ORIGINAL CIVIL.

1881
December
15, 16, 17.

Before Sir Charles Sargent, Kt., Justice, and Mr. Justice Melvill.

MITHIBAI AND OTHERS (PLAINTIFFS) *v.* LIMJI NOWROJI BANAJI AND OTHERS (DEFENDANTS).*

HARI VALABDAS KALIANDAS, APPELLANT.

Agreement—Construction—Parsis in Mofussil of Bombay, English law how far applicable to—Lex loci—Rule in Shelley's Case—Act IX of 1837.

The members of a Parsi family, the heirs of one Framji Cowasji Banaji, deceased, entered into an agreement dated the 24th May, 1851, by which they agreed that the remaining income (after paying the deceased's debts) of a certain estate which had belonged to the deceased, called the Poway Estate, situated in the island of Salsette, and, therefore, in the Mofussil of the Presidency of Bombay, should be appropriated in certain shares among the heirs mentioned in clause 9 of the agreement—*i. e.*, among the parties to the agreement, "*but after their death their shares are to be enjoyed and received by their heirs and children from generation to generation for ever*". It was contended that Parsis being subject to English law, these words conferred an absolute estate in their respective shares upon the various parties to the agreement under the rule in *Shelley's Case*.

Held (affirming the order of Bayley, J.,) that, even assuming English law to be applicable, the English law so to be applied could not include the rule in *Shelley's Case*, which is a law of property or tenure based on feudal considerations, and unsuited to the circumstances of India; that the rule of construction to be applied to the agreement must in any case be to give effect to the intention of the parties according to the plain meaning of the language; and that to construe the agreement as giving more than a life-interest to the parties thereto, would be to defeat their obvious intention.

APPEAL from a decree of Bayley, J. See judgment reported in I. L. R., 5 Bom., p. 506.

Framji Cowasji Banaji died on the 12th February, 1851, leaving three sons—Jehangir, Pestonji, and Nanabhoy; three daughters, and some grandchildren by three other daughters who had predeceased him. At the time of his death he was possessed (*inter alia*) of the Poway Estate in Salsette which had been granted to him in fee by the East India Company in the year 1837. He left a will and a codicil, the latter of which was as follows:—

CODICIL.

In the way thus particularly set forth this will or testament was made before. It is to be considered as confirmed and upheld. And besides this, as to the property (called) the Sans Souci which I having sold, laid out on Poway Rs. 1½ (one

* Suit No. 377 of 1870.

1881

MITHIBAI v. LIMJI NOWROJI BANAJI.

and a half) lakhs. I cannot at present write at great length, because my health is much impaired; but now, by the grace of God, I am better: so I will afterwards make a memorandum, but at present this is all. On the———, 1831, I wrote a letter to Government, an answer to which arrived on the———, in accordance with which it shall not be competent to my heirs to sell this estate, neither shall it be competent to them to partition it. As to the conveying of water from Mugbhat to Kumatecpol (or Kamathipura) the outlay for that is to be made out of this Poway Estate; and, besides that, after making the outlays, whatever balance may remain my heirs are to divide and take. And as to the whole of the outlays for the water of Mugbhat, in case my heirs should neglect the same, I have made the Government joint trustees, (and) they will, disgracing you, cause the same (outlays) to be made. Therefore you should very honourably carry on that water charity perpetually. Now, if God will bestow good health on me, I will write a separate memorandum in regard to this. The English date the 15th December of the year 1831: the Kudmi 15th day *Dukhmir*, the 4th month *Teer*, *Yezdezerdi* 1201 (*Maha Sud* 11th of *Samvat* 1878), the day of the week—Thursday.

There was no disposition either in the will or codicil of the Poway Estate, nor did either of these documents contain any residuary clause or any words large enough to include the Poway Estate. By his will the testator virtually disinherited his eldest son, Jehangir, and his family.

Disputes having subsequently arisen with regard to the distribution of the property, an agreement was entered into on the 24th May, 1851, by the various parties interested. The following are the material clauses of this agreement :—

1. The said late Framji Cowasji Seth, deceased, had for many years past carried on an extensive business, and, agreeably to the affairs of this world and by reason of his trade, he has left behind him debts due by him, and has at the same time, by the favour of God, left very extensive landed property; but it is now the desire of all of us, the undersigned, that the deceased during the lifetime having entertained a wish to settle all his affairs with his own hand, but as it has pleased the Almighty to order him at last to leave this world and he departed this life on the 12th day of February, 1851, of the English year and the 19th day of *Furverdin* of the 6th month of *Sharavur* of the Kudmi, and carried with him the desire he had entertained of settling his affairs; but he, having been ill for a long time before his death, had, in accordance with both his wishes, commenced making out his new will, but as the same remained executed and unattested, we all of us, having unanimously joined together, do entertain the same wish that the debts due by, and to, him be paid and received in a proper manner; and with a view that no blot should in any way be attached to his name, we, the undersigned, are to aid and assist in conducting this business as far as it may lay in our power, and to carry on the whole affair with peace and unanimity, and, therefore, it became necessary to make this writing, and we are to act agreeably to the conditions of this writing, which is truly to be agreed to and abided by by all of us respectively and our heirs and executors.

2. On searching the presses of the late Seth Framji Cowasji, deceased, on the 17th of February, 1851, the above-mentioned will of the 5th July, 1828, with its codicil of the 15th December, 1831, was found in a tin-box; at which all of us were delighted that, after obtaining probate under the said will, the management of the affairs and dealings of our patron, the late Framji Cowasji, deceased, would be carried on with ease; but on examining it we found it had been made many years ago, whereupon we all, the undersigned, do hereby unanimously consent and agree that the said will should only be made use of, and abided by, for the purpose of obtaining probate from the Supreme Court, in order that the affairs and dealings of the deceased may be managed by the hands of his executors. Therefore none of us, the undersigned heirs, or any one else to whom a legacy or inheritance or a lump sum has been given in the said will, shall now or at any time hereafter make any claim or demand after the probate has been obtained, of the said will; and if any one should make any claim or demand whatsoever, it shall be by this writing considered null and void, and that this writing containing this arrangement after being executed and attested by all shall be registered in the Supreme Court along with the abovesaid will of the deceased, and we are truly to abide by the same.

4. After I, the undersigned Bai Bachubai, have obtained probate of the above-mentioned will of the 5th July, 1828, with its codicil, it is resolved, with the unanimous consent of us, Bachubai and all the undersigned, to give full authority to Parsi Cursetji Nusservanji Camaji for conducting the management of my late husband Framji Cowasji Seth's affairs and dealings, for collecting and paying (his debts), selling his landed property and other goods and effects, and managing his estates in Salsette and other villages; and this party, after I, Bai Bachubai, shall have obtained probate, is to commence to exercise his authority under this writing; but to whatever the said Cursetji Nusservanji Camaji does, neither I, Bai Bachubai, nor any of the other undersigned are to raise a dispute or objection of any kind whatever, and are not to swerve herefrom; and, should we at any time raise any dispute or objection, it is truly to be all null and void.

7. As to all the debts due by the late Seth Framji Cowasji, deceased (the proceeds of) the sale of his landed estate in Bombay and the amount of insurance of the ship *Buckinghamshire*, destroyed by fire, having been collected, and furniture and other goods and effects having been sold, and such outstanding debts as may be due by different persons having been collected, his creditors should be paid. But on selling and collecting all the above (property), should all the creditors be not paid in full, then there are six villages, inclusive of Poway in Salsette belonging to the deceased which have been obtained from Government rent-free for ever: out of the income of these villages in the first place water should be supplied for the use of the poor community of Kamathipura in Bombay which the late Framji Cowasji Seth, deceased, has been supplying from the year 1824 A.D. out of the well in his Girgaon oart, called Mugbhat; and, in order that this charity may continue for ever, a trust-deed in English, dated the 30th September, 1837, had been made for drawing Rs. 2,400—namely, twenty-four hundred—annually out of the income of the villages, inclusive of Poway; and the English Government has been appointed trustees therein with a view that, should the heirs of the deceased be unable to supply the water properly, then Government—the trustees

1881

MITHIBAI v. LIMJI NOWROJI BANAJI.

having drawn out of the income of the village of Poway the above-mentioned sum of Rs. 2,100 every year—are to conduct and preserve that charity work for ever. Therefore, after the amounts of these charges of the karkuns and sepoys and other charges of the villages, inclusive of Poway, have been deducted from the amount of the income, the surplus, whatever it may be, should be paid in the best possible way to the creditors in part payment of the interest; and, in case there be any surplus, the same should be paid to them in equal proportions, in part payment of their principal, until all the debts of the late Framji Cowasji, deceased, are discharged: payments are to be truly made out of this income.

9. We all, the undersigned heirs of the late Seth Framji Cowasji, deceased, have by our unanimous consent acknowledged and determined by the writing of the undermentioned persons to be the heirs of the said Framji Cowasji, deceased. The particulars of their names and the manner in which it is agreed their shares are to be paid, are as follows:—

25 (twenty-five) cents to Bai Bachubai, the widow of our late patron, Framji Cowasji.

50 (fifty) cents to be divided equally among the sons who are living. The particulars whereof are as follows:—namely, (1) Jehangir Framji, (2) Pestonji Framji, and (3) Nanabhoy Framji—50.

25 (twenty-five) cents to be divided in equal shares among the living daughters and the heirs of the deceased daughters:—(1) Bai Rutonbai, the widow of the late Nusserwanji Rustomji Baly Hamaji, deceased.

(2) Bai Navazbai, the wife of Dhunjibhoy Byramji Rana.

(3) Bai Pirozbai, the wife of Ardasir Cursetji Seth.

(4) The late Goolbai, deceased, wife of the late Dhunjibhoy Nusservanji, deceased, is dead; and her daughter, Hirabai, is at present her heir, and she is the wife of Sorabji Pestonji.

(5) The late Meherbai, deceased, the wife of Pestonji Nowroji, is dead, and her heirs are her two sons, Ardesir Pestonji and Nowroji Pestonji, and these sons are at present young, and are living with their father, Pestonji Nowroji; and having appointed along with their father and guardian two other persons as trustees, and the amount of the share of these young heirs until such time as they come of age having been duly guaranteed,—that is to say, having been invested in Government paper; the accumulating interest is to be added thereto, and their shares should be paid to them as they respectively come of age. The late Maneckbai, deceased, the wife of Dadabhoy Rustomji, is dead, and her heirs are her daughter, Sirinbai, and her son, Kaikhashru, but those children are at present young and are living with their father, Dadabhoy Rustomji; and having appointed along with their father and guardian two other persons as trustees, the amount of the shares of these young heirs until such time as they come of age having been duly guaranteed,—that is to say, having been invested in Government paper,—the accumulating interest is to be added thereto, and their shares should be paid to them as they respectively come of age. According to these particulars, 100 —namely, one hundred—cents are to be apportioned among Bai Bachubai, the three sons, the three living daughters, and the children and heirs of the three deceased daughters, agreeably to the shares of the heirs settled above.

10. Agreeably to what is written above, the said Bai Bachubai, the widow of our patron, the late Frámji Cowasji, deceased, having obtained probate in her own name alone under the said will of our patron, the late Frámji Cowasji, deceased, and having given a full authority to her attorney or vakil, the above-mentioned Cursetji Nusservánji Cámáji is to discharge all the debts due by our patron, the late Frámji Cowasji, deceased, and after paying all those debts and after paying them by selling the landed property and other goods and effects, the surplus, whatever it may be, shall be divided among the said heirs, determined in the above-mentioned paragraph, 9, agreeably to what is written in that very paragraph, and the same is truly to be apportioned by the said Bái Bachubái, the widow of the late Frámji Cowasji, deceased, and Cursetji Nusservánji Camaji.

11. After paying in full, agreeably to what is written above, all the creditors of the late Seth Frámji Cowasji, deceased, out of the income of the Poway Estate of the late Seth Frámji Cowasji, deceased, as written above; *out of the remaining income*, whatever it may come to, after paying for the two charitable works—namely, supplying water and the management of fire-temple, for which trust-deeds have been made agreeably to and as mentioned in paragraphs 7 and 8—and after deducting the amount of the expenses of those villages, *the remainder is to be apportioned to the above-mentioned heirs agreeably to the shares mentioned above; but after their death their shares are to be enjoyed and received by their heirs and children from generation to generation for ever;* no other person shall make any claim or demand whatsoever thereon; and, should any male or female heirs give away his or her or their share to a stranger or to any improper person, the same should not take effect; and we, all the heirs, do agree by this writing that, should anything of this kind be done, it is to be all null and void, and is truly to become void; and should any of the undermentioned heirs or their heirs and children die hereafter without issue, then his or her share is truly to go to the surviving male and female heirs, and my (Bai Bachubai's) share, too, after my death, is truly to go to the male and female heirs settled above, and, in the event of their death, to their children and heirs in the manner written above. This we, all the undersigned heirs concurring with one another, are truly to abide by. Should we or our children and heirs now or hereafter make any alterations or deviations therein, or make any claim or demand thereon, it is to be truly null and void. Moreover, the authority for the management of all the remaining estate of the late Seth Framji Cowasji, deceased, whatever it may be, and the income of the villages in Salsette, inclusive of Poway, and the management and the taking care thereof, and for the management of the supply of water for charity from the Girgaon cart to the poor of Kamathipura in Bombay belongs to us, Pestonji Framji and Nanabhoy Framji, executors and heirs appointed in the said will of the late Seth Framji Cowasji, deceased; and, in the event of the death of either of them, one of his sons and heirs is to be appointed by the other, and so from generation to generation, who is to do all the business agreeably to what is written above. Should any one die without appointing any one out of his sons as his heirs, then his eldest son, whoever he may be, is truly to join in conducting all the management on behalf of his father agreeably to what is written above, and is truly to give and receive what is due to and from the other

1881

MITHIBAI v. LIMJI NOWROJI BANAJI.

heirs appointed by this writing agreeably to what is written above; no other heirs have any authority in this matter; and, should any one whatsoever raise any claim or demand whatsoever thereon at any time, it is truly to be null and void.

12. The trust-deeds, which have been executed by our patron, the late Framji Cowasji, deceased, during his lifetime are to be kept in force in every respect, and they shall not in any way be affected, or be suffered to be affected, by anything contained in this writing; and we are truly to agree and abide by whatever is contained therein, and conduct ourselves agreeably thereto.

14. As the late Seth Framji Cowasji, deceased, had himself no right either to sell or mortgage the villages and the estate in Salsette belonging to our patron, the late Framji Cowasji, deceased, consequently none can ever exercise such a right over the same in any respect; but we, the undersigned heirs, and our successive heirs do agree that we are in no way able either now, or at any time hereafter, to sell or mortgage the said estate in Salsette; but in addition thereto, agreeably to what is written in the above paragraph in this writing, it is agreed that the claim of inheritance of us, the undersigned heirs of our patron, the late Framji Cowasji, deceased, is to be received out of the income of this estate. As to that claim we, the undersigned, all the heirs of the late Seth Framji Cowasji, deceased, and our successive heirs do agree that *the claim of each of us separately over the above-mentioned income is not in any way to be sold or to be given in writing to any one now or hereafter by any one of us or any of our successive heirs*; and should any one do any such thing it shall truly be null and void by this writing. Our respective shares, after they shall have come into our hands, may be used and enjoyed by us in any way we like; but, agreeably to this writing, we are not to sell or give away in writing our prospective income to any body, which we all are truly to agree to and by agreeably to this writing.

15. We, after having read and understood the above-mentioned particulars, have at present signed this writing, and are truly to sign without any objection another writing also that may be made in English from this writing through an attorney.—Dated *Samvat* 1907, *Vaisak Vud* the 9th day of the week, being Saturday, the English date being the 24th of May, A. D. 1851.

The testator's eldest son, Jehangir, died on the 16th December, 1863, having by his will appointed his wife, Mithibai (the first plaintiff in this suit), his executrix, and given her authority over his inheritance and share in the property of his deceased father. Pestonji, the second son, died after the institution of the present suit; and one of his executors, Limji Nowroji Banaji, was made defendant in his stead.

The present suit was for the administration of the testator's estate, and was filed in December, 1870. The plaintiffs were Mithibai, the widow and the heiress of Jehangir, the eldest son of the testator; and the defendants were the other parties to the

family agreement of the 24th May, 1851. The plaintiffs prayed *(inter alia)* that the rights and interests of the plaintiffs and defendants under the said agreement might be ascertained and declared, and that the net residue of the testator's estate might be ascertained and divided according to the shares mentioned in the said agreement.

By a consent decree made in the said suit on the 24th February, 1872, it was declared *(inter alia)* that the plaintiffs and defendants were entitled to have the estate of the testator ascertained and distributed under the agreement of the 24th May, 1851, and that the said agreement was a binding and valid agreement between the parties thereto, and the suit was referred to the Commissioner for taking accounts to enquire and report who were entitled to a share in the said estate, and in what shares and from what duties they were so entitled.

All the right, title, and interest of Nanabhoy (the third son of the testator) in his father's property having been attached in execution of decrees against him, all his interest in the property and all the rights secured by such decrees become subsequently vested in Hari Valabdas Kaliandas, who by a judge's order, dated 18th March, 1880, was added as a party defendant to the suit.

In 1881 the Assistant Commissioner (Mr. Farran), before whom the accounts were being taken under the decree, made a special report certifying that he had decided that the persons who had signed the agreement of the 24th May, 1851, had a life-interest only in the Poway Estate in Salsette; that they had no power to dispose of any interest in that estate, save such life-interest by deed or will; and that the interest of the defendant, Hari Valabdas Kaliandas, extended only to the life-interest of the defendant, Nanabhoy Framji, in the Poway Estate.

The defendant, Hari Valabdas Kaliandas thereupon moved to vary the special report. The motion was heard before Bayley, J., who refused the motion, and confirmed the Commissioner's special report[1]. Hari Valabdas Kaliandas and other parties to the suit then appealed.

(1) See judgment reported I. L. R., 5 Bom. 506.

1881

MITHIBAI v. LIMJI NOWROJI BANAJI.

Latham and *Inverarity* for the appellants.—The question is as to the construction of clause 11 of the agreement. It might be construed as giving—

(1) an estate in fee to the persons named in clause 9 of the agreement, with a gift over on death without issue;

(2) or as an estate for life to the persons named in clause 9, with remainder over;

(3) or an estate for life, without any gift over.

We contend that the first construction is the right one, and that the Court will reject the provision against alienation. By this clause a share is given to each of the parties for life, and after his death to his heirs and children. Applying the rule in *Shelley's Case* to this limitation, each party takes an estate in fee. The first point to determine is, what law is to be applied: The parties here are Parsis resident in the Mofussil. We submit that the English law, as the *lex fori*, should be applied: *The Secretary of State* v. *The Administrator General of Bengal*(1); *In the matter of Kahandas Narrandas*(2); *Naoroji* v. *Rogers*(3); *Stephen* v. *Hume*(4); *Abraham* v. *Abraham*(5); *Musleah* v. *Musleah*(6); *Sarkies* v. *Prosonomoyee*(7) The case ought probably to be dealt with under Act IX of 1837, which is the *lex fori* of this Court.

The agreement only deals with the income of the property, but by English law a gift of income gives the *corpus*: 1 Jarman on Wills, 756; Indian Succession Act (X of 1865), sec. 159. The fact that the gift is a gift of income only, does not prevent the application of the rule in *Shelley's Case*: Tudor's Real Property Cases (2nd ed.), 765-6. There was clearly no intention to give to the issue as purchasers, and, where this is so, the rule in *Shelley's Case* applies. There is no designation of heirs. The idea of the parties to the agreement was mainly that the estate should descend in the family; but there is no preference given to any particular person. Counsel referred to the Indian Succession Act (X of 1865), secs. 80 and 84; Tudor's Real Property Cases (2nd ed.), 626—858; *Bradley* v. *Peixoto*(8); *Lear* v. *Leggett*(9); Fearne on

(1) 1 Beng. L. R. 87, O. C. J.
(2) I. L. R., 5 Bom. 154.
(3) 4 Bom. H. C. Rep. at p. 79.
(4) 1 Fulton at p. 243.
(5) 9 Moore's Ind. Ap. 195.
(6) 1 Boulnois, 234, 239.
(7) I. L. R., 6 Calc. 794.
(8) 3 Ves. Jun. 324.
(9) 1 Rus. & My. 690.

Contingent Remainders, 200; 1 Jarman on wills (3rd ed.), 281-82; Act XXXI of 1854, sec. 2; Stat. 1 & 2 Vic., c. 110, secs. 11—13; 27 and 28 Vic., c. 112, sec. 14.

Pigot for other appellants.—Clause 9 of this agreement declares who are the heirs. They take an estate of inheritance; clause 11 merely appoints managers, and directs how these managers are to deal with the income. The words in that clause are not intended to be words of limitation, but merely restrictive of the power of disposition.

Marriott (Advocate General) for respondent.—By this agreement the legal estate of the Poway property is in the manager. The Poway property, not being in the island of Bombay, is a chattel real, and so Act IX of 1837 does not apply. We say the rule in *Shelley's Case* does not apply, and that the parties take for life only. In importing English law into India all purely English technicalities have been discarded: *e.g.* the law of mortmain—*Attorney General* v. *Stewart*(1); *Mayor of Lyons' Case*(2). It is true there is no *lex loci* in the Mofussil. So that English law, which is the *lex fori*, must be applied, but it must be modified so as to be suitable to the community. The rule in *Shelley's Case* is of feudal origin, and wholly out of place in India: *Perrin* v. *White*(3); *Advocate General of Bengal* v. *Ranee Dossee*(4). Counsel referred to Supreme Court Charter, secs. 33 and 41; *In re Kahandas Narrandas*(5); *Varden Seth Sam* v. *Luckpathy*(6); *Goodtitle* v. *Herring*(7); *Knight* v. *Ellis*(8); *Ex parte Wynch*(9); *Goldney* v. *Crabb*(10); *Foster* v. *Wybrants*(11). As to the construction of the agreement, we contend that the estate is given to the children as purchasers, whatever estate they may take. We submit that the first takers, at all events, have only a life estate. "Children heirs" is equivalent to "children", and children is a word of purchase. As to the estate taken by Hari Valabdas Kaliandas, counsel referred to Act XXXI of 1854, sec. 2; *Davies* v. *Tollemache*(12).

(1) 2 Mer. 143.
(2) 1 Moore's Ind. Ap. 175 at p. 270.
(3) 4 Burr. 2580.
(4) 9 Moore's Ind. Ap. 424.
(5) I. L. R., 5 Bom. 154.
(6) 9 Moore's Ind. Ap. at p. 320.
(7) 1 East 264.
(8) 2 Bro. C. C. 570.
(9) 5 De G. M. & G. 188.
(10) 19 Bea. 338.
(11) 11 Ir. L. R. Eq. 40.
(12) 2 Jur. N. S. 1181.

1881

MITHIBAI v. FRAMJI NOWROJI BANAJI.

Latham in reply referred to Burge's Colonial and Foreign Laws Vol. II, 376, as to how far English law is in force in a colony.

SARGENT, J.—The question in this appeal turns upon the construction to be placed on a Gujarati agreement dated the 24th May, 1851, made between the widow, Bachubai; the three sons—Jehangir, Pestonji and Nanabhoy; and the three surviving daughters—Rutonbai, Navazbai and Pirozbai; and the children and heirs of three predeceased daughters—Goolbai, Meherbai and Maneckbai of one Framji Cowasji who died on 12th February, 1851; leaving, amongst other property, an estate in Salsette, called the Poway Estate, which had been granted to him in fee by the East India Company. Framji Cowasji left a will and codicil; but disputes and differences having arisen respecting the same and the distribution of the property, the several persons interested in his estate entered into the above agreement for the amicable settlement of his affairs.

A suit was filed on 5th December, 1870, by Mithibai, widow of Jehangir Framji, one of the sons and his heirs, against the other members of the family to carry out the said agreement and have the rights and interests of the parties, under the agreement of 24th May, 1851, ascertained and declared; to make the surviving executors of the will account; and to have a receiver appointed. On 24th February, 1872, a decree was made, declaring the agreement to be binding between the parties, and referring it to the Commissioner to inquire and report who were then entitled to share in the estate then remaining of Framji Cowasji, and in what shares and from what dates they were so entitled on the footing of the said agreement. The appellant, Hari Valabdas Kaliandas, was subsequently made a party to the suit on 18th March, 1880, by order of the Court, as the purchaser, at an auction-sale, of all the right, title, and interest of Nanabhoy, one of the testator's sons, in the Poway Estate; and having taken out a warrant in the Commissioner's office to show cause why the Commissioner should not issue a certificate or special report defining the extent and nature of the estate and interest in the Poway Estate of the defendants, Hari Valabdas and Nanabhoy Framji and of the other persons named as heirs in the ninth clause of the said agreement, "the Commissioner made a special report by

which he decided that the persons who signed the agreement took only a life-interest in the Poway Estate, and that the interest of Hari Valabdas Kaliandas extended only to such life-interest of Nanabhoy Framji." This report was confirmed by order of the Court on 4th August, 1881, and against that order the present appeal is now brought.

It appears, from the judgment of the learned Judge who made the order, that the question raised before him was whether the persons who signed the agreement took an absolute interest in the Poway Estate or only a life-interest. This issue, however, could not be properly decided in the absence of the persons who might prove to be entitled in remainder on Nanabhoy's death, assuming his interest to be a life estate, and yet, with the exception of the children of the son Jehangir who with their mother Mithibai thought proper to support the contention that the signataries to the agreement took the estate absolutely, not one of those even apparently entitled in remainder, was either on the record or represented before the Commissioner or the Division Court. It is true that Nanabhoy appeared before the Division Court by the Advocate General, and supported the certificate of the Commissioner; but it was only in his individual character, in which, indeed, it is difficult to see how he had any *locus standi* at all, all his interest having become vested in Hari Valabdas.

It was plain, therefore, that this appeal, if heard on the merits, would be heard in the absence of the parties really interested in supporting the order of the Court below—at any rate except so far perhaps as regards the share of Jehangir. As, however, great expense had already been incurred, and the special object of obtaining the certificate of the Commissioner was to obtain a declaration as to the interest of Nanabhoy, we consented to hear the appeal on the merits after having the persons placed on the record who are presumptively interested in supporting the order so far as regards the share of Nanabhoy.

Now the agreement in question, after providing for the payment of the debts of the deceased Framji Cowasji, contains in its ninth clause an unanimous acknowledgment and determination by the signataries that they are the heirs of Framji Cowasji in

1881

MITHIBAI v. LIMJI NOWROJI BANAJI.

certain shares therein particularly mentioned, and by the eleventh clause it is directed that "the remainder of the income of the Poway Estate (after providing for the payment of the debts and other charges as therein before mentioned) is to be apportioned to the above-mentioned heirs agreeably to the said shares, but after their death their shares are to be enjoyed and received by their heirs and children from generation to generation for ever. That, should any male or female heirs give away his or her or their share to a stranger or any improper person, the same should not take effect, and that, if any thing of the kind should be done, it should be null and void; and, lastly, that if any of the undermentioned heirs, or their heirs and children, die thereafter without issue, their, his or her share should go to the surviving male and female heirs."

It was contended for the appellants—1. That, having regard to Act IX of 1837, the Court ought to treat the property in question as chattels real; that English law, including the rule in *Shelley's Case*, was applicable to the construction of that clause, and the designated heirs took their shares absolutely; that (2) assuming the property must be regarded as real estate, the designated heirs, at any rate, took an estate tail, and that the right to bar the entail would pass to Hari Valabdas; but that in any case, assuming that the rule in *Shelley's Case* was not applicable, the language of the clause was such as is generally used in native documents and wills to confer an absolute estate, and should be so construed in the present case.

As the contract relates to immoveable property outside the territorial jurisdiction of this Court, the rights of the parties must, according to the well-established rule, be determined by the *lex loci rei sitæ*. This rule would be applicable both as forming part of the English law, which, as stated by the Chief Justice in *Nowrojee* v. *Rogers*[1], has always been the law applicable to Parsis in this Court, subject to certain statutory and other exceptions, or as the well-established rule of jurisprudence adopted by all writers on the subject.

Much learned argument was addressed to us as to what is the *lex loci* of the Mofussil. We do not, however, think it necessary

(1) 4 Bom. H. C. Rep. 1.

to come to any distinct conclusion on this question which has occupied the attention of so many learned Judges with such varied results. In the view we take of this case it becomes unnecessary to determine whether there be any *lex loci* properly so called in the Mofussil, or, if there be, whether it is the English law in some modified form or the Regulations; as we cannot doubt that, even assuming English law to be the *lex loci* in the Mofussil, or that, at any rate, it must be applied in this Court in the absence of any *lex loci*, the English law so to be applied cannot include the rule in *Shelley's Case*, which, although said to be a rule of law and not merely of construction (Jarman on Wills, Vol. 2, 273, 274, 278) was, at any rate, a law of property or tenure based upon feudal considerations, and is quite unsuited to the circumstances of this country. Such is the view taken by Mr. Fearne, in his Essay on Contingent Remainders, of the origin of the rule, and which was adopted by Lord Cranworth and Lord Justice Turner in *Ex parte Wynch*[1] as the ground for refusing to follow those cases in which the rule had been applied to personalty. If, however, the rule—which, as Mr. Jarman says at p. 278, generally operates to subvert the intention—be dismissed as inapplicable, it is immaterial whether the English law or the Regulations be applied in construing this agreement. In either case the rule of construction must be to give effect to the intention of the parties according to the plain and obvious meaning of the language used.

Now, we cannot doubt that the parties to this agreement have clearly expressed their intention that the enjoyment of their respective shares should be confined to a life-interest. The words are: "The remainder (*i.e.*, of the income of the property) is to be apportioned to the above-mentioned heirs agreeably to the shares mentioned above, but after their death their shares are to be enjoyed and received by their heirs and children from generation to generation for ever." It was said, indeed, that this amounts to nothing more than an agreement that the designated heirs and their heirs should enjoy their respective shares from generation to generation—words which, it was said, even with a clause against alienation, would be construed to give an absolute

(1) 5 De G. M. & G. 188.

1881

MITHIBAI v. LIMJI NOWROJI BANAJI.

estate in a native will. In *Arumugam Mudali v. Ammi Ammal*[1] the Court refused to place that construction on language almost identical with that in the present agreement, on the ground that it would defeat the intention of the testator. Now, in the present case it is to be remarked we have not to construe a will, but an instrument *inter vivos*, by which the parties have themselves defined their interest in the property by mutually agreeing in express terms that, after their respective deaths, their respective shares in the income should be enjoyed and received by another designated class, thus showing, as plainly as words can express it, a distinct intention that their own interest in the property should be confined to the enjoyment of the income during their lives. This view of the intention of the parties is quite independent of the question, whether the land be regarded as of the nature of freehold or chattels real. We may, however, remark that Act IX of 1837 only applies to immoveable property within the jurisdiction of the High Court, and, moreover, only treats such immoveable estate as chattels real and not as freehold so far as regards the transmission of such property on the death and intestacy of a Parsi or by the last will of such Parsi; whereas in the present case the lands are outside the jurisdiction of the High Court, and the question is as to the construction to be placed on an agreement entered into by persons assumed to be the heirs of the testator.

Under these circumstances we think that to construe this agreement as giving more than a life-interest to the parties to it, would be to defeat their clear and obvious intention. As to the persons who are entitled to take on the death of the several designated heirs, they cannot be ascertained until that time arrives, and it would, therefore, be premature to express any opinion as to what estate they will take.

All parties to have their costs out of the estate.

Order affirmed.

Attorneys for the appellants.—Messrs. *Craigie, Lynch, and Owen* and Messrs. *Crawford and Bovey.*

Attorneys for respondents.—Messrs. *Tobin and Roughton.*

(1) 1 Mad. H. C. Rep. 400.