APPELLATE CIVIL.

Before Mr. Justice M. Melvill and Mr. Justice Kemball.

1881
September 21.

LAKSHMISHANKAR AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* VAIJNA'TH AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Hindu will—Bequest for the performance of ceremonies and giving feasts to Brahmans—Bequest of undivided share of joint property.

A bequest by a Hindu for the performance of ceremonies and giving feasts to Brahmans is valid.

A Hindu has no power to bequeath his undivided share of joint family property.

THIS was a special appeal against the decision of S. H. Phillpotts, Judge of Ahmedabad, confirming the decree of Rao Saheb Chunilal Maneklal, Subordinate Judge of Borsad.

One Umayashankar by a will dated the 14th of November, 1874, devised all his property to the plaintiffs as trustees, directing them to reduce it to money, and expend it in the performance of his funeral ceremonies and in feeding Brahmans according to the customs of his caste. The material part of the will was as follows :—"Whatever property might remain at the time of my death, it is my wish to expend it in the performance of ceremonies and giving feasts to Brahmans, according to the custom of my caste, as far as it may be possible. I, therefore, entrust the business to the two persons mentioned below [the plaintiffs] who are my relatives. They should reduce the property in their possession after my death and apply it towards the purposes above described. In that nobody should interfere, because nobody has a right to interfere, because my cousins have no share in this property, and I am at enmity with them, and, therefore, I do not like to give them any portion of it. I give full authority to the two persons to sell the property and to apply the proceeds of the sale in performance of obsequies at such places as they might think proper." Relying upon this will the plaintiffs sued the defendants to recover possession of a portion of a field, some trees, and a building-site. The defendants contended that the will was invalid ; that the field was their joint family property which the testator could not will away.

* Second Appeal, No. 131 of 1881.

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The Subordinate Judge held the will to be invalid. He argued that the testator in making the will was not actuated by religious motives, but wished to disinherit the defendants from feelings of enmity. He found that the defendants for a whole year after the testator's death had performed his funeral ceremonies. He referred to the cases of *Morice* v. *Bishop of Durham*(1); *Williams* v. *Kershaw*(2); *Ellis* v. *Selby*(3); *The Advocate General* v. *Damodar Madhavjee*(4); *Pranjivan Tulsidas* v. *Devkuvarbai*(5); *Baker* v. *Sutton*(6).

The District Judge agreed with the Subordinate Judge, and confirmed his decree.

The plaintiffs appealed to the High Court.

Nanabhai Haridas, Government Pleader, for the appellants.—The bequest is specific, and neither vague, indefinite, nor uncertain. It is for the performance of the testator's funeral ceremonies and to the extent of the property in giving feasts to Brahmans according to the custom of his caste: Perry's Oriental Cases, 526. In *Dwarkanath Bysack* v. *Burroda Persaud Bysack*(7) Mr. Justice Pontifex upheld a bequest directing a trustee to feed "the really poor and needy at Gopinathji", and his decision was confirmed, in appeal, by Garth, C. J., and Markby, J. In that case the learned Judges considered the English cases referred to by the Subordinate Judge and a good many others.

Manekshah Jehangirshah.—The Subordinate Judge has held that a part, at least, of the property is joint. The District Judge has not touched that point at all. If the property is joint, the testator could not will away his undivided share. This appears on the face of the plaint. This point must be inquired into, even if the will be held to be otherwise valid.

MELVILL, J.—We see no reason for holding that a bequest "for the performance of ceremonies and giving feasts to Brahmans" is invalid. Such a bequest was upheld by the Calcutta High Court in *Dwarkanath Bysack* v. *Burroda Persaud Bysack*(7). The Bombay cases, on which the Courts below rely, merely establish

(1) 9 Ves. 399.
(2) 5 Cl. & F. 111.
(3) 1 M. & Cr. 286, 298, and 299.
(4) Perry's Oriental Ca. 526.
(5) 1 Bom. H. C. Rep. 76.
(6) 1 Keen. 224.
(7) I. L. R. 4 Calc. 443.

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the proposition that a devise to '*dharma*' is void, because the word '*dharma*', without any qualifying expression, is too vague an indication of the testator's intention to constitute a valid gift to charity. A specific bequest, for the purpose of particular charity, stands on a different footing.

It may be, however, that the will (exhibit No. 3) is invalid, wholly or in part, on another ground, viz., that the testator had no power to bequeath his undivided share of joint family property: *Gangubai* v. *Ramanna*(1) and *Vrandavandas* v. *Yamunabai*(2). There has been no finding, by the Courts below, on the question, whether the property in suit, or any part of it, was joint family property at the date when the will (exhibit No. 3) was executed. If it were so, the will, so far as it affects to deal with the testator's interest in such undivided property, would be invalid. The decrees of both the Courts below must be reversed, and the case remanded for a new decision, with reference to the issue above suggested. Costs to follow final decision.

Decrees reversed.

(1) 3 Bom. H. C. Rep. 66, A. C. J. (2) 12 Bom. H. C. Rep. 229.

APPELLATE CIVIL.

Before Mr. Justice M. Melvill and Mr. Justice Kemball.

September 12.

KHUSA'LBHA'I AND OTHERS (PLAINTIFFS), APPLICANTS, v. KABHAI AND OTHERS (DEFENDANTS), OPPONENTS.*

The Civil Procedure Code (Act X of 1877), *Section* 386—*Act XII of* 1879, *Sections* 60 *and* 108—*Limitation Act XV of* 1877, *Schedule II, Article* 171 *B—Deceased defendant—Application to make legal representative defendant—Construction of Limitation Acts.*

Subsequently to the institution of the plaintiffs' suit, one of the defendants died, and his son, as his legal representative, was made a defendant in his stead. The new defendant *(inter alia)* objected that his father had been dead more than six months before the application of the plaintiffs to make him a defendant, and that, therefore, the suit should abate, as provided by the last clause of section 368 of the Civil Procedure Code Act X of 1877 (introduced by the amending Act XII of 1879) and article 171 B of the Limitation Act XV of 1877, which prescribes a period of sixty days within which an application should be made to have the representative of a deceased defendant made a defendant to a suit.

* Extraordinary Application, No. 26 of 1881.