1885.

SHÁPURJI JIVANJI v. THE COLLECTOR OF BOMBAY.

I now come to the subordinate question, whether the plaintiff is liable to pay a new assessment before the Collector had fixed what it should be. In 1879 he was, no doubt, authorized to impose a new rate, but nothing was said as to the time from which it should date, and there was nothing in the authorization to give retrospective operation to the new assessment. Indeed, all that was done was to sanction a scheme for re-assessment. I think the Government sanction must be taken as prospective only, and as only sanctioning the new assessment from the time that it was actually made by the Collector. There is nothing in the language of the Government Resolution inconsistent with that interpretation, or to show any intention to give a retrospective effect to the new assessment. I think, therefore, the plaintiff is entitled to the return he claims.

As neither party is completely successful, each must pay his own costs.

Attorneys for the plaintiff.—Messrs. *Jefferson, Bhái shankar and Dinshá.*

Attorney for the defendant.—Mr. *F. A. Little,* Government Solicitor.

ORIGINAL CIVIL.

Before Mr. Justice Bayley.

JAIRA'M N'ARRONJI, PLAINTIFF, *v.* KUVERBA'I AND OTHERS, DEFENDANTS.*

1885. *January* 29.

Will—Construction—Vested or contingent estate—Fund set apart by will for payment of monthly allowances proving insufficient—Right to supply deficiency from the general estate—Interest chargeable on property of a testator deposited with a firm.

C., a separated Hindu, died in 1874 possessed of a half share in two dwelling-houses, one situated in Bombay and the other in Káthiáwár. He was also possessed of considerable moveable property. He left, him surviving, two widows, Kuverbái and Kessarbái, and one daughter named Jivá. By clause 2 of his will dated 4th July, 1874, he directed, as to his share in the houses, that his wives should have a right to reside therein as long as they might live, and, in the event of their decease, that his nephew, Vullubdás, the son of his brother, Visrám, should be the owner; and should the decease of Vullubdás take place, then who-

* Suit No. 258 of 1883.

1885.

JAIRÁM NÁRRONJI v. KUVERBÁI.

ever might be the son of Visrám should be the owner. By a subsequent clause (the 16th) of his will the testator declared that, should the decease of his two wives take place, all his immoveable and moveable property should go to his nephews, Vullubdás and Morárji, the sons of Visrám. Vullubdás and Morárji both died in the lifetime of C.'s two widows. Morárji died first childless and unmarried. Vullubdás left a widow him surviving, who claimed that, under clause 2, Vullubdás took a vested estate in the testator's share in the two houses, which on his death devolved upon her, and that, under clause 16, Vullubdás and Morárji took a vested estate in joint tenancy; that on Morárji's death his interest survived to Vullubdás, and on his death devolved upon his widow. It was contended on behalf of the two widows of C., the testator, that the gift to Vullubdás by clause 2 and to Vullubdás and Morárji by clause 16 was contingent, and had lapsed by their deaths; that the result was an intestacy so far as regards the property in question; that they, consequently, took a widow's estate in the immoveable property for their lives; and that upon their death the property should go to the testator's daughter, Jivá; and that, as to the moveables, they took absolutely.

Held, that, under clause 2, Vullubdás took on the death of the testator not a contingent but a vested estate in perpetuity, which on his death devolved on his widow; and that, under clause 16, Vullubdás and Morárji took a vested interest in joint tenancy in the whole of the residuary estate; that on the death of Morárji, the survivor Vullubdás took the whole absolutely, and on his death his interest was transmitted to his widow.

Held, also, that the interest taken by Vullubdás under the above clauses of the will was subject to the right of the testator's widows to reside in the houses, and to have their monthly allowances paid out of the moveable estate, and was subject, also, to the bequests, charitable and otherwise, contained in the will.

By clauses 15 and 16 of his will the testator directed that certain monthly allowances should be paid to each of his widows out of the interest of certain Government Promissory Loan notes which were to be purchased by his trustees.

Held, that if the particular sources of income, out of which the testator directed these allowances to be paid, should prove insufficient, the rest of the moveable property, or the income derivable from it, as well as the rents of the immoveable property should contribute.

The funds belonging to the testator's estate had, in accordance with the directions in his will, been kept in the firm of Visrám Mowji, in which the testator had been a partner.

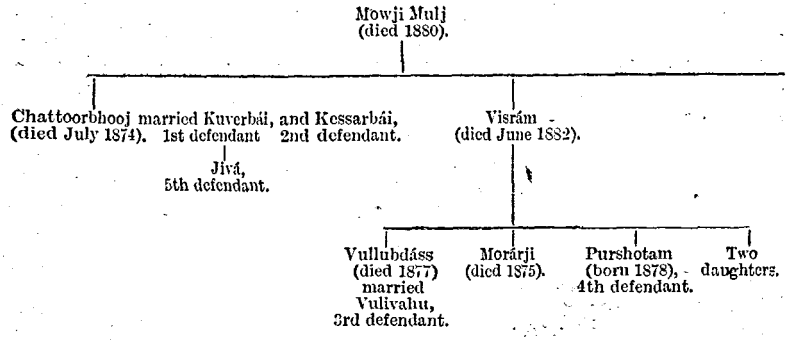
Held, under the circumstances of the case, that the firm should be charged interest at the rate of six *per* cent. *per* annum.

SUIT by a trustee to obtain the construction of a will.

Chattoorbhooj Mowji, the testator, died on the 5th July, 1874, leaving, him surviving, two widows, Kuverbái and Kessarbái, (defendants Nos. 1 and 2), one child a daughter named Jivá

(defendant No. 5), his father Mowji Mulji, one brother Visrám Mowji, and two nephews, *viz.*, Vullubdáss Visrám and Morárji Visrám, who were the sons of Visrám. Chattoorbhooj in his lifetime was separate from his father and brother, but owned some property in common with them.

The following table will show the relationship of the parties to the suit—



At the time of his death the testator, Chattoorbhooj, was possessed of considerable property. His immoveable property consisted of a half share of a dwelling-house in Bombay and a half share in a house at Varvara. His moveable property consisted of shares in certain joint-stock companies, and cash standing to his credit in the books of the firm of Visrám Mowji & Co., of which he was a member.

Chattoorbhooj left a will, dated the 4th July, 1874, of which the following are the material portions:—

Article 2.—"There are my dwelling-houses in Bombay and Varvara. Bhái Visrám has a half share therein, and a half share is mine. My two wives may reside in the same as long as they may live, and, in the event of the decease of my two wives, Bhái Visrám Mowji's son, Vullabdáss, the son of the living Visrám, is (shall be) subsequently the owner of my half share; and should the decease of Vullabdáss take place, then whoever may be the son of Bhái Visrám Mowji is (shall be) the owner; and no one else has any claim in respect hereof."

Article 3.—"In the event of my decease, and (then) as to the religious and charitable (deeds) to be performed thereafter, a sum of Rs. 50,000, namely, fifty thousand, for the same is to be entered to credit. Outlays are to be made therefrom. The particulars thereof are (as follows). The same are to be made in accordance with what is written below:—

"One temple, to be dedicated to the deity Shri Vithal Náthji, is to be built at Dwárká or Kambálla. In that temple the dicty Thákurji is to be caused to be established; and a settlement for the maintenance thereof and suits of clothes and

1885.

JAIRÁM NÁRRONJI v. KUVERBÁI.

ornaments for decoration are to be made; and one *sadávarat* (daily distribution) is to be made, so as to give *ládu* (sweetmeat) to *báwás*,—that is, one *ládu* to each holy man *(sádu)*; and, after my decease shall have taken place, one caste feast for the Gujri Bráhmins at Dwárká is to be made when my anniversary day shall arrive. It is to be made every year; one pice is to be given to (each of) them as a present. On the said outlays having been made, should any surplus out of the interest be left, the same is to be appropriated for religious and charitable purposes at other places. The authority in respect thereof belongs to my brother Visrám Mowji; and the said sum is to be credited and kept at the place of business of Bhái Visrám Mowji."

Article 8 as follows:—"My daughter Bái Jivá is to be got betrothed, and '*taks*' (presents) are to be given to her, and her marriage is to be got solemnized; and other outlays, which may have to be made, are to be made. For the same, Rs. 20,000, namely, twenty thousand, are to be credited and kept in the shop of Bhái Visrám Mowji. On the said outlays having been made, the interest, which may be received on account of the money that may remain over, is to be paid to Bái Jivá; and should the decease of the Bái take place, then the interest is to be paid to the sons who may be born of her womb, and should they be betrothed, then out of this sum as many rupees as Vahu Kuvervahu and Bhái Visrám, two persons, may think are to be paid; and should the decease of Bái Jivá take place, and should she have no son born of her womb, then all this money which may have been credited is to be thrown into the sum of Rs 50,000 (fifty thousand) which is to be used on my religious and charitable account, but it is not to be given to any one else; and on the said outlays having been made, as to any money which may remain as surplus, Government promissory loan notes are to be purchased therewith. The interest thereof that may be yielded is to be paid to Bái Jivá."

Article 9 as follows:—"There is '*sadávarat*'* carried on in Dwárká in the name of my father, the worshipful Mowji Mulji. The outlays for the same are to be made out of the shop of Jairám Nárronji and Visrám Mowji as long as they may continue to be partners in the shop, and after Bhái Jairám Nárronji shall withdraw his share from the shop, as to the expenses which may be incurred in respect of the said *sadávarat*; a half share thereof is to be paid out of the moneys standing to my credit, and a half share is to be paid by Bhái Visrám, he debiting the same to his account. But this *sadávarat* is to be kept up permanently; and should Bhái Visrám Mowji pay the amount of his half share for the expenses of the said *sadávarat*, then Bhái Visrám shall also pay the amount of my one-half share,—that is, the same is to be paid out of my money. But this *sadávarat* is to be kept up permanently; and the authority to carry on the said *sadávarat* belongs to Bhái Visrám Mowji."

Article 15 as follows:—"To my wife, Kuverbái, Rs. 150, namely, one hundred and fifty, *per* month are to be paid for (her) expenses. Out of the same as many rupees as may be required for expenses are to be paid for the purpose of being expended, and on outlays having been made out of the Rs. 150, the

* *Sadávarat* is a daily distribution of corn to poor travellers.

money which may remain as a surplus is to be entered to credit in her name at Bhái Visrám Mowji's shop. As to that money, when Bhái Visrám may go on the great (or) on small pilgrimage, and when she may go on a pilgrimage with him too, then the said money is to be expended; and she alone shall not go on a pilgrimage; and she is to conduct (herself) in accordance with the reputation of our house; and she is not to conduct herself improperly in any way; and (but) she is to behave in accordance with the respectability of our house; and should she conduct herself improperly, then the Rs. 150, which are directed to be paid to her for expenses, are not to be paid; and she is to defray her expenses out of the money which is in her possession; and she is to act agreeably to the directions of Bhái Visrám."

Article 16 is as follows:—"My wife, Kessarbái, is the owner of whatever ornaments and clothes belong to her. Besides that, Rs. 200, namely, two hundred, *per* one month are to be paid to my wife for her expenses. Out of the same as many rupees as may be required for expenses are to be paid. On outlays having been made out of the said Rs. 200, the money which may remain as a surplus is to be credited in her name and kept at Bhái Visrám Mowji's shop. As to that, when Bhái Visrám may go on the great, or on a small pilgrimage, (*i.e.*) when she may go on a pilgrimage with Bhái Visrám, the same is to be expended; and she is not to go alone on a pilgrimage; and out of this money the expenses are to be defrayed; and she is to conduct herself in accordance with the respectability of our house; and she is not to conduct herself improperly in any way; and should she conduct herself improperly, then out of the Rs. 200, which I am paying to her, as many rupees as may be sufficient for (her) maintenance and clothes are to be paid to her; no more is to be paid; and she is to act agreeably to the directions of my brother Bhái Visrám."

Further as follows:—"By the operation of destiny should my decease take place, then as to my business which is carried on in Bhái Visrám Mowji's shop, in which I have a share of five annas, it is to be made to cease; and there are my ten shares of the market; they are not to be sold; and as to the amounts for religious and charitable institutions, and receipts from, and payments to, others that are mentioned above, the same are to be entered to credit out of my funds. On the same having been entered to credit, as to the money which may remain as a surplus, Government Promissory Loan notes are to be purchased therewith out of the same, meaning, it is presumed, out of the interest thereof; the moneys which are mentioned above the same are to be entered to credit out of my funds. On the same having been entered to credit, as to the money which may remain as a surplus, Government Promissory Loan notes are to be purchased therewith. Out of the same moneys which are mentioned above are to be paid to my wives; and by the operation of destiny *should the decease of my two wives take place, then, as to my immoveable property and moveable property, whatever there may be belonging to me, Bhái Vullubdáss and Morárji, two persons, the sons of my brother Visrám Mowji, are the owners of the whole thereof;* no one else has any claim to the same; and should the decease of either of my two wives take place by the operation of destiny, then an outlay of Rs. 5,000, namely, five thousand, after on the decease of one—*i.e.*, an outlay after (on the decease of) each one respectively—is to be made according to the custom of our caste; and in this

1885.

JAIRÁM NÁRRONJI v. KUVERBÁI.

will I have appointed my three trustees. Of them I appoint my brother Visrám Mowji, the owner, for carrying out all the above religious and charitable bequests and for my 'power' the probate which will have to be obtained; and no one can question Bhái Visrám Mowji; and I have made this will in my lifetime in sound mind. It is duly to be held as agreed to and approved by me and my heirs and representatives."

By the above will Chattoorbhooj appointed three "trustees" thereof, *viz.*, his brother Visrám Mowji, one Sunderdáss Mulji, and the plaintiff Jairám Nárronji; but he directed that probate should be obtained by his brother Visrám alone. Visrám accordingly took out probate on the 17th July, 1875, and managed the affairs connected with the estate of the deceased until his death, which took place in June, 1882. Sunderdáss Mulji had died in 1876, and accordingly on Visrám's death the plaintiff, Jairám Narronji, being the sole surviving trustee appointed by the will, took upon himself the management of the estate. Difficulties, however, arose as to the construction of the will; and the plaintiff filed this suit, setting forth in the plaint the various questions for the Court, and praying for the administration of the estate.

Defendants Nos. 1 and 2 were the two widows of the testator. Defendant No. 3 (Vulivahu) was the widow of the testator's nephew, Vullubdáss, who had died in 1877. Defendant No. 4 (Purshotam) was a nephew of the testator, being a son of his brother Visrám. Purshotam was not born until 1878, *i.e.*, after the death of the testator, and of Vullubdáss and Morarji, the latter of whom had died in 1875. Defendant No. 5 was Jivá, the daughter of the testator by his wife Kuverbái, (defendant No. 1). Jivá was made defendant by an order of Court after the case came on for hearing.

The following extract from the plaint sets forth the points on which the plaintiff prayed for the direction of this Court:—

"By the second clause of the said will the testator as to his half share in his dwelling-houses in Bombay and Varvara, subject to the right of his widows to reside therein during their lives, directed that Vullubdáss Visrám, or, if he should be dead, whoever might be the son of Visrám Mowji at their deaths, should be the owners. The testator left no other immoveable property than his half share in the houses above referred to. By the 16th clause of his said will the testator declared that, after the death of his widows, the said Vullubdáss Visrám and

Mowji Visrám should be the owners of *all his immoveable* as well as of his moveable property.

"(2). In the third clause of the said will the testator has directed a sum of Rs. 50,000 to be set apart for certain charitable purposes. The said sum has been so set apart, and up to last *Diváli*, corresponding with the Christian date 11th November, 1882, amounted to Rs. 66,527-12-9 with interest up to that date. The said testator has directed that the said sum is to be credited and kept at the place of business of Bhái Visrám Mowji, and the plaintiff apprehends that the sum is not sufficient for the foundation and maintenance of a temple at Dwárká, and the plaintiff desires the direction of the Court as to the disposal of future investment of the said fund.

"(3). By the ninth clause of his will the testator has given certain directions as to the keeping up of a *sadávarat* therein referred to. The testator's brother, the said Visrám Mowji, has by his will set apart Rs. 15,000 for the maintenance of the said *sadávarat* out of his own property, and has directed that a further sum of Rs. 15,000 should be set apart for that purpose from the estate of the testator. The directions of the Court are sought in reference thereto.

"(4). By the 8th clause of his will the testator directs that a sum of Rs. 20,000 should be set apart, at interest, in the firm of Visrám Mowji, and that out of such sum and the interest accrued thereon the marriage of the testator's said daughter, the defendant Jivá, should be solemnized, and the interest on the residue should be paid to her, and further directions as to the interest on such residue are given. The said sum was set apart by the said Visrám Mowji on or about the 10th day of November, 1874, which with interest amounted to Rs. 27,816-11 up to *Diváli*, corresponding with the Christian date 11th November, 1882. The defendant Jivá was married in the month of March last, and the expenses of such marriage, consisting only of presents made to the said Jivá and her husband, amounted to Rs. 13,613-8-6. The defendant Kuverbái declined to pay out of the said Rs. 20,000 and the accumulations of interest any sum of money towards the costs of giving caste feasts in honour of the said marriage. A sum of Rs. 1,514-14-6 has already been expended on account of such expenses, and the said Kuverbái requires a further sum of Rs. 5,000 for giving the final feast, which she is required to do by the usages of the caste. The said Kuverbái desired that the unexpended balance of the said sum of Rs. 20,000 and the accumulation of interest thereon should be handed over to her said daughter for her absolute use. The directions of the Court are prayed in reference thereto.

"(5). The direction of the Court is sought as to whether the plaintiff is at liberty to employ the income arising from the piece-goods bázár shares of the testator to make up the income of the widows, which is directed to be paid from the interest of Government promissory notes to be purchased out of the surplus funds of the testator (clauses 15 and 16 of the will)."

The following were the material issues raised at the hearing:—

(1.) Who, having regard to the provisions of the will and to the events that have happened, are or is entitled to the immoveable and moveable property of the testator, and what are their, his, or her interests therein?

1883.

JAIRÁM NÁRRONJI v. KUVERBÁI.

(2). Whether the sums of Rs. 1,504-14-6 and Rs. 5,000, or either of them, referred to in sub-paragraph 4 of the plaint, are to be paid out of the Rs. 20,000 in the said clause mentioned?

(3). What interest does Jivá take in the balance of the said sum of Rs. 20,000 after payment of the marriage expenses properly chargeable to such sum?

(4). Whether the estate is not entitled to be credited with a greater amount of interest than has been allowed by the executors, and, if so, at what rate and what amount?

(5). Whether the defendants Nos. 1 and 2, as widows of the testator, are entitled to manage the various trusts created by the will?

(6). Whether the sum of Rs. 15,000 should be set apart out of the estate of the testator for the maintenance of the *sadávarat?*

(7). Whether the plaintiff is at liberty to employ the income of the testator's estate to make up the deficiency of the income to be allowed to the widows of the testator under clauses 15 and 16 of the will?

Macpherson and *Kirkpatrick* for the plaintiff.—The plaintiff is not personally interested in any of the questions raised, except as to the amount of interest to be paid by his firm on the moneys deposited therein. The rate allowed on the accounts is a proper rate under the circumstances.

Telang and *Carnac* for the first defendant Kuverbái.—Under clause 2 of the will, Vullubdáss did not take a vested estate. It was contingent on his being alive at the death of the two widows. The widows are still living, but he is dead, and his estate has, therefore, lapsed. Purshotam, (defendant No. 4), was the only son of Visrám living at the death of Vullubdáss, but he was not born until after the testator's death, and, therefore, cannot succeed, and the devise to him by clause 2 is void—*Tágore Case*[1]; *Sir Munguldáss Nathubhoy* v. *Krishnábái*[2]. Visrám's daughters cannot take—*Soudaminey Dossee* v. *Jogesh Chunder*[3].

So also under clause 16 of the will we contend that the gift to Vullubdáss and Morárji was contingent, and has lapsed by their death. There is, therefore, an intestacy after the death of the widows, but they have a life estate in the houses, and after their death the property goes to the testator's daughter Jivá, (defendant No. 5). As to the residue undisposed of, so far as it consists of moveables the widows take absolutely.

(1) Ind. Ap., Sup. Vol., p. 47. (2) I. L. R., 6 Bom., 38. (3) I. L. R., 2 Calc., 262.

The bequests to charities are good—*Lakshmishankar* v. *Vaijnáth*[1]. As to the management of the charities, the widows as heirs ought to be the managers.

Fox (with *Jardine*) for Kessarbái, (defendant No. 2).—The intention of clause 2 of the will is to give a life estate to the two widows, and then a life estate to Vullubdáss, with remainder over to an unborn son of Visrám. That clause is void—*Soudáminey Dossee* v. *Jogesh*[2]; *Kherodemoney Dossee* v. *Doorgamoney Dossee*[3]. By clause 16 the widows take a life estate in all the property, and Vullubdáss and Morárji an estate contingent on their surviving the widows. The words," whatever there may be ", indicate a future time. That construction is supported by the Succession Act X of 1865, sec. 107, ill. (*c*). Vullubdáss and Morárji having died in the lifetime of the widows, there is an intestacy, and the widows take a widow's estate in immoveables, and they take the moveables absolutely—Mayne's Hindu Law, para. 357. As to the bequests to charities, *Dwárkánáth Bysack* v. *Burroda Persaud*[4]. As to interest, the plaintiff and his predecessor as trustees have only allowed 4 *per* cent. on the estate in their hands. We claim 6 *per* cent.

Starling and *B. Tyabji* for Vulivahu, (defendant No. 3), widow of Vullubdáss. Vullubdáss took a vested estate under clause 2 of the will, and on his death, there being then no other son of Visrám's living, his widow became entitled—Jarman on Wills, (4th ed.), Vol. I, p. 809; *ibid.* Vol. II, 759; *Smart* v. *Clark*[5]; *Tilson* v. *Jones*[6]; *Andrew* v. *Andrew*[7]; *Benyon* v. *Maddison*[8]; *Blamire* v. *Geldart*[9]; Succession Act X of 1865, secs. 106 and 107-120. If, however, that is not the true construction of clause 2, then under that clause, Vullubdáss having died, there is, so far, an intestacy, and the houses fall into the general estate, and with it go, by clause 16, to Vullubdáss and Morárji. Clause 16 gives them a vested estate in joint tenancy—Jarman on Wills, (4th ed.), Vol. II, pp. 251, 253; Henderson's Succession Act X of 1865,

(1) I. L. R., 6 Bom., 24.
(2) I. L. R., 2 Calc., 262.
(3) I. L. R., 4 Calc., 455.
(4) I. L. R., 4 Calc., 443.
(5) 3 Russ., 365.
(6) 1 Rus. & My., 553.
(7) L. R., 1 Ch. Div., 410.
(8) 2 Bro. C. C., 75.
(9) 16 Ves., 314.

1885.

JAIRÁM NÁRRONJI v. KUVERBÁI.

secs. 93 and 94; Williams on Executors, Vol. II, p. 1461. On Morárji's death, Vullubdáss took his half share of the residue by survivorship—Succession Act X of 1865, sec. 89. The result is, that the legacies are to be paid, the widows have a right of residence for life, and Vulivahu as the widow of Vullubdáss is entitled to all the rest of the property. As to the expenses of caste feasts on marriage, they must be paid out of the Rs. 20,000 given to Jivá. So large a sum as Rs. 15,000 ought not to be given to the *sadávarat*. There should be an inquiry as to the persons to whom the management of the charities should be given. As to the rate of interest, the plaintiff was appointed a trustee, and did not renounce.

Vicáji with *Latham* (Advocate General) for Purshotam, (defendant No. 4).—As Purshotam was not born until after the testator's death, he cannot claim under clause 2 of the will—*Tágore Case*[1]. But he claims under clause 16. We contend that by that clause Vullubdáss and Morárji took a vested estate, not as joint tenants, but as tenants in common. Then on Morárji's death his share went to his father, Visrám, and on Visrám's death it came to Purshotam—*Rewun Persád* v. *Mussumat Rádhá Beeby*[2]; Succession Act X of 1865, sec. 98.

Lang and *Inverarity* for Jivá, (defendant No. 5).—We submit that under clauses 2 and 16 of the will there was a contingent gift which has lapsed, the result being an intestacy. The widows consequently take a life estate in the immoveables. On the death of the widows, Jivá, the testator's daughter, will succeed to the immoveables, and to such of the moveables as are not disposed of by the widows. The Court should not permit Rs. 6,000 to be expended in feasting out of the legacy of Rs. 20,000. The gift of the surplus to charity is void. Some of the other bequests to charity are vague or invalid.

5th May. BAYLEY, J.—This suit is brought by Jairám Nárronji, the survivor of three trustees appointed by the will of a Hindu named Chattoorbhooj Mowji, dated the 29th June, 1874, executed at Varvara, near Dwárká in Káthiáwár, on the 4th July, 1874, in the presence of Captain Jackson, Acting Assistant Resident in

(1) Ind. App. Sup. Vol., p. 47. (2) 4 Moore's Ind. Ap. 137. See. p. 173-177.

charge at Okhámandal, and other witnesses. Chattoorbhooj Mowji died on the following day, 5th July, 1874.

The plaintiff by his plaint, which was filed on the 2nd August, 1883, prays (1) that the will of the testator may be construed by this Court; (2) that his estate may be administered under its direction; (3) that new trustees may be appointed in conjunction with the plaintiff to carry out the trusts of the said will; (4) that it may be ascertained and declared, who is or are the person or persons entitled to the residuary estate of the testator after the death of his two widows, Kuverbái and Kessarbái, the first and second defendants; (5) that all proper orders may be made, accounts taken, and directions given; (6) that the plaintiff may have such further or other relief as the circumstances of his case may require; and (7) that the costs of the suit may be provided for. The testator by his will appointed his brother, Visrám Mowji, Sunderdás Mulji, and the plaintiff, a cousin of the testator, trustees of his will. He directed that Visrám Mowji should carry out his religious and charitable bequests contained in the will; and directed that he alone should obtain probate. Visrám Mowji duly proved the will in this Court on the 17th July, 1875.

The testator left him surviving his two widows, the defendants, (Nos. 1 and 2), Kuverbái and Kessarbái, and a daughter, the defendant (No. 5), Jivá (by the defendant Kuverbái), now about sixteen and married, but no male issue. He also left him surviving his brother Visrám Mowji and his two nephews, Vullubdáss and Morárji, sons of his brother Visrám. The testator was separate in estate from his brother and nephews, but owned some property in common with them. The property dealt with by the will was admitted to have been self-acquired.

Sunderdás Mulji died on or about the 12th January, 1875. One of the testator's nephews, Morárji Visrám, died unmarried, at the age of four or five, soon after the death of the testator. The other nephew, Vullubdáss, died in 1877 at the age of fifteen or sixteen, intestate, and without issue, leaving his widow, the defendant Vulivahu, him surviving. The testator's brother and executor, Visrám Mowji, died on the 9th June, 1882, leaving

1885.

JAIRÁM NÁRRONJI v. KUVERBÁI.

him surviving a son, the defendant Purshotam Visrám, who was born in 1878. He also left a widow and two daughters.

In 1880 Mowji Mulji, the father of the testator and of Visrám Mowji, died. He was not in the firm of Visrám Mowji. He was left a legacy of Rs. 10,000 by the testator's will, which was paid to him before his death, and no question arises as to that.

The immoveable property of the testator consisted of a half share in a house in the Kálbádevi road in this city, the ground floor of which is occupied by the shop of Messrs. Thompson and Taylor, Chemists, and a half share in a house at Varvara, in Káthiáwár, which houses the two brothers had purchased out of their private funds, and of which houses they were tenants in common. The moveable property left by the testator was, according to the plaintiff's account, of the value of about rupees one and a half lákhs, and was all situated in Bombay. The defendants, the testator's widows, contended that it was of very much greater value.

The testator was a member of the firm carried under the name of Visrám Mowji, and had a five-annas' share therein. The members of the firm were the testator and his brother Visrám; and they were general and piece-goods merchants. The firm is still going under the name of Visrám Mowji.

The plaintiff's son, Lilládhur Jairám, who was the only witness called in the case, stated that he (Lilládhur) is the eldest son, and has four brothers; and that he, his father, and his four brothers are now the partners in the firm, he himself having become a partner in 1937 (1880-81). He also stated that the house in the Kálbádevi road, *i. e.*, the whole of it, according to the present rates prevailing, is worth from Rs. 60,000 to Rs. 70,000. The house at Varvara he had never seen.

The first question arises on the construction of the limitations in the will regarding the testator's half share in the two houses already referred to. Those limitations are contained in clause 2 and in a portion of clause 16. The will is in Gujaráti, and the official translation of such portions of the will made by Mr. Flynn,

the probate of which was put in and marked as exhibit A, is as follows :—

Article 2.—"There are my dwelling-houses in Bombay and Varvara. Bhái Visrám Mowji has a half share therein, and a half share is mine. My two wives may reside in the same as long as they may live; and in the event of the decease of my two wives, Bhái Visrám Mowji's son, Vullubdáss, (the son) of the living Visrám, is (shall be) subsequently the owner of my half share; and should the decease of Vullubdáss take place, then whoever may be the son of Bhái Visrám Mowji is (shall be) the owner, and no one else has any claim in respect thereof."

It having been suggested during the hearing by Mr. Telang, one of the counsel who appeared for the defendant Kuverbái, that the latter portion of the above claim did not clearly represent the words in the original, the Court's interpreter, Mr. Surrottam Succárám, was asked to translate it orally, and he stated that the proper translation was as follows :—

"In the event of the death of Vullubdáss, then the children (*'chokrá'*) of Bhái Visrámji, whoever they may be, shall become owners (*'málak'*), and no one else shall have any right or title thereto."

Towards the end of clause 16 is the following passage as officially translated by Mr. Flynn :—

"And by the operation of destiny should the decease of my two wives take place, then as to my immoveable property and moveable property whatever there may be belonging to me, Bhái Vullubdáss and Morárji, two persons, the sons of my brother Visrám Mowji, are the owners of the whole thereof. No one else has any claim to the same."

During the argument, and in answer to a question from one of the learned counsel, Mr. Surrottam, the Court's interpreter, stated that the literal translation of the latter part of that passage was this :—

"I have made my brother Visrám Mowji's sons, Bhái Vullubdáss and Morárji, two persons, owners. In the same no one else has any right."

1885.

JAIRÁM NÁRRONJI v. KUVERBÁI.

By clauses 15 and 16 the testator leaves to his wives, Kuverbái and Kessarbái, monthly allowances, respectively, of Rs. 150 and 200 for their expenses, subject to cesser, in case they conduct themselves improperly in any way, and not in accordance with the respectability of the testator's house. Each is to act agreeably to the directions of his brother Visrám.

By clause 8 the testator directs Rs. 20,000 to be credited and kept in the shop of Bhái Visrám Mowji for the benefit of certain trusts he proceeds to create in favour of his daughter, Jivá, till betrothal and marriage; and, in the event of her having no son, in favour of the testator's religious and charitable account, for which account, in clause 3, he directs that the sum of Rs. 50,000 be credited and kept at the place of business of Bhái Visrám Mowji.

As this will was made by a Hindu after the 1st September, 1870, and related in part to immoveable property situated within the local limits of the ordinary original civil jurisdiction of the High Court of Bombay, certain portions of the Indian Succession Act X of 1865 are, by section 2 of the Hindu Wills Act XXI of 1870, made applicable to such will, so far as relates to the testator's half share of the house in the Kálbádevi Road.

The portions of the Indian Succession Act X of 1865, applicable to the construction of the limitations of the half share of that house, are mainly founded on decisions in the Courts of Equity in England, and embody the results of the earnest endeavours of a long series of very eminent judicial authorities to give effect to the wishes of testators as expressed in their testamentary documents, which have often been drawn in ambiguous and imperfectly expressed language.

Two years after the passing of the Hindu Wills Act XXI of 1870, *viz.*, in July, 1872, the *Tágore Case*[1] was decided in the Privy Council. It was there held that by Hindu law, as a general principle, a person capable of taking under gift or will must either in fact, or in contemplation of law, be in existence at the time when the gift takes effect, *i.e.*, in the case of a will at the death of the testator; therefore, that where a testator left the residue of

[1] L. R. Ind. Ap., Sup. Vol., p. 47,

his estate to A for life, with subsequent void limitations—as, for instance, in favour of persons unborn at the death of the testator,—and limitations describing an inheritance in tail male, and where at the same time it appeared that no estate of inheritance, other than the void estate in tail male, could be read or deduced from the will, it was held that the estates of inheritance and estates or interests, subsequent to A's life interest failed. At p. 83 the Lords of the Judicial Committee say: "He, (the plaintiff), takes nothing under the will. As heir at law he is entitled to so much of the inheritance in the real and personal property as is not exhausted by the valid provisions of the will." In *Lallubhái Bápubhái* v. *Mánkuvarbái*[1] (affirmed in the Privy Council) it was held (in 1876) by the Court of Appeal of the High Court of Bombay, that "in the exercise of the testamentary power among Hindus the intention to disinherit must be clear and unambiguous; and that mere bequests of special portions of the testator's estate to the heir, without language of disherison, do not exclude him from the undisposed of residue."

In the judgment in the *Tágore Case*[2] is a passage which may be usefully cited with reference to the will now under consideration. "Another general principle applicable to transfers by gift (more literally applied in the law of England to wills than to gifts *inter vivos*) is that a benignant construction is to be used, and that if the real meaning of the document can be reasonably ascertained from the language used, though that language be ungrammatical or untechnical, or mistaken as to name, or description, or in any other manner incorrect, provided it sufficiently indicate what was meant, that meaning shall be enforced to the extent and in the form which the law allows.

"Accordingly, if the gift confers an estate upon a man with words imperfectly describing the kind of inheritance, but showing that it was intended that he should have an estate of inheritance, the language would be read as conferring an estate inheritable as the law directs.

"If an estate were given to a man simply without express words of inheritance, it would, in the absence of conflicting context, carry by Hindu law (as under the present state of law

(1) I. L. R., 2 Bom., 388; 7 Ind. App., 212.

(2) L. R. Ind. App., Sup. Vol., p. 47.

1885.

JAIRÁM NÁRONJI v. KUVERBÁI.

it does by will in England) an estate of inheritance. If there were added to such a gift an imperfect description of it, as a gift of inheritance, not excluding the inheritance imposed by the law, an estate of inheritance would pass"—p. 65.

I do not consider that the law as laid down in the *Tágore Case*[1] is affected by the Hindu Wills Act XXI of 1870, although Mr. Justice Wilson thought it was—*Alangamonjori Dabee* v. *Sonamoni Dabee*[2] His decision was expressly overruled, in May 1882, by Sir Richard Garth, C. J., and Mr. Justice White, who decided that a gift by will to persons unborn at the time of the death of the testator, whether made prior or subsequently to the passing of the Hindu Wills Act, is void—*Alangamonjori Dabee* v. *Sonamoni Dabee*[3].

The testator in the present case does what we so frequently find in the wills of Hindu testators. He does not make those nearest, and one might presume dearest, to him—his wives and his only child, Jivá—the largest recipients of his bounty. He gives to his wives a right of residence in the half share in the two houses which belonged to him, and makes a money provision for them and for his daughter Jivá. On the death of his wives he gives his property, subject to the charitable and other bequests, to his nephew Vullubdáss; and after Vullubdáss' death he makes a bequest which is unquestionably void under the principles laid down in the *Tágore Case*[4]. Then by clause 16 all the residue of his immoveable and moveable property is, after the death of his two wives, to become the property of his nephews, Vullubdáss and Morárji.

After carefully considering the will and its various provisions, the able arguments of counsel, and the authorities cited by them, I have arrived at the following conclusions:—I am of opinion that, as regards the immoveable property, the two widows take no more than a right of residence in the two houses. To hold, as contended for by the learned counsel for Kuverbái, that there was an intestacy as to the half of the Kálbádevi house, and that the widows took on the testator's death a life estate, and on the death of Vullubdáss a widow's estate in the remainder, would, I think, be contrary to the express provisions of the will. He clearly

(1) L. R. Ind. App., Sup. Vol., p. 47.
(2) I. L. R., 8 Calc., 157.
(3) I. L. R., 8 Calc., 637.
(4) L. R., Ind. App., Sup. Vol., p. 47

intended, in clause 2, to make his nephew, Vullubdáss, and after him Vullubdáss' unborn brother, or brothers, the owner or owners of his half share in the two houses. I think it is quite clear, as well under the Indian Succession Act and Hindu Wills Act as under the principles of construction which I ought to apply in construing these limitations, that, under clause 2 of the will, Vullubdass took, on the death of the testator, not a contingent, but a vested, estate in perpetuity in all that was devised to him.

Section 106 of the Indian Succession Act X of 1865, which is adopted by the Hindu Wills Act XXI of 1870, is as follows:—(His Lordship read the section.) Illustration (c) is applicable here. "A fund is bequeathed to A for life, and after his death to B. On the testator's death the legacy to B becomes vested in interest to B." If that section be, as probably it is, applicable to the devise of the half share of the house at Varvara in Káthiáwár, the English authorities—which I should, in the absence of any Indian ones, follow—point to the same result.

In *Benyon* v. *Maddison*(1), decided by Sir Lloyd Kenyon, M. R., in 1786, there was a bequest of all the testator's estates to A, to pay the income to testator's mother for life, and after her decease, I *then* give to A, &c., and the residue to B, with power to dispose of it by will. It was held that the legacy to A vested immediately, and A. having died in the lifetime of the mother, was transmissible to the plaintiff as A's representative. The Master of the Rolls said: "I take it the word *then* in the present case is not to be construed as an adverb of time, and I thought the question had been settled by the decisions." In the will of Chattoorbhooj Mowji the word appears in the translation as 'subsequently', which means, at the death of the widows, and is equivalent to the word 'then' in the case just cited.

The case of *Barnes* v. *Allen*(2) was decided by Lord Chancellor Thurlow in 1782. There was a devise of the residue of personal estate to the wife, and if she died without issue living at her death, to the testator's two brothers, or, if one of them should be dead, to the survivor. They both died in the lifetime of the wife. The legacy was held to be vested in both the brothers as joint tenants, and, therefore, went to the representative of the survivor.

(1) 2 Brown's C. C., 73. (2) 1 Brown's C. C., 180.

1885.

JAIRÁM NÁRRONJI v. KUVERBÁI.

The necessity that exists for looking at the whole provisions of a will in considering whether an estate is vested or contingent, is shown in a decision of the Privy Council in 1882 in a case on appeal from the Supreme Court at New Zealand. There a testator, after making certain dispositions in favour of his wife and others, directed that, from and after the decease of his wife without leaving issue of his marriage, his trustees should stand possessed of all the undisposed of residue of his real and personal estate in trust for his natural daughter for the term of her natural life, with further provision in case of her death or marriage. It appeared that there was no issue of the marriage; that the testator's widow was still living; and that the natural daughter was still unmarried. It was held, from an examination of the whole will, that, according to the intention therein appearing, the vesting in possession of the natural daughter's estate was not postponed till after the death of the widow—*Rhodes* v. *Rhodes*[1].

Then the devise in clause 2, after the death of Vullubdáss, is clearly void for remoteness. The defendant, Purshotam Visrám, son of the testator's brother, Visrám Mowji, was not born till 1878, four years after the testator's death. The *Tágore Case*[2] shows that he could not take under the concluding part of clause 2. No son of Visrám, who was not born until after the testator's death, can take under the limitations in that clause; and accepting Mr. Surrottam's translation as correct, *viz.*, that, "in the event of the death of Vullubdáss, then the children *(chokrá)* of Visrám, whoever they may be, shall become the owners *(máluk)*", such children cannot take. As was said by Norman, J., in *Srimati Bramamji Desái* v. *Jages Chaundra Dutt*[3]: "It is a well-settled rule in construing wills formed upon excellent reasons, and which has been adopted in the 102nd section of the Indian Succession Act X of 1865, that where there is a gift to a class and some persons constituting such class cannot take in consequence of the remoteness of the gift, or otherwise, the whole bequest must fail." Section 102 of the Indian Succession Act, X of 1865, which is

(1) 7 App. Cas. H. L. 192.

(2) L. R. Ind. App., Sup. Vol., p. 47.

(3) 8 Beng. L. R., 410.

extended to the wills of Hindus by the Hindu Wills Act XXI of 1870, and which applies to the devise of the half share of the house in the Kálbádevi Road, enacts that, "if a bequest is made to a class of persons with regard to some of whom it is inoperative by reason of the rules contained in the two last preceding sections, or either of them, such bequest shall be wholly void." In *Soudaminey Dossee* v. *Jogesh Chunder Dutt*[1] decided by Pontifex, J., in 1877, it was held that "the rule that where there is a gift to a class, and some persons constituting that class cannot take in consequence of remoteness, the whole bequest must fail, as well as the principle of the English Courts in deciding questions of remoteness, that regard is to be had to possible and not to actual events, is applicable to the interpretation of the wills of Hindus."

Next, as to the devise to the two nephews in clause 16. In my opinion the devise was a devise to them jointly. It created a joint tenancy in the whole of the residuary estate; and on the death of Morárji in 1875 the survivor, Vullubdáss, took the whole absolutely; and on his death, in 1877, his interest was transmitted to his widow, the defendant, Vulivahu.

Section 93 of the Indian Succession Act X of 1865, which applies here, enacts that "if a legacy be given to two persons jointly, and one of them die before the testator, the other legatee takes the whole. Illustration—'The legacy is simply to A and B. A dies before the testator. B takes the legacy,'"

As was laid down in the *Tágore Case*[2], "if an estate were given to a man simply, without express words of inheritance, it would, in the absence of a conflicting context, carry by Hindu law an estate of inheritance", (p. 65).

Here there is no conflicting context. The contention, that the nephews took as tenants in common, is, in my opinion, untenable; the language of the whole will and also that of the particular decree in question leading to no inference that the testator intended to, or that he did, confer an estate on his nephews as tenants in common.

(1) I. L. R., 2 Calc., 262 (2) L. R. Ind. App., Sup. Vol., 47.

1885.

JAIRÁM NÁRRONJI v. KUVERBÁI.

In *Lakshmibái* v. *Ganpat Morobá*[1] Sir Joseph Arnould said "The very reasons assigned by Mr. Jarman for the technical construction put by English judges on such expressions as 'share and share alike' in English wills show that the rule of construction contended for is one that should not be adopted by Indian tribunals in suits between Hindus * * *. For these reasons it appears to me that in a suit, like the present, in which all the parties are Hindus, I ought not to construe the words, 'share and share alike,' occurring in the will, as necessarily constituting a tenancy in common, with all the incidents attached thereto in English law." See also the remarks of the Court of Appeal on that case in *Lakshmibái* v. *Ganpat Morobá*[2].

In the present will there are no such words, and no indication of an intention that the nephews should take as tenants in common. The result, therefore, is that Vullubdáss by the combined operation of sections 2 and 16 took at the testator's death a vested estate in perpetuity in the half share of both houses from his brother's death; and a similar estate in the residuary immoveable and moveable property subject to the right of the widows to reside in the houses, and to have their monthly allowances paid out of the moveable estate; and is subject to the bequests, charitable and otherwise, contained in the will. His interest is now vested in the defendant, Vulivahu, as his widow. Who will be entitled to succeed on her death, it is premature now to consider. There is, in my opinion, no intestacy as to any portion of the testator's property.

Then, if the particular sources of income, out of which the testator directed that his widows' monthly allowances should be paid, be not sufficient, the rest of the moveable property, or rather the income derived from it, as well as the rents derived from the immoveable property, must contribute. It will be noticed that the testator in the concluding clause of his will directs that an outlay of Rs. 5,000 is to be made after the death of each of his widows according to the custom of his caste. He does not indicate out of what portion of his estate such sums are to come. He probably considered that his move-

(1) 4 Bom. H. C. Rep., 161, 162, O. C. J. (2) 5 Bom. H. C. Rep., 138, 139, O. C. J.

able property by its investment, and by the accumulation of interest arising thereupon, and the income derived from the rents of so much of the house in the Kálbádevi Road as would not be occupied by the widows, would suffice for the purpose. By his directions in clauses 15 and 16, that both of his widows are to act agreeably to the directions of his brother Visrám, he seems to have contemplated that his brother would live as long as the widows. He made no provision for the contingency, which has happened, of Visrám dying in the lifetime of those ladies. The will was made evidently without proper legal assistance. What this Court has to do is to endeavour to construe it, and give effect to the expressed wishes of the testator, so far as it legally can; and not to make a new will, or supplement any provisions which the Court might think ought to be found in it, but which are not.

Next, as to the rate of interest to be allowed on the moneys set apart in the firm of Visrám Mowji in accordance with the directions in the will.

From the evidence of the plaintiff's son, Lilládhur Jairám, it appears that the firm cannot be considered as a banking firm. It had and has no deposits of strangers, but had small deposits of female relations of the partners. To them the firm allowed 6 *per* cent., as the amounts deposited were small, and they lived on the interest. The firm had no need to borrow money from others. It depended, he said, on circumstances what rate of interest firms allow on moneys. If there is a running account, 9 *per* cent. is usually charged. On a running account between his firm and European houses it was usual to charge 5 *per* cent. on both sides of the account. He had looked over the firm's books for many years, and had never come across a higher rate than 6 *per* cent. The balance struck in Chattoorbhooj's account in the firm's books on the 1st *Kártak Sudh* 1930, (22nd October, 1873), the last *Diváli*, before his death, was Rs. 1,64,754-7-5 in his favour. On that sum interest was allowed at 6 *per* cent. After the testator's death Rs. 90,800 were carried to different accounts according to the directions in his will; and on the 1st day of 1931 the balance to credit, after such new accounts had

1885.

JAIRÁM NÁRRONJI v. KUVERBÁI.

been opened, was Rs. 25,546-2-1. Rs. 50,000 out of the Rs. 90,800 were credited to the testator's charity account, and interest at 6 *per* cent. was allowed on that and on the other accounts opened in pursuance of the directions in the will. Interest at 6 *per* cent. has up to recently been allowed on the Rs. 50,000 charity account.

With reference to the other accounts, an alteration took place in the rate of interest allowed under the following circumstances.

Lilládhur Jairám stated that in *Jet* 1937 (28th May to 26th June, 1881,) the partners had a talk with Visrám Mowji and said they were required to pay a very heavy rate of interest on the moneys lying in their firm, and they proposed to him that the moneys belonging to Chattoorbhooj's estate should be invested in Government promissory notes, or in some other way, or in some other place. That it was resolved that, from *Asád* following, 6 *per* cent. should be allowed on the charity account, and 4½ *per* cent. on the other accounts. Lilládhur said that on those terms his father (the plaintiff) and he himself and the other partners agreed to keep the moneys in the firm; and those rates were credited in the account up to Visrám's death in June, 1882; and that his father who on Visrám's death succeeded to the management of the firm, has credited the interest in the same way.

He admitted, however, that the accounts of the partners are allowed 6 *per* cent. in the firm's books. That in 1927 or 1928, (1870-71, 1871-72), the firm first became agents to a mill, and afterwards to two or three mills, and as such agents lent moneys to the mills, when the mills were in want of money, first at 9 *per* cent., but for the last five or six years at 6 *per* cent.

Chattoorbhooj, the testator, died on the 5th July, 1874, and as a partner in the firm of Visrám Mowji with a five-annas' share in it must, of course, have known that he and his partners were getting 9 *per* cent. for the moneys lent by the firm to the mills. The reduction of the rate paid by the mills to 6 *per* cent. did not occur till after his death. He must also have known that his firm never allowed to any one interest at a higher rate than 6 *per* cent. Although he directed the sums mentioned in his will

to be set apart, and entered to credit in the firm's books, he could not compel the partners to continue to hold money, unless they chose to retain the moneys belonging to his estate. He does not contemplate his share in the partnership continuing after his death.

In clause 16 he says: "Should my decease take place, then as to my business which is carried on in Bhái Visrám Mowji's shop, in which I have (a share) of five annas, it is to be made to cease." He nowhere states the rate of interest which he wishes, or assumes that the firm will continue to pay after his decease.

Lilládhur said that his father recently purchased 4 *per* cent. Government promissory notes for Rs. 60,000 with the money standing to the credit of the charity account; and that, in addition thereto, Government promissory notes for Rs. 65,000 have been purchased, of which notes the firm has now the possession. All such notes must at once be endorsed over to the Accountant General of this Court, who will retain them until the final decree is made in this suit, or until further order.

Now was the reduction from 6 *per* cent. to 4½ *per* cent. on some of the moneys held by the firm made in May or June, one which those interested in the estate of the testator have a right to complain of? I may here remark, that I cannot collect from the evidence whether the interest at the rate of 6 *per* cent. or that at the rate of 4½ *per* cent. allowed by the firm was made up with or without annual rests. In *Fergusson* v. *Fyffe* (1), which was a case regarding an account opened with a banking agency house in Calcutta by a Scotchman in 1786, who became insane in 1793 and died there in 1810, it was held by the House of Lords that there cannot be a title to compound interest without a contract, express or implied, or custom; and that by the law of England a contract for compound interest is not valid, except in mercantile accounts current for mutual transactions.

In *Boddam* v. *Ryley* (2) decided by Lord Chancellor Thurlow in 1783 and by the House of Lords in 1787, which affirmed his decree, the question was as to what interest should be allowed on

(1) 8 Cl. & Fin., 121.

(2) 1 Brown's C.C. 234 S. C. 2 Brown's C.C. 2 S. C. 4 Brown's Parl. Cases, 561.

1885.

JAIRÁM NÁRRONJI v. KUVERBÁI.

certain accounts between Samuel Hough and John Spencer, who when residing in Bombay in 1755 entered into partnership as merchants there, and afterwards became involved in pecuniary difficulties. Lord Thurlow said: "The question now is merely upon the interest. Spencer's representative claims 9 *per* cent. interest from year to year, upon the ground that the books were so made up. But I think no such interest can be allowed; for, although, where there are cross accounts, interest is as fair to one as the other, yet it is not fair after closing the trade. Then, whether he shall have Indian interest. If accounts are regularly made up upon Indian transactions, they ought to carry such interest as obtained there at the time when the transactions passed" (1).

The early portion of the above quoted passage was cited in the House of Lords by Lord Cottenham, L. C., in *Fergusson* v. *Fyffe*(2) as conclusive upon the point.

Lilládhur Jairám admitted, in cross-examination by Mr. Jardine, that his firm does not allow interest at 4½ *per* cent. in its accounts with other firms. His firm did not borrow at 4½ *per* cent. Indeed, it had no need, he said, to borrow money from others.

Except from the reason of its being the half of 9 *per* cent., which is and long has been the current rate amongst native merchants in Bombay, I do not understand why that rate was fixed upon by the partners in *Jet* 1937 (28th May to 26th June, 1881).

As the accounts of the partners in the firm were allowed 6 *per* cent. interest, and that the rate allowed on the balance of Rs. 1,64,754-7-5 standing to Chattoorbhooj's credit in the firm's books at the *Diváli* preceding his death, as well as on the moneys of the testator's estate in the hands of the firm from his death in 1874 to May or June, 1881, I think that such rate may be accepted as a fair one upon all the moneys of the estate in the firm's hands up to the time when the investments of Rs. 60,000 and 65,000 were respectively made in Government 4 *per* cent. promissory notes; after which it would be unfair to charge the

(1) 1 Brown's C.C. at p. 239. (2) 8 Cl. & Fin., p. 141.

members of the firm, or rather Visrám Mowji and the plaintiff with a higher rate than that which the notes produced. Lilládhur stated that the Government notes are not used for the purposes of the firm, and that he and his partners do not wish to keep them in the firm. Whether the accounts from the testator's death should be made up with annual rests or not, I must refer to the Commissioner, as I have no materials at present for forming an opinion on the point.

The other questions raised in paragraph 5 of the plaint, (sub-clauses 2, 3, and 4,) can be better answered when the Court has the Commissioner's report before it, and when it knows exactly what the real value of the estate is.

The question raised in sub-clause 5 of the above quoted paragraph as to making up the income of the widows, I have already answered. Lilládhur said that the monthly allowances to the widows are debited in the firm's books to the general account of the testator estate, and in my opinion correctly so.

The Court, therefore, passes a decree in favour of the plaintiff, and directs, as prayed, that the estate of the testator be administered under the direction of this Court. The usual administration accounts must be taken. The Commissioner must report what charitable and other bequests have been made by the will of the testator, and what moneys have been or are necessary to be set apart for the purpose of carrying out the same. Let him also report whether or not annual rests ought to be allowed, and, if so, from and to what dates, on all or any of the moneys of the estate during the time they have been in the custody of the firm of Visrám Mowji. Let the plaintiff forthwith assign over and endorse, or cause to be assigned over and endorsed, to the Accountant General of this Court the Government 4 *per* cent. promissory notes for Rs. 60,000 and Rs. 65,000 purchased with the moneys of the testator's estate; and let the Accountant General open separate accounts in the name of this suit in respect of such several amounts, and hold the same respectively subject to the further order of this Court, or of the sitting Judge in chambers. Let the Commissioner inquire and report who would be proper trustees to be appointed, and whether

1885.

JÁIRÁM NÁRRONJI v. KUVERBÁI.

alone or in conjunction with the plaintiff, in carrying out the charities and bequests to charity in the testator's will; and let the Commissioner frame a scheme for the future management of such charitable bequests and charities as have been duly made and established according to the law and usage in force in relation to the same.

As the testator has made a will, the provisions of which require the assistance of this Court to construe and determine the meaning of it, the costs of all the parties to this suit of and incidental thereto, as well as the costs reserved by the order of the 28th July, 1884, must come out of the estate; the same to be taxed as between attorney and client. Leave to apply as advised. Further costs and further directions reserved.

Attorneys for the plaintiff.—Messrs. *Thákurdás and Dharamsi.*

Attorneys for the defendants.—Messrs. *Little, Smith, Frere and Nicholson*; *Tobin and Roughton*; and *M. Munshi.*

APPELLATE CIVIL.

Before Sir Charles Sargent, Knight, Chief Justice, and Mr. Justice Birdwood.

1885. *June* 18.

TRIBHOVAN GANGA'RA'M, PLAINTIFF, *v.* AMINA', DEFENDANT.*

Account stated—Kháta, suit on a—Limitation—Acknowledgment—Construction.

A *kháta* consisting of one item only on the debit side, and bearing the mark of the debtor, *held* to be a mere acknowledgment, and not an account stated.

THIS was a reference by Ráv Sáheb Sakhárám M. Chitale, Subordinate Judge of Mahád, under section 617 of the Civil Procedure Code (Act XIV of 1882).

The reference was stated as follows :—

"The plaintiff sues to recover from the defendant Rs. 16 as principal, and one rupee and six annas as interest, on a *kháta* executed to the plaintiff by the defendant on the 10th of March, 1882.

"Copy of an account signed by the defendant in a book belonging to the plaintiff, Tribhovan Gangárám Gujar, deceased.

* Civil Reference, No. 14 of 1885.