1881

PURMANUNDASS JIVANDASS v. H. R. CORMACK.

November, 1878, at 9 per cent., until the 28th December, 1878, the date of the presentation of the petition to wind-up the company, less the sum of Rs. 800, the amount of the promissory note, with interest thereon at the above rate up to the 28th December, 1878. He must return the 385 shares to the official liquidators if they desire to have that absolutely worthless paper.

Purmanundass must have his costs of, and incidental to, his claim and of the hearing thereof, and of this day, out of the estate of the company; such costs to be paid by the official liquidators in full and in priority to any claims of shareholders.

The official liquidators will have their costs, to be taxed as between attorney and client, out of the estate of the company.

All the above costs to be taxed as if this were a long cause in Court.

NOTE.—An appeal was filed by the official liquidators against the above decision, but was not proceeded with.

Attorneys for the claimant.—Messrs. *Hearn, Cleveland, and Little.*

Attorneys for the company.—Messrs. *Ardasir and Hormasjee.*

ORIGINAL CIVIL.

Before Mr. Justice West.

BAI MANECKBAI (PLAINTIFF) v. BAI MERBAI AND OTHERS (DEFENDANTS).*

December 15.

Parsis—Statute of Frauds—Stat. 29 Charles II, c. 3—Trust—Resulting trust.

The plaintiff, who was the widow of G., sued the defendant, the executrix of J., to recover a sum of Rs. 7,394-9-6, part of the purchase-money of a house which had been sold by J. in his lifetime, and which the plaintiff alleged had been, shortly before his death, conveyed by her husband G. to J. in trust to sell and hold the proceeds in trust for G's family. The defendant denied the trust, and insisted that J. had purchased the house from G. for valuable consideration. Both J. and G. were Parsis.

Held that, even assuming that no consideration was given by J. to G. for the house, the plaintiff was not entitled to succeed.

In the absence of consideration, the trust of the house, which was admittedly conveyed by G. to J., would have resulted to G., unless, under the provisions

* Suit No. 39 of 1881.

1881

BAI MANECKBAI v. BAI MERBAI.

of section 7 of the Statute of Frauds (29 Charles II, c. 3), he (G.) had declared in writing some other trust which was to supersede the resulting trust in his own favour. No such declaration of trust in writing was proved. If, on the other hand, the trust did result to G., he, no doubt, might, as equitable owner of the house, have disposed of his interest by will. If he did so, the plaintiff had not qualified herself to sue as his representative. Probate had not been obtained of the will, and until the will was proved, it could not be said that G. had made a particular declaration of trust by it. Nor without probate could the plaintiff take up the position of legal representative of her deceased husband entitled to enforce his rights, and, amongst others, his rights under the supposed resulting trust. Except as executrix or as administratrix the plaintiff could not recover property, or enforce rights equitably vested in her deceased husband.

The Statute of Frauds (29 Charles II, c. 3), except so far as it has been repealed, applies to Parsis in India.

THE plaintiff was the widow of one Gustadji Bhikaji Dantra, and the first defendant was the widow and executrix of one Jamsetji Burjorji Mestry.

The plaint alleged that, in 1865, Gustadji bought a house in Bombay for Rs. 17,000, which sum was made up of a sum of Rs. 10,500 of his own and the dowries of his three daughters, Putlibai, Jaiji and Bhikaiji. Shortly after effecting the said purchase, Gustadji became ill, and during his illness he conveyed the house to Jamsetji Burjorji Mestry. The conveyance, though in form a sale, was really made and accepted as a trust, the said Jamsetji undertaking to hold the said house in trust to dispose of the same, and to hold the proceeds in trust to pay the above-named three daughters of Gustadji their dowries, and then to pay the marriage expenses of Gustadji's son, Dadabhoy, and of his daughter Awabai, and to invest the balance for the maintenance of the family.

In January, 1867, Gustadji died, leaving the plaintiff Maneckbai (his widow) and four daughters, viz., Putlibai, Jaiji, Bhikaiji and Awabai, him surviving. His son Dadabhoy had died a few days previously. Up to the time of his death, Gustadji and his family resided in the said house, and after his death the family continued to reside there, and to pay the taxes, &c., thereof.

On the 20th April, 1868, the house was sold for Rs. 13,000 to one Pestonji Rustomji Sethna, and out of the purchase-money Jamsetji Burjorji expended Rs. 5,605-6-6, and the balance of Rs. 7,394-9-6 remained in his hands.

1881

BAI MANECKBAI v. BAI MERBAI.

In 1871 Jamsetji died, leaving a will, appointing the first defendant, Bai Merbai, his executrix. She thereupon took possession of his estate, including the said sum of Rs. 7,394-9-6.

The plaintiff prayed that the trust might be declared and established, that a trustee might be appointed, and that the first defendant might be ordered to pay over the said balance of Rs. 7,394-9-6.

The first defendant filed a written statement, in which she pleaded that the suit was barred by limitation, and, further, that the plaintiff was not entitled to sue, not having obtained letters of administration to her husband Gustadji. She also denied that the house had been conveyed to Jamsetji in trust; but stated, on the contrary, that Jamsetji had paid Rs. 17,000 to Gustadji for the property.

The material issues raised were—

Whether the claim was barred by limitation.

Whether the plaintiff could maintain the suit, she not having taken out letters of administration to Gustadji, and not being joined as plaintiff by the other beneficiaries.

Whether the plaintiff was entitled to the relief sought.

Jardine (with *Inverarity*) for plaintiff.—There is no reported authority showing that section 7 of the Statute of Frauds (Stat. 29, Car., c. 3) is applicable to Parsis. This is a trust of the proceeds of sale of immoveable property, not immoveable property itself. As to limitation, we rely on section 10 of the Limitation Act, XV of 1877. The trust, if it exists at all, is one for a specific purpose. A specific purpose merely means a purpose that is specified, and a purpose can be specified as well orally as by writing.

Lang (with *Latham*, Acting Advocate General) for defendants.

The claim is made thirteen years after the sale of the house, and fifteen years after the trust is said to have been declared. It is alleged the trusts were orally declared: *Saroda Pershad* v. *Brojo Nath*(1); *Petre* v. *Petre* (2); Lewin on Trusts, chap. 29, para. I

(1) I. L. R., 5 Calc., 910.

(2) 1 Dr. 371 at p. 393.

1881

BAI MANECKBAI v. BAI MERBAI.

Dyer v. *Dyer*(1). An oral agreement at the time of the purchase cannot be proved, but the furnishing of the purchase-money may be proved. Here, if the transfer of the house by Gustadji to Jamsetji was gratuitous, there was a resulting trust for the transferor. The law implies no other trust. Sections 91 and 92 of the Evidence Act exclude oral evidence of the trust: *Daimoddee Paik* v. *Kaine Taridar* (2); *Banapa* v. *Sundardas* (3); *Adrishappa* v. *Gurushidappa* (4); *Kronheim* v. *Johnson*(5). Apart from objections founded on the Evidence Act, the alleged trust has not been validly created. English law applies to Parsis: *Navroji* v. *Rogers*(6). The Statute of Frauds is in force in India, except so far as it has been repealed: Morley's Digest, 594. No administration has been taken out to Gustadji's estate.

WEST, J.—The first issue in this suit raises the question of limitation, and the fourth that of the capacity of the plaintiff to maintain the present suit without being joined by the other beneficiaries under the alleged trust in virtue of which the claim is made, and without having taken out letters of administration to her deceased husband Gustadji. In dealing with either of these issues, however, the other principal questions between the parties will be disposed of. I will first consider the fourth.

There is no serious doubt as to the conveyance of the house in question by Gustadji to Jamsetji, both now deceased. For the defendant Merbai it is contended that the evidence as a whole shows that this conveyance was one for value; and no distinct and direct acknowledgment on the part of Jamsetji, that he took the property otherwise than as full owner and free from any trust, has been put forward by the plaintiff. There are circumstances proved in evidence which are consistent with a trust held for her benefit. Perhaps it may be said that they are more easily reconcileable with such a trust than with the counter theory of Merbai's counsel. But the property being primarily, and as to the legal estate that of Jamsetji and his representatives, it lies on those who would establish any right in it, to make this out, not

(1) White and Tudor 223 (5th ed.)
(2) I. L. R. 5 Calc. 300.
(3) I. L. R. 1 Bom. 333.
(4) I. L. R. 4 Bom., 494.
(5) 7 Ch. D., 60.
(6) 4 Bom. H. C Rep. 1.

only by proving facts consistent with it, but by facts inconsistent with any other state of the relations between the parties, or, at least, so nearly inconsistent as virtually, for practical purposes, to exclude any other hypothesis than that of the trust relied on.

Now, though there are some facts in this case which, so far as appears, we must account for either by the consciousness on Jamsetji's part that Gustadji and his family had a legal claim upon him, or else by a strong feeling of kindness and generosity on his part towards his less fortunate friend, I do not, on the whole evidence, find myself able to refer what took place so certainly to the former cause as to say decidedly that Jamsetji was, and must have been, under a legal obligation, much less that he had accepted the particular trust here relied on. It is not a thing altogether unknown that a friend should make to a friend or to the family of a dead friend concessions which, had they been insisted on, would have afforded evidence of rights contradictory of his own. The safer assumption generally is, no doubt, that people act from selfish motives, stand at arm's length from their acquaintances, and give nothing but what they are obliged to give. Thus from a concession we infer a right to it on the other side, and rely on a general presumption that each party to a transaction has done the best for himself. But this, though a useful presumption derived from general experience, is, after all, but a presumption, and here it has to meet the contrary presumption of ownership resting on the legal and formal acts of the parties. To overcome this, it should be of the strongest kind. On the contrary, I find that the testimony is loose and contradictory, and the indications it affords are, by no means, decisive. In such circumstances, I should, at least, find great difficulty in pronouncing in favour of the alleged trust. Some of the facts rather point to it, but so many more are wanting, which ought to exist and to point to it, had it really been created, that on a balance of probabilities I might have to say that Jamsetji's ownership was unburdened; but it is not necessary for me to go into a minute examination of the evidence which leads to such a conclusion. Accepting, for the sake of argument, the truth of the general story told by the plaintiff's witnesses, I must still declare her incapable of maintaining this suit.

1881

BAI MANECKBAI v. BAI MERBAI.

Evidence was given that a portion of the money expended by Gustadji in buying the house in question was furnished by his wife and daughter. His wife may, as she says, have saved a certain sum from her house-keeping allowance, and she may have been permitted to retain it as her own and separate property. One would naturally expect some more convincing evidence of this than has been laid before the Court, and the evidence that the marriage gifts of Gustadji's daughters Putlibai and others formed a palpable fund which went with their mother's savings towards the purchase of the house, is of the weakest character. But, however the truth may be in this respect, Gustadji took the house by conveyance to himself as owner. As owner he disposed of it by a registered conveyance to Jamsetji. His family do not assert—at least the plaintiff does not assert—that this was done furtively. She knew of it, and it does not appear that Jamsetji in taking the conveyance had any notice of an equitable co-ownership with Gustadji, of Manekbai and her daughters, or of any trust held by Gustadji for them. If there were direct and credible evidence of such a trust, no doubt several facts in the case might properly be referred to it; but we must not invent it for that purpose. We must go by the evidence as it is, not as it might have been, had circumstances been different. Gustadji, so far as appears, dealt as owner with Jamsetji and the members of his family who, having equitable rights stood by and allowed this, are bound by the transaction.

Jamsetji either gave consideration for the house or he did not. If he did, as Merbai says he did—then there is an end of the controversy. The continued residence, for a few years, of Gustadji and his family in the house must be referred simply to Jamsetji's kindness. If, however, the consideration, though solemnly acknowledged by Gustadji, was a fictitious one and the transaction a colourable one intended to enable Gustadji to keep the property out of the reach of his creditors, yet the immediate legal ownership of the house undoubtedly passed to Jamsetji by the registered conveyance. There might be a right in Gustadji to make him reconvey; but until the reconveyance was made, the property was his, by whatever personal obligation he was bound with regard to it.

But Gustadji, it is said, made a declaration of trust in parting with the property to Jamsetji in favour of his wife and daughters, and Jamsetji took it subject to this trust. No declaration on Jamsetji's part is established or even relied on. No declaration merely acquiesced in by him but made by Gustadji could be effectual unless made in writing. Supposing that Jamsetji took the property without consideration, a resulting trust immediately arose in favour of Gustadji, and to this, as constituted by the law itself, the Court would be bound to give effect. To any other trust a manifestation in writing was necessary, and this had to be made by Gustadji. It is the beneficial owner only who can declare the trust which is to supersede the resulting trust in his own favour (*Kronheim* v. *Johnson*(1)) and under the Statute of Frauds, section 7, this must be in writing. It was contended that Parsis are not subject to the Statute of Frauds, but for this contention no authority was produced. The powerful and exhaustive judgment in *Naoroji* v. *Rogers*(2) establishes the general subjection of the inhabitants of Bombay, as such, to the English law introduced here with regular Courts, and of that law the Statute of Frauds was an integral part. If it were necessary under such circumstances to resort to general reasoning on the subject, it might not be hard to show that the public benefit and the checking of fraud are likely to be furthered as much amongst Parsis as amongst Englishmen in Bombay by the salutary provisions of that Statute; but, whether for good or evil, these provisions apply, I think, to Parsis. A Calcutta case to which I referred at the hearing (*Sarkies* v. *Prosonomoyee*(3)) shows that the English law even of dower may be applied to Armenians, who, though Christians, had never had the institutions out of which dower sprung in Western Europe. The Statute of Frauds applies to transactions not having necessarily any religious character or governed by family law. The Parsis are, I think, as subject to it as any inhabitants of Bombay, to whose circumstances it is indeed in its 7th section particularly applicable.

Gustadji, if recognized as equitable owner in virtue of a resulting trust, might have disposed of his interest by will. Perhaps

(1) 7 Ch. D. 60. (2) 4 Bom. H. C. Rep. 1.
(3) I. L. R. 6 Calc. 794.

1881

BAI MANECKBAI v. BAI MERBAI.

he did; but, if he did, the plaintiff has not qualified herself as his representative. Probate has not been taken out of the will, and till the will is proved it cannot be said that Gustadji has made a particular declaration by it. Nor without probate can the plaintiff Manekbai take up the position of legal representative of her deceased husband entitled to enforce his rights, and, amongst others, his rights under the supposed resulting trust. If there is a will but it is invalid, Manekbai might still possibly be made her husband's representative as administratrix, but this she has not had done. It was not contended, nor could it be contended that, except as executrix or as administratrix, she could recover property or enforce rights equitably vested in her deceased husband. The effort has been to make out a declaration on Gustadji's part, and an acceptance of a trust by Jamsetji under which the plaintiff and her daughters became beneficiaries to whom Jamsetji was directly responsible, and whose equitable rights adhered to the estate or followed it into the hands of his widow Merbai. This suggestion is, as I have said, consistent with some of the facts proved; but the negative facts are strong on the other side—too strong to be overcome by such testimony as has been placed before me. But here again the Statute of Frauds would prevent the success of the plaintiff, unless not a declared but a resulting trust in her favour could be made out through knowledge on Jamsetji's part in taking the conveyance of her equitable co-ownership. It is impossible, I think, to say that this is proved.

If it were proved, or a trust were in any way established, it would be necessary to find on the first issue whether the enforcement of the right is or is not barred by limitation; but, finding that the right itself is not existent or, if existent, is not at present vested in the plaintiff in such a character as enables her to enforce it by a suit, I find for the defendant on the fourth issue, and reject the claim with costs.

Attorneys for the plaintiff.—Messrs. *Tobin and Roughton*.

Attorney for the defendant.—Mr. *Pestonji Kavasji*.