

## ORIGINAL CIVIL.

Before Mr. Justice Jardine.

LIMJI NOWROJI BĀNĀJI, (PLAINTIFF), v. BĀPUJI RUTTONJI  
LIMBUWĀLLĀ AND OTHERS, (DEFENDANTS).\*

1887.

February 25.

*Charity—Will—Bequest to charity—Public charity—Trusts affecting land—Perpetuity—Pārsi religious ceremonies: bāj rozgār, nirangdīn, yezāshni, ghambār, and doslā—Civil Procedure Code (Act XIV of 1882), Sec. 527.*

A Pārsi by his will directed that the income arising from a one-third share of a *bungalow* in Bombay, to which he was entitled, should be devoted in perpetuity to "the performance of the *bāj rozgār* ceremonies and the consecration of the *nirangdīn* and the recitation of the *yezāshni* and the annual *ghambār* and *doslā* ceremonies." He further directed that the said share should not be sold or mortgaged. Evidence was given, which showed that the above-mentioned religious ceremonies were performed among Pārsis rather with a view to the private advantage of individuals than for the public benefit.

Held, that the trusts of the will were void, and that the direction, that the property should not be sold, was invalid.

CASE stated under section 527 of the Civil Procedure Code (Act XIV of 1882).

"1. One Nowroji Cursetji Limbuwallā, a Pārsi inhabitant of Bombay, died on the 30th June, 1857; having previously thereto made his will in the Gujarāthi language, whereby he appointed his son, Ruttonji Nowroji, and his brother, Hormasji Cursetji, his executors. The said will was duly proved in the Supreme Court of Judicature at Bombay on the 23rd September, 1857, by the said Ruttonji Nowroji; and administration of all and singular the goods, chattels, rights, and credits of the said deceased was committed to the said Ruttonji Nowroji, reserving the right of the said Hormasji Cursetji to come in and apply for the like probate. The said Hormasji has since duly renounced such right.

"2. The said Nowroji Cursetji died possessed of considerable property, moveable and immoveable, including an undivided one-third share of a *bungalow* situate at Khetvādi, in Bombay. The clauses in the said will, relating to the said *bungalow*, are as follows:—

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“The thirteenth article is this: ‘I have a *bungalow* situated at Khetvádi; my *bungalow* comprising three shares, of which one share belongs to me, and one share belongs to my own son, Bhái Ruttonji, and one share belongs to my brother, Hormasji.’

“The fourteenth article is this: ‘My *bungalow* situate at Khetvádi has been perpetually set apart for charity purposes (*dharmkháta*). As to that, my son, Bhái Ruttonji, and my brother, Hormasji, shall conduct all the affairs respecting the performance of the *báj rozgár* ceremonies and the consecration of the *nirangdín* and the recitation of the *yezáshni* and the annual *ghambár* and *doslá* ceremonies.’

“The fifteenth article is this: ‘The (landed) estate or *bungalow* situated in Khetvádi, mentioned in the foregoing fourteenth article, shall not be sold or mortgaged by any one; whoever advances money on this *bungalow* shall lose the same.’

“3. By the seventeenth clause of the said will, the testator directed that the said Ruttonji Nowroji should be the heir to all his property; and by the nineteenth clause he directed that after the death of the said Ruttonji the said property should belong to his five sons in equal proportions.

“4. The said Nowroji Cursetji left him surviving his said son Ruttonji and five sons of the said Ruttonji, *viz.*, Bomanji Ruttonji Limbuwállá, the defendant Bápuji, Cowásji, Rustomji, and Nusserwánji, who has been adjudged a lunatic, and the committee of whose estate and effects is the plaintiff.

“5. By an indenture bearing date the 9th day of June, 1880, the said Bomanji Ruttonji released in favour of the said Ruttonji Nowroji and his other sons all his claims and demands to, or in, the moveable or immoveable estate of the said Nowroji Cursetji, or of the said Ruttonji Nowroji Limbuwállá.

“6. After the death of the said Nowroji Cursetji a sixth son, the defendant, Nowroji, was born to the said Ruttonji Nowroji. It was agreed by the defendants, Bápuji, Cowásji, and Rustomji and the said Nusserwánji that the defendant Nowroji should share equally with them in the estate of the said Nowroji Cursetji.

"7. The said Ruttonji Nowroji died on the 8th November, 1884, having duly made his last will, dated the 7th January 1884, whereby he appointed his wife, the defendant Pirozbái, and the defendant Bápuji his executrix and executor; probate of the said will was granted to the said executrix and executor on the 30th January, 1885.

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"8. The seventh clause of the said will is as follows:—

"I hereby direct as follows:—My father, Nowroji Cursetji Limbuwálla, by his own will has set apart his own personal one-third share in the *bungalow* at Khetvádi bearing the present assessment No. 28 and the Collector's No. 538 for the purpose of performing in our house the commemorative *báj rozgár* ceremonies and certain other ceremonies on the days fixed for the praise of the holy *frohár* (spirit). My executors are to cause the above-mentioned ceremonies to be performed out of the income of the said one-third share, and are to do such acts as may be proper to be done, so that thereby the entire object of the said will may be accomplished."

"9. The plaintiff, as such committee as aforesaid, and the defendants, Bápuji, Cowasji, Rustomji, and Nowroji, contend that the devise of the said one-third share in the said Khetvádi house by the said will of the said Nowroji Cursetji is void, as being in perpetuity, and not for a charitable use; that the direction in the said will, that the said house should not be sold, is also void; and the plaintiff, as such committee as aforesaid, and the defendants, Bápuji, Cowasji, Rustomji, and Nowroji, are entitled to such one-third share in equal proportions.

"10. The Advocate General of Bombay joins in stating the present case as representing the said charity if validly created.

"11. The questions for the opinion of this Honourable Court are:—

"(1.) Whether the trusts declared by the said will of the said Nowroji Cursetji Limbuwálla, with reference to the one-third share of the said *bungalow* at Khetvádi, are legal and valid trusts, or whether any and which of such trusts are or is legal and valid.

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“(2.) Whether the trusts thereby declared, or any and which of such trusts, are or is void.

“(3.) Whether the direction contained in the said will, that the said *bungalow* should not be sold, is or is not binding.

“(4.) Whether the plaintiff, as such committee as aforesaid, and the defendants, Bápuji, Cowasji, Rustomji, and Nowroji, are now lawfully entitled to the said one-third share in the said house.

“12. In the event of this Honourable Court deciding that the said trusts are void, and that the said one-third share can be sold freed from such trusts, or any of them, and that the plaintiff, as such committee as aforesaid, and the defendants, Bápuji, Cowasji, Rustomji, and Nowroji, are entitled thereto, it is agreed that the said one-third share shall be sold by the plaintiff and the defendants other than the Advocate General of Bombay or such of the said persons as may be necessary parties to such sale, and the net proceeds of such sale divided in equal proportions between the plaintiff, as such committee as aforesaid, and the defendants, Bápuji, Cowasji, Rustomji, and Nowroji.

“13. In the event of this Honourable Court deciding that the said trusts are not void, and that the said one-third share cannot be sold freed from the said trusts, or from any of them, the sanction of this Honourable Court is desired to a sale of the one-third share at the same time as the sale of the rest of the said *bungalow*. The plaintiff and defendants, other than the Advocate General, undertake that the net proceeds of the sale of the said one-third share should be invested in Government paper, and the income thereof applied in and upon the said trusts, or such of them as are valid.

“14. It is agreed that the costs of all parties to this case to be taxed as between attorney and client shall be paid out of the estate of Nowroji Cursetji Limbuwálla.”

*Lang* for the plaintiff:—Where trusts in perpetuity of this kind affect land, the test of their validity is whether they are for public charitable and beneficial objects. The trusts in this case are not for public charitable objects. They are merely for private bene-

fit, and are, therefore, not valid. The law as to perpetuities is laid down in *Yeap Cheah Neo v. Ong Cheng Neo*<sup>(1)</sup>: see also *Fátmá Bibi's Case*<sup>(2)</sup>, where the trust was held to be for a public charity; *Das Mercers v. Cones*<sup>(3)</sup>; *Andrews v. Joakim*<sup>(4)</sup>. As to the Pársi ceremonies, in reference to which the proposed trusts were to be established, counsel referred to the History of the Pársis by Dosábhái Frámji, pp. 165, 212; Essays on the Sacred Language, Writings, and Religion of the Pársis, by Martin Haug, (Trübner)<sup>(5)</sup>, pp. 224-225, p. 313, p. 400, note, p. 403; the Bombay Gazetteer, Vol. XIII, p. 271. He contended that these ceremonies were all for private benefit.

*Macpherson* (Acting Advocate General) for the defendants.

Oral evidence was given as to the nature of the above-mentioned ceremonies.

JARDINE, J.:—The one-third share of the *bungalow* at Khetvádi, in Bombay, was set apart by the testator, who died on the 30th June, 1857, for the performance of the ceremonies called *báj rozgár*, *nirangáin*, *yezáshni*, and the annual ceremonies called *ghambár* and *doslá*<sup>(6)</sup>. The head priest, Jivanji Jamshedji Modi, has deposed that *muktád*, a word derived from the Sanskrit, means the same as *doslá*, and that all these ceremonies, except *muktád*, which is celebrated for the benefit of the dead alone, are performed for the living as well as the dead. Excepting the *ghambárs*, in which the Pársi community sometimes has a share, though not always, these ceremonies are, according to the witness, performed for the advantage or comfort of private individuals only.

The *báj rozgár* ceremonies are performed on the fourth, tenth, and thirtieth days after a death, and each subsequent month, for a year or longer; and, according to this priest, they are meant to induce the *frohárs*, or guardian spirits of the dead, to continue their good offices to the living; and also to show that the living

(1) L. R., 6 P. C., 381.

(2) I. L. R., 6 Bom. : see p. 50.

(3) 2 Hyde, 65.

(4) 2 Beng. L. R., O. J. C., 148.

(5) Essays on the Sacred Language,

Writings, and Religion of the Pársis,

by Martin Haug (Trübner).

(6) *Doslá* ceremony is same as *muktáds*: see History of the Pársis by Dosábhái Frámji, p. 212; Gazetteer, 271, note,

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have not forgotten the dead. According to Dr. Haug (Essays, 2nd Edition), these *frohárs* were originally the departed souls of ancestors, comparable to the *pitrús* of the Bráhmíns and the manes of the Romans. Now they are regarded as guardian angels, each being of the good creation having one.

The *yezášni* or, as Dr. Haug spells it in Gujaráthi, *ijashne* ceremony is part of the *báj roz*. *Báj* appears to be a recitation (Essay, 403). The *ijashne* comes from a root meaning to worship by means of sacrifices and prayers. It is described by Dr. Haug (pp. 139, 281, and 394). Its connection with Bráhmínical ceremonies is explained: as performed by the Pársi priests now-a-days, it contains, according to the learned author, all the elements which constitute the different parts of the *jyotishtoma*, cycle of sacrifices, the prototype of all the *soma* sacrifices. The *yasna* is recited, and prayers are said. The head priest deposes that, at the *ghambárs*, prayers are recited for the living and dead, and sometimes feasting takes place. These *ghanbárs*, as Dr. Haug calls them, are feasts marking the seasons, held six times a year, each lasting five days, in which *afringans* or blessings are recited over a meal, and an angel, or deceased spirit, is invited. The meal is provided in his honour and eaten by those present (pp. 224 and 408).

The *muktád* or *fravardigan* days (pp. 129) occur at the end of the Pársi year, and are occupied with ceremonies held in tender and religious memory of the dead. They are described at p. 212 of Mr. Dosabhái Frámji's History of the Pársis.

The head priest has stated that, after the third day, the soul of the dead receives no spiritual benefit from these different ceremonies. But the Pársis consider their dead friends to be consoled by the remembrance of the living; the other advantages of these ceremonies seem to consist in the propitiation of these *frohárs*, or guardian spirits, who, according to Dr. Haug, are each a kind of prototype of some person, to be compared with the "ideas" of Plato. They are believed to comfort and protect the living, if propitiated. The *nirangdin* is described by the head priest as the consecrated use of the urine of a sacred white bull, which is kept by the community here. This product is applied

outwardly, and some of it is drunk. This great purification ceremony is described by Dr. Haug (pp. 241 and 285), who states that the custom has descended from the most ancient times, when a purifying and highly medicinal influence was ascribed to the fluid in question. The *nirangdin* requires a formal *ijashne* with *homa* (p. 400). It is intended, says Dr. Haug, for the removal of any impurity whatever; it lasts nine days, and is chiefly practised by priests. According to the priest, the living as well as the dead benefit thereby.

The words of the will, as I understand them, point to benefits not open to all the Pársi community; and from the evidence of the priest and the reference made to Dr. Haug's learned essays, I come to the opinion that the benefits which, according to the belief of the Pársis, result from the ceremonies specified, are consolation to the spirits of certain dead persons and comfort to certain living persons, afforded by certain of the *frohárs* or prototypes of the dead.

In approaching the question of law, I take, as authorities, the cases that have been cited—*Yeap Cheah Neo v. Ong Cheng Neo*<sup>(1)</sup> and *Fátmá Bibi v. The Advocate General of Bombay*<sup>(2)</sup>. The object of the rule against perpetuities is, as stated by their lordships of the Judicial Committee, to prevent the mischief of making property inalienable, unless for objects which are in some way useful or beneficial to the community. An exception is made, also on grounds of public policy, in favour of gifts for purposes useful and beneficial to the public, and which in a wide sense of the word are called "charitable uses."

In the present case, I am of opinion that neither the consolation of the dead nor the propitiation of the *frohárs* is a general public use. The first object bears some analogy to the purpose of the dedication of the Sow Chong house in the case of the devise with which their lordships dealt. Their lordships' observation appears applicable to Pársis in Bombay: "In this respect a pious Chinese is in precisely the same condition as a Roman Catholic, who has devised property for masses for the dead, and as the Christian of any church who may have devised property

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(1) L. R., 6 P. C., 381.

(2) I. L. R., 6 Bom., 42.

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to maintain the tombs of deceased relatives." The other object, viz., the acquiring, by a few private persons; of benefits through the protection of the *frohars* seems to me to resemble a gift to a private company, and, therefore, not a gift to a charitable use—*Cocks v. Manners*<sup>(1)</sup>; *Attorney General v. Haberdashers' Company*<sup>(2)</sup>. On the present question which arises under section 527 of the Civil Procedure Code in a case stated, there has been no conflict, the parties being of accord that the devise is void, and the Advocate General, as representing the charity, leaving them in the hands of the Court.

For the reasons given, I find: that the trusts declared with reference to the one-third share of the *bungalow* at Khetvadi are void, and that the direction in the will, that it should not be sold, is not valid, nor binding, and that the plaintiff, as committee of the lunatic, and the first four defendants are lawfully entitled to the said one-third share. The decree will so declare, and will incorporate the substance of clause 12 of the case stated and clause 14 thereof as to costs.

Attorneys for the plaintiffs:—Messrs. *Wadia and Ghandy*.

(1) L. R., 12 Eq., 574.

(2) 1 My. & K., 420.

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*Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Bayley.*

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March 11-18.

TOOLSÁ GOOLÁL AND OTHERS, (PLAINTIFFS), v. JOHN ANTONE  
AND ANOTHER, (DEFENDANTS).\*

THE BOMBAY TRAMWAY COMPANY, LIMITED, APPLICANT.

*Execution—Practice—Garnishee—Attachment by a judgment-creditor of a debt due to judgment-debtor by a third party—Order upon third party to pay, where debt admitted—Procedure where existence of debt not admitted—Civil Procedure Code (XIV of 1882), Secs. 267-268, 503.*

When a debt alleged to be due by a third party to a judgment-debtor has been attached by the judgment-creditor, the Court may, under section 268 of the Civil Procedure Code (Act XIV of 1882), make an order upon the garnishee for the payment of such debt to the judgment-creditor in case the former admits it to be due, or for so much as he admits to be due to the judgment-debtor. Where

\* Suit No. 25761 of 1884.