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

JAMNABAI, WIFE OF KHIMJI VULLUBDASS (*Defendant*), *Appellant v.* KHIMJI VULLUBDASS AND OTHERS (*Plaintiffs*), *Respondents* AND SAKERBAI AND JIVABAI AND ANOTHER (*Defendants*), *Respondents.** [20th September, 1889.]

Will—Charity—Public charity—Sadavarat—*Well—Cistern—Hindu law—Preference given to unmarried daughters over married daughter.*

M, a Hindu inhabitant of Bombay, died in 1886, leaving him surviving his widow, Maneckbai, and three daughters, *viz.*, Jamnabai, Sakerbai and Jivabai. Jamnabai was his daughter by a predeceased wife and was married in his lifetime. Sakerbai and Jivabai were his daughters by his wife Maneckbai, and were unmarried. The testator's will contained the following provisions:—

"Clause "6.—Should my wife die without leaving an heir, then as to whatever property of mine there may be left, the same be used as follows:—My trustees shall make the outlay for both the *sadavarats* and that for the work of repair of my property out of my fund. And as to whatever surplus may remain out of the same, let my trustees pay to my brother Dósa Mulji's son, named Bhai Ramdas, Rs. 50 *per* one month for his expenses. As to the surplus moneys which may remain out of the same after taking Bhai Ramdas' advice are to be used in making the outlays for building a well and *avada* (*i.e.*, cistern of water for animals to drink out of). Such moneys are truly to be used by my trustees."

"10. In my country, at the village of Shri Anjar, I am at present carrying on a *sadavarat*. Similarly out of my fund my trustees are always to continue (the same,) and if there be heirs of mine, those also are to continue the same. The *sadavarat* shall never be stopped.

"16. After my death my trustees shall out of my income set up a *sadavarat* in the town of Shri Nassik. In that *sidho* (articles of food) are to be given to each person as follows.—Flour weighing sixty rupees. *Dal* (pulse) weighing eight rupees. Salt and chillies."

"18. A *sadavarat* of mine is now going on in the village of Shri Anjar, and I have written for another *sadavarat* to be set up at Shri Nassik. Thus my [2] trustees are to carry on both the *sadavarats* in a good manner, and they are to pay the expenses thereof out of my funds. And when my trustees shall make over my property to any of my abovementioned heirs, or to any one who may hereafter be appointed as heir, in order that the expenses of both the *sadavarats* may be properly defrayed out of the interest (or rents), a sum of money sufficient for that, or houses, whichever my trustees may choose (*i.e.*) property sufficient to maintain the expenses of both the *sadavarats*, shall be set apart. And as to the property which may remain, my trustees shall make over the same to my heir, but the sum or houses thus set apart for the expenses of the *sadavarats* are to be separated."

Held—

(1) That the bequest to the *sadavarat* at Anjar was valid.

(2) That the bequest to the second *sadavarat* which by cl. 16 the testator directed to be established at Nassik, was valid, and was not void for uncertainty. The clear intention of the testator was that this *sadavarat* should be on the same

* Suit No. 116 of 1888: Appeal No. 625.

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scale as the one at Anjar and there would, therefore, be no difficulty in ascertaining the nature of the *sadavarat* to be established and the sum to be expended upon it.

(3) That the bequest in cl. 6 in the building of a well and cistern was valid as a charitable trust.

(4) That under cl. 18 of the will the residue of the testator's property should go to the two unmarried daughters of the testator in preference to the married daughter.

THIS was a suit for the purpose of having the will of one Morarji Mulji construed, and the rights of the several persons interested in this estate ascertained and declared.

Morarji Mulji, a Hindu inhabitant of Bombay, died on the 4th of August 1886, leaving a will, dated the 28th of February 1884, of which he appointed the plaintiffs executors and trustees. Probate of the will was obtained by the plaintiffs on the 24th January, 1887.

The testator left him surviving his widow, Maneckbai, and three daughters, the defendants Jamnabai, Sakerbai, and Jivabai. The testator left considarable self-acquired property, moveable and immoveable. Maneckbai died some months after the testator, leaving no son of her own, and without having taken one in adoption.

The defendant Jamnabai, a daughter of the testator by a predeceased wife, was married in the testator's lifetime. The defendants Sakerbai and Jivabai had never been married.

[3] The portions of the said will material for the purposes of this report were:—

Clause "6. Should my wife die without (leaving) an heir, then as to whatever property of mine there may be left, the same be used as follows:—My trustees shall make the outlay for both the *sadavarats* and that for the work of repair of my property out of my fund. And as to whatever surplus may remain out of the same, let my trustees pay to my brother Dosa Mulji's son, named Bhai Ramdas, Rs. 50 (in number fifty) *per* one month for his expenses. As to the surplus moneys which may remain out of the same after taking Bhai Ramdas' advice are to be used in making the outlays for building a well and *avada* (*i.e.*, cistern of water for animals to drink out of). Such moneys are truly to be used by my trustees."

"9. After my death, outlays are to be made after me, and moneys are to be paid as legacies, as written below:—

"5,000. Let there be purchased and kept promissory notes for Rs. 5,000 in the name of Bai Jamna. Let the interest which may be received thereon be continued to be paid to her.

"5,000. Let there be purchased and kept promissory notes for Rs. 5,000 in the name of Bai Saker. Let the interest which may be received thereon be continued to be paid to her. Let such interest be paid after Bai Saker's marriage shall have taken place.

"5,000. Let there be purchased and kept promissory notes for Rs. 5,000 in the name of Bai Jiva. Let the interest thereon be paid after Bai Jiva's marriage shall have taken place. * * * * * * * * * * * * * *

"10. In my country, at the village of Shri Anjar, I am at present carrying a *sadavarat*. Similarly out of my fund my trustees are always to continue (the same), and if there be heirs of mine, those also are to continue the same. This *sadavarat* shall never be stopped."

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"16. After my death my trustees shall out of my income set up a *sadavarat* in the town of Shri Nassik. In that, *sidho* (articles of food) are to be given to each person, as follows:—

"[4] Flour weighing sixty rupees. *Dal* (pulse) weighing eight rupees. Salt and chillies."

"18. A *sadavarat* of mine is now going on in the village of Shri Anjar, and I have written for another *sadavarat* to be set up at Shri Nassik. Thus my trustees are to carry on both the *sadavarats* in a good manner. And they are to pay the expenses thereof out of my funds. And when my trustees shall make over my property to any of my abovementioned heirs, or to any one who may hereafter be appointed as heir, in order that the expenses of both the *sadavarats* may be properly defrayed out of the interest (or rents), a sum of money sufficient for that, or houses, whichever my trustees may choose, (*i.e.*, property sufficient to maintain the expenses of both the *sadavarats*), shall be set apart. And as to the property which may remain, my trustees shall make over the same to my heir, but the sum or houses thus set apart for the expenses of the *sadavarats* are to be separated."

The suit came on for hearing before Jardine, J., who on the 22nd of September, 1888, delivered a judgment, of which the following portions only are material for the purposes of this report:—

"Mr. Telang, as counsel for Maneckbai's daughters, argues that even if the Court holds that after Maneckbai's death the property goes to her husband's heirs, her daughters are entitled, as unmarried, in preference to Jamnabai, the married daughter.

"For this proposition are cited Mayne's Hindu Law, ss. 479 and 514 (4th edn.) and West and Buhler, pp. 104 and 442 (3rd edn.) and the authorities to which these learned authors refer. They appear to me to show that in this part of India the unmarried daughter succeeds in preference to the married, under the rule stated in the Vyavahara Mayukha and the Mitakshara, and no custom to the contrary being alleged or suggested. I interpret the rule in this manner, and on the second issue find that the two unmarried daughters, defendants 2 and 3, take absolute and several estates (*Bulakhidas* v. *Keshavlal*(1); Mayne's Hindu Law, s. 515, (4th edn.); whether they be regarded as [5] inheriting from the father or the mother—*Bhagirthibai* v. *Kahnujirav* (2).

"The construction of cl. 6 presents some difficulty. I assume with some doubt that the bequest of the residue in cl. 18 does not take effect, because there is no son born or adopted. The last direction in this clause may then be considered alone, and its language, which resembles the words construed in *Dwarkanath Bysack* v. *Burroda Persaud Bysack* (3) may be construed as a bequest of the residue. The parties wish to support these charitable bequests; and as no Indian or other cases have been cited, I have paused to consider how far the decisions in England can reasonably be applied to the circumstances of India and the notions of Hindus. Those to which I will now refer seem to me fairly applicable. I cannot presume a charitable object in the well and cistern, and if not charitable, the gift must fail for uncertainty, under s. 76 of the Succession Act X of 1865—*Aston* v. *Wood* (4). But even as a charitable gift it would be void for uncertainty, like the gift of the residue in *Chapman* v. *Brown* (5) to build

(1) 6 B. 85. (2) 11 B. 285. (3) 4 C. 443.
(4) L. R. 6 Eq. 419. (5) 6 Ves. 404 (410).

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a chapel. The language of the Master of the Rolls in that case applies *mutatis mutandis*. 'It is quite impossible to give any direction that would not be vague and indefinite to a degree almost ridiculous: an inquiry what they might have employed for building a chapel, without knowing what kind of chapel: the testatrix having given no ground to ascertain what kind of chapel; no locality.' As remarked in *In re Birkett* (1) by Sir G. Jessel, M.R., in approving of this decision 'you might have any kind of chapel; you might have something very much like a barn, or you might have a beautiful chapel resembling for instance, La Sanite Chapelle in Paris, or the Sistine Chapel at Rome.'

"Another matter for decision relates to the two *sadavarats* which are established for the daily distribution of food to mendicants and travellers. This object is, in my opinion, a public charity. Clause 6 is explained by cl. 16, whence it appears that one of these *sadavarats* was intended by the testator to be [6] created at Nassik. As regards this *sadavarat*, I am of opinion that the bequest is void for uncertainty. The authorities already cited apply, and also *Flint* v. *Warren* (2) where the Vice-Chancellor held a bequest void for uncertainty; for, 'first' the testatrix had not specified the sum which was to be the subject of the bequest; and the difficulty of ascer taining the amount of the fund which the Court ought to direct to be set apart to answer the bequest, was insuperable.' The subjects also were not clearly specified; see, too, *Vezey* v. *Jamson* (3) and *Price* v. *Peacock* (4). I find no means of ascertaining, even approximately, for what number of persons the testator wished to make provision of daily dole, or what style of building he wished to have erected. The circumstances differ thus from those in the *The Magistrates of Dundee* v. *Morris* (5) decided by the House of Lords.

"Having regard to the observations on the *The Magistrates of Dundee* v. *Morris* (5) in *Fisk* v. *Attorney-General* (6) and in *In re Birkett* (1), I am of opinion that the Court can support the bequest to the *sadavarat* at Anjar, in Cutch. That charity is in actual existence, and was so in the testator's lifetime. The locality is defined. Clauses 10 and 18 show that what the testator wished to have continued was this very actual *sadavarat*. It is to be continued in the same way and in a reasonable manner. I think, then, 'there is sufficient limitation pointed out by the will as to the charitable object to enable "the Court" to ascertain the amount required to be applied for carrying out that object.' For this purpose a reference must be made to the Master in the usual way.

"Thus in construing cl. 6 I uphold the bequest to the Anjar *sadavarat* and that to Ramdas.

"I also find that defendants 2 and 3, the daughters of Maneckbai, are entitled to the residue, moveable and immoveable, in absolute and several estates. The residue devolves to them as heirs of the testator, they being unmarried daughters, in preference to the married daughter Jamnabai.

[7] Against so much of the decree as declared the defendants, Sakerbai and Jivabai, to be entitled to the residue to the exclusion of the defendant, Jamnabai, the defendant, Jamnabai, appealed.

(1) L. R. 9 Ch. D. 576 (579).
(2) 15 Sim. 626 (629).
(3) I. S. & St. 69 (70).
(4) 2 Lev. 267.
(5) 3 Macq. 134.
(6) L. R. 4 Eq. 521.

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The plaintiffs, the executors, objected to the decree in so far as it held that the bequest for the *sadavarat* at Nassik was void for uncertainty. The Advocate General objected to the decree for the last mentioned reason, and also because it held that the bequest for building a well and cistern was void for uncertainty.

Lang, *Inverarity* and *Jardine*, for the appellant.

Budrudin and *Chitty* for the executors, respondents.

Telang and *Dhairyavan*, for the defendands Sakerbai and Jivabai, respondents.

Latham (Advocate General) and *Chitty* for the Advocate General, respondant.

As in the event of the charitable bequests absorbing the whole of the property it would be unnecessary to go into the appellant's case, it was agreed that the Advocate General should commence.

Latham (Advocate General) :—First, as to the *sadavarat* at Nassik. A charitable bequest cannot fail for uncertainty. *Chapman* v. *Brown*(1), on which Mr. Justice Jardine relied, was decided on the law of Mortmain, and does not apply. That case, too, has been practically overruled by a series of cases mentioned in *In re Birkett* (2). The current of authority has changed, and now a bequest of residue to charity will never fail. Besides, in this case the *sadavarat* at Anjar is ascertained, as it was commenced in the testator's lifetime, and the Court will ascertain the *sadavarat* at Nassik from it. The testator evidently intended that the two *sadavarats* should be carried on in a similar manner and at a similar cost.

Secondly, as to the well and cistern. There can be no doubt that it is a good charitable bequest—*Jones* v. *Williams* (3) ; West and Buhler's Hindu Law, p. 206, note (*j*) (3rd ed.) ; Viramitrodaya, p. 250 ; Mandlik, p. 336 ; *Fatmabibi* v. *The Advocate General of Bombay* (4).

The well is for men, the *avada* for animals. A bequest for animals useful to men has been held valid.

[8] [SARGENT, C. J.:—You may conclude that it is a charitable object.]

Then it cannot be void for uncertainty as it is a gift of the whole residue. It is very different whether you have to deal with residue or a specific fund. When the Court can come to the conclusion that the gift is charitable with charges on it, then all doubt ceases—*Mitford* v. *Reynolds*(5); *Dwarkanath Bysack* v. *Burroda Persaud Bysack* (6).

Chitty for the executors in support of the *sadavarat* at Nassik.

Telang :—I submit it is not in the discretion of the Court to say how much shall go in charity. The testator only intended a portion to be so applied, and that portion is uncertain. *Dwarkanath Bysack* v. *Burroda Persaud Bysack*(6) is distinguishable, as there was a general residuary bequest in favour of charity. Then, again, I submit that the word "fund" in the will means income only, and that the capital is undiposed of. If the *sadavarat* at Nassik is to be established, it must be out of the income. A portion of the residue is given for the well, but that portion being uncertain, the whole gift is void for uncertainty.

Latham in reply.

The judgment of the Court was delivered by

(1) 6 Ves. 404. (2) L.R. 9 Ch. D. 576. (3) Amb. 651.
(4) 6. B. 42. (5) 16. Sim. 105. (6) 4 C. 443.

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JUDGMENT.

SARGENT, C. J., after stating the facts of the case continued as follows:—The questions now before the Court are on the construction of cl. 6 of the will of Morarji Mulji, which runs as follows:—(His Lordship read cl. 6.) Mr. Justice Jardine has found no difficulty in declaring valid the bequest to the *sadavarat* at Anjar, in Cutch, as that *sadavarat* is already in existence, and was, in fact, established and maintained by the testator in his lifetime. But a question has arisen as to the validity of the bequest to the second *sadavarat*, which the testator has by cl. 16 of his will directed to be set up at Nassik. It is said that no fixed sum has been set apart for the establishment or maintenance of this *sadavarat*, and that the bequest is consequently void for uncertainty. In cl. 18 the testator says: [9] "A *sadavarat* of mine is now going on in the village of Shri Anjar, and I have written for another *sadavarat* to be set up at Shri Nassik. Thus my trustees are to carry on both the *sadavarats* in a good manner." We think that taking a reasonable view of the will, which is not artificially drawn, it was clearly the intention of the testator that the *sadavarat* to be set up at Nassik should be on the same scale as that already carried on at Anjar. There will, therefore, be no difficulty in ascertaining the nature of the *sadavarat* to be established and the sum to be expended upon it—*The Magistrates of Dundee* v. *Morris* (1). This seems to us to be the fair and reasonable view to take of the clauses relating to the *sadavarats*, and a direction must, therefore, be given for the carrying on of both of them.

A further question was raised, in the course of the argument, as to what was meant by the word "fund" used in the will. Looking at the will, as a whole, we are of opinion that by the word "fund" the testator meant personal property. It is clear that he must have meant something distinct from "property," as in cl. 15 he mentions his immoveable property, which he directed was not to be sold or mortgaged; thus showing that he considered that as something apart from the rest. Again it has been argued that "fund" means "income"; but when he means to speak of "income" he uses that word as in cl. 16. We may state that in our opinion, the *sadavarat* should be supported out of the income of the fund. That would, in any view of the case, be the natural course.

We come to the latter part of cl. 6 which directs the building of a well and "*avada*", (cistern for animals to drink water from), out of the surplus of his fund after providing for the outlay of the two *sadavarats* and repairing his property. Mr. Justice Jardine considered he could not presume a charitable object in a well and "*avada*". Such an object is so frequently the result of charitable intention in Oriental countries, and is so entirely in accordance with the notions of the people of this country, that, we think that, in the absence of anything to show that the testator intended the well and "*avada*" to be built for [10] the benefit of his property—and there is nothing in the present will to show such intention—they should be presumed to have been intended by the testator for the use of the public. However the Division Court considered that in any case the bequest was void for uncertainty; and as the whole of the residue of the fund was clearly not intended to be applied to that charitable purpose, the question doubtless arises whether the bequest was void on that account. The Division Court relied on *Chapman* v. *Brown* (2) and the remarks of Sir G. Jessel in *In re Birkett* (3).

(1) 3 Macq. 194. (2) 6 Ves. 404. (3) L.R. 9 Ch. Div. 579.

v. *Brown*(1) what was actually decided by Sir W. Grant was that the bequest of the "surplus" of the residue after providing for the building of a chapel was void, because that object having failed, being in violation of the Mortmain Act, it could not be ascertained how much would have been applied to the building of the chapel by the executors, and thus the gift of the surplus became void from uncertainty. No doubt Sir W. Grant in the course of his judgment expressed the opinion, which may have some bearing on the present question, that it would be impossible to refer it to the Master to enquire what the executors might have employed for building a chapel without knowing the locality where it was to be built, or what kind of chapel was intended by the testator and which, as Sir G. Jessel said in *In re Birkett* (2) "might have been something very much like a barn, a kind of structure with which we are too familiar in this country, or you might have a beautiful chapel resembling, for instance, La Sainte Chapelle in Paris, or the Sistine Chapel at Rome." However in *Mitford* v. *Brown* (3) Lord Lyndhurst, after referring to *Chapman* v. *Brown* considered that the monument, which the testator directed to be built to contain the body of himself, his two parents and his sister and to be built of durable materials, was sufficiently described; and so also in *The Magistrates of Dundee* v. *Morris* (4) the House of Lords regarded the sum to be spent on the hospital for one hundred boys was sufficiently restricted by the will.

Again in *Dwarkanath Bysack* v. *Burroda* (5) there was a direction [11] to the trustees of the will to expend suitable sums after the demise of the testator's father, mother, grandfather as well as of himself for the annual contribution and gifts to Brahmins, Pandits holding tolls for learning in the country at the time of the Durga Pooja and for the perusal of Mahabharat and Puran and for the prayer of God in the month of *Kartik*, it was held that the proper sum to be expended could be ascertained. The present will is silent as to the precise amount to be expended on the well and *avada*, but it may be reasonably inferred that the testator intended such a well and *avada* (the former being presumably intended to supply the latter) as would be in accordance with the ordinary usage of the country in such maters; and it would, therefore, be quite possible to refer it to the Master in Equity to ascertain what would be a proper sum for the purpose.

It must, therefore, be referred to the Commissioner to ascertain what would be a reasonable sum to be expended in building the well and cistern, such sum to be paid out of the moveable property of the testator. The testator's will also set apart a sum sufficient for the two *sadavarats* as directed by cl. 18; and also on general principles we think the moveable property should be first employed for that purpose and then, if necessary, the immoveable property. There will in all probability be a residue consisting of the immoveable property and so much of the moveable property as may not be required for these charitable purposes, which residue will go to the heirs of the testator.

The question as to who was entitled to the residue of the testator's property was then argued.

Lang, for appellant.—I submit that Jamnabai, the married daughter, is entitled to share in the residue equally with Sakerbai and Jivabai, the

(1) 6 Ves. 404. (2) L. R. 9 Ch. D. 679. (3) 1 Phillips.
(4) 8 Macq. 134. (5) 4 C. 433.

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unmarried daughters of the testator. The reason for the rule that preference should be given to the unmarried daughter, is that she is supposed to be unendowed. Here all are equally provided for by the will, and the reason for the rule fails. There is no case in which the exact question has arisen. One text, Katyayan, gives the words "if unmarried or unprovided for"; Mayne's Hindu Law, para 479, (4th ed.) Mayukha, [12] Stokes', p. 86, IV, 8, 12, 13; Mayukha,, Stokes' Hindu Law, p. 440, II, 1, 2, 3; in Mandlik (p. 79) for the word "or" is given "and"; that means that the property is to go to the unmarried daughter if unprovided for. Here all are provided for equally. Therefore the reason for the rule fails. You must look at the object of the rule.

Telang, for Sakerbai and Jivabai.—The point is incapable of argument; the texts are clear—Stokes' Hindu Law, p. 440. That the object of the rule fails in any particular instance is no reason why the rule should not be applied.

Lang in reply.

Cur. adv. vult.

JUDGMENT.

The judgment of the Court was delivered by

SARGENT, C. J.—On the question as to who are entitled to succeed to the residue of the estate under cl. 18 of the will it was contended for the defendants, Sakerbai and Jivabai, that the widow, Maneckbai, took an absolute estate under that will; and that they, as devisees under her will, are the persons now entitled to the residue. But we agree with the Judge of the Division Court that the appointment of Maneckbai to be the testator's heir in the absence of express words showing a contrary intention, does not confer an estate of inheritance on her. This was so held in *Hirabai* v. *Lakshmibai* (1), where the testator, as in the present case, appointed his wife to be his heir, and the appeal Court held she only took a widow's estate. This being so, and Maneckbai having died without heirs, by which it is clearly meant a natural or adopted son to which the testator refers in cls. 2, 3, 4 and 5 of his will, we have to consider who are the heirs to take the residue under cl. 18.

It is not disputed that had the defendants, Sakerbai and Jivabai, not been provided for by the will they, as the unmarried daughters of the testator, would be entitled to succeed in preference to the married daughter, Jamnabai. But it was said that the ground of the preference shown to unmarried daughters is the father's obligation to marry and provide for them; and that, if this has been done, they have no better claim to their [13] father's property than his married daughters. It is probable that the preference of the unmarried daughter was in some degree founded on the above consideration: see West and Buhler's Hindu Law, p. 105 (3rd ed.). However, in Strange's Hindu Law, Vol. II, p. 39, it is said that "the maiden takes the property by reason of her offering the funeral oblation to her deceased father"; a duty which arises from the married daughters having passed into another *gotra*. It was also urged that the text of Gautama—"unmarried *or* unprovided for"—should be read "unmarried *and* unprovided for." But such is plainly, not the construction put on the text in the Mitakshara and Mayukha, where the distinction is drawn in the first instance, between "married" and "unmarried" daughters, and

(1) 11 B. 573 (578).

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only as to the former between those "provided for" and those not "provided for"—Mitak. c. 2, s. 2, sl. 1, 2, 3. 4; Mayukha, chap. IV, s. VIII; sl. 11 and 12. The language of these texts is, in our opinion, too distinct in giving an unconditional preference to maiden daughters to allow of any equitable consideration arising from the special circumstances of the case being deemed to qualify that right.

We must, therefore, hold with Mr. Justice Jardine that the defendants, Sakerbai and Jivabai, are entitled to the residue as contemplated by the 18th clause of the will.

Appellant must pay the respondents, Sakerbai and Jivabai, their costs of this appeal. Those of the Advocate-Genaral and the trustees under the will to be paid out of the estate as between attorney and client.

Attorneys for the appellant :—Messers. *Jefferson, Bhaishankar, Dinsha, and Kanga.*

Attorneys for the respondents :—Messrs. *Mansukhlal, Damodar and Jamsetji* and Messrs. *Little, Smith, Frere and Nicholson.*

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[14] FULL BENCH.

Before Sir Charles Sargent, Kt., Chief Justice, Mr. Justice Bayley, Mr. Justice Scott and Mr. Justice Nanabhai Haridas.

BHAU BALA (*Original Defendant*), *Appellant v.* BAPAJI BAPUJI (*Original Plaintiff*), *Respondent.** [7th February, 1889.]

Practice—Civil Procedure Code (Act XIV of 1882), *s. 562—Remand order—Power of the High Court to go into the merits on appeal from a remand order.*

The Court of first instance dismissed a suit as barred by limitation. In appeal, that decision was reversed, and the case was remanded under s. 562 of the Civil Procedure Code (Act XIV of 1882). Against the order of remand the defendant appealed to the High Court under cl. 28 of s. 588 of the Civil Procedure Code. It was contended by the plaintiff that the High Court had no power to decide the point of limitation, but could only consider whether the order of remand satisfied the requirements of s. 562 of the Civil Procedure Code.

Held by the Full Bench that in an appeal against such an order of remand the power of the High Court is not confined to the question whether that order satisfies the requirements of s. 562; but may also determine the correctness of the lower appellate Courts's decision on the preliminary point on which the Court of first instance disposed of the case.

Badam v. *Imrat* (1) approved of and followed.

[F., 15 Ind. Cas. 181=15 O.C. 33; Appr., 16 A. 252=14 A.W.N. 64; 20 M. 152 (155); R., 1 P.R. 1903 (F.B.)=1 P.L.R. 1903; D., 19 M. 422 (424).]

THIS was a reference to a Full Bench by the Division Bench consisting of Mr. Justice Birdwood and Mr. Justice Jardine.

The reference was as follows :—

"The decree of the Court of first instance, dismissing the present suit as barred by time, has been reversed by the lower appellate Court, which has remanded the suit, under s. 562 of the Code of Civil Procedure, as

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* Appeal No. 41 of 1888, reference in.

(1) 3 A. 675.