administration, for, if it were to be regarded as testamentary, it was invalid, as not having been made under such circumstances as are required by Part IX of the Succession Act; and, if it were a gift of moveables, of which delivery was made under s. 178 of the same Act, such gift would not constitute Erasha heir of Ardesir Bazanji, and would not give Erasha any right to letters of administration, and, moreover, would not affect immoveable property. As to Dhanbai, the widow of Ardesir Bezanji, the District Judge, referring to *Lambell* v. *Lambell*(1), said that her separation from her husband "would be a reason apparently for excluding her" from succession to his property "under s. 201 of the Indian Succession Act," but he declined to decide that question, and said that, as she was cited, but did not appear to oppose the grant to Jerbai, or to ask for a grant to herself, he was not, by reason of the widow Dhanbai's existence, precluded from complying with Jerbai's application.

(1) 3 Hagg. 568; 570 Wms. on Executors, p. 417 (7th ed). And see *Chappell* v. *Choppell*, 3 Curt. 429.

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As to the divorced wife Gulbai, she, not having made any application for letters, and both parties agreeing that she had [543] been divorced, did not (the District Judge held) stand in the way of Jerbai.

The occasional residence of Ratanji Rastomji in the district of Surat the District Judge held to be sufficient: so he granted to him, as attorney for Jerbai, limited letters of administration under s. 214 of Act X of 1865.

Against that grant, Erasha by his guardian Kaikhasru Dosabhai, alone appealed.

The only point (amongst several taken in the memorandum of appeal) argued in this Court was that Jerbai, having been expressly excluded by Ardesir Bezanji in his will from taking any share in his property, was not entitled to a grant of letters of administration of his estate, either to herself or to her attorney.

He, however, having died intestate as to his property, *i.e.*, not having made any bequest or devise of it, which can take effect, inasmuch as his sole devisee Ratansba predeceased him, we think that the estate must go in accordance with the law of succession. The negative words which he has used, cannot exclude his daughter or widow Dhanbai from succeding to shares in the estate. *Johnson* v. *Johnson*(1) is directly in point to that effect. There the testator directed that his wife and her child Harriet "should be cut off from any part of his property, and should not receive any benefit or advantage therefrom." He died, leaving his wife and the said Harriet and several children surviving him, but made no disposition of his property, and Sir L. Shadwell, V. C., held that the said wife of the testator and his next of kin were entitled to succeed to the clear residue of his estate according to the Statute of Distributions.

Thus it will be seen that by the use of mere negative words, unaccompanied by any effective disposition of his property, it was held that the testator could not alter the course of the law. And in the *Tagore Will Case* (2), although the testator Prasanna [544] Kumar Tagore, who was offended by his son Ganendra's conversion to Christianity, by his will declared that he had already made such provision for Ganendra as was sufficient, and that Ganendra should "take nothing whatever under the will," yet the testator, having by that will attempted to create certain trusts of his property which were deemed to be *ultra vires* and void, was declared to that exent to have died intestate, and Ganendra, his son was held, as his heir-at-law, to be entitled, subject to the trusts of the will not declared void, to the real and personal property of the testator.

A somewhat, bu tnot precisely similar principle prevailed in *Holmes* v. *Godson* (3), in *Re Wilcock's Settlement* (4), and *Balkrishna* v. *Savitribai* (5), where the operation of law was not permitted to be defeated.

For the appellant, ss. 74 and 196 of the Indian Succession Act (X of 1865) have been relied on. But s. 74 is applicable only where the testator has made a disposition of his property, at least partially effectual, and s. 196 has no bearing upon the present case.

As to the intestacy of Ardesir Bezanji by reason of the failure of the only disposition of his property made by the will, ss. 25 and 92 of the same Act have been rightly relied upon for Jerbai.

(1) 4 Beavan, 318; 2 Wms. on Executors (7th ed.), 1488.
(2) 9 B. L. R. 377 (387, 416)=M. I. A. Supp. Vol., 47 (56, 86)=18 W. R., C. R. 359.
(3) 8 De Gex M. & G. 152, and *per* Turner, L.J. at p. 162.
(4) 1 Ch. Div. 229 and *per* Jessel, M.R. p. 231. (5) 3 B. 54.

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Under the Parsi Succession Act (XXI of 1865), widows and children rank before brothers or sisters.

We affirm the order of the District Judge with costs.

As to the right of Ardesir Bezanji's widow Dhanbai and his widow or divorced wife Gulbai and her son to any share or shares in the estate of Ardesir Bezanji, we do not give any opinion.

Order affirmed.

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[545] ORIGINAL CIVIL.

Before Mr. Justice West.

MATHURA NAIKIN, *Plaintiff v.* ESU NAIKIN AND OTHERS, *Defendants.** [22nd, 24th, and 25th June 1880.]

Naikins, adoption among—Inheritance—Partition, suit by daughter for—Custom—Usage as a source of law—Functions of Courts of Law and of the Legislature respectively in giving effect to usage—Judicial decisions giving effect to usage in India, when and how far to be followed.

The plaintiff and the defendants were naikins. The plaintiff, as the adopted daughter of the first defendant, sued to recover a share of the property in the hands of her adoptive mother which she (plaintiff) alleged to be family property.

Held, that adoption by naikins cannot be recognized by Courts of Law, and confers no right on the person adopted.

An adoption by a woman pre-supposes a husband to whom she adopts as her representative, and a naikin, while she remains a naikin, can have no husband.

Though daughters succeed to their mother's property, they cannot call for a partition during her life. That is a right peculiar to the son and grandson as joint owners by birth with the father of the ancestral estate.

Although the Courts in India are bound by charter to recognize the "usages of the Gentus," they are not limited to the sole sense of the word 'usage' which shuts out all amelioration. The practices of an abandoned class are, no doubt, a usage in the sense of a tolerably uniform series of acts, but they do not, therefore, spring from a consciousness of compulsion, but rather from mere habit, imitation and ignorance. Such usage is not a law, for over it presides the higher usage of the community at large from whose approval it must have derived any conceivable original validity, and in opposition to which it cannot subsist; and as the community comes to recognize certain principles as essential to the common welfare it will no longer lend its sanction to sectional practices at variance with the principles thus recognized. It is only according to the standards of the Hindu law that a usage has coercive force amongst Hindus; and what the Hindu law is, must, for the purposes of secular justice, depend on the general sense of the Hindu community.

Although at one time in India the existence of companies of temple women may have been thought not so repugnant to the essential principles of the Vedic Code as to prevent their recognition as a source of law for themselves, it is not so at present. The popular sentiment would now no longer give validity to a usage of adoption among prostitutes, which devotes children, while still infants, to a life of infamy. The whole constitution [546] of the class of courtesans would, it is certain, be now regarded by the great mass of the Hindu community as essentially vicious. The laws or rules by which such an association endeavours to make itself and its mischievous influence perpetual, would be deemed directly opposed to "the laws of God," and the usage itself, therefore, not as valid and coercive like a law, but as essentially invalid on account of its contradiction of the law. A contrary opinion, if shown to have been held and acted on in a time gone by, would unhesitatingly be referred to error, and a

* Suit No. 55 of 1879.