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 APRIL 15.  
 ORIGINAL  
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 14 B. 353.

The High Courts in India have all the powers of a Court of Equity in England for enforcing their decrees *in personam*—*Martin v. Lawrence* (1); *Hassanbhoj v. Cowasji Jehangir Jassawalla* (2); and we think that, had it been intended to exclude suits *in personam* as well as suits *in rem* from the jurisdiction of the [360] High Courts, the framers of the Letters Patent, who were presumably English lawyers, would have employed different language.

The present decree, it is true, is for sale of the land by the officer of the High Court. The practice, however, of making an order for sale in that form has been so long established that it ought not, we think, to be interfered with.

We must, therefore, confirm the decree with costs.

Attorneys for the appellant (defendant): Messrs. *Ardesar, Hormasji and Dinsha*.

Attorneys for the respondent (plaintiff): Messrs. *Tyabji and Dudabhai*.

14 B. 360.

ORIGINAL CIVIL.

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

VULLUBHDAS DAMODHAR (*Original Defendant*), Appellant v.  
 THUCKER GORDHANDAS DAMODHAR AND OTHERS (*Original  
 Defendants and Plaintiffs*), Respondents.\* [27th February, 1890.]

*Will—Construction.*

One Damodhar Madhowji died, leaving two sons, Gordhandas and Vullubhdas. His will contained the following clauses:—

"5. As to the immoveable property which I have, the particulars thereof are as follows:—There is one *vadi* (oart) situated on the Girgaum Back Road. In it there are small and large bungalows, chawls, stables, sepoy's and *mali*'s sheds, making in all thirteen buildings. Thereof one bungalow, bearing No. 23, shall be given to my two sons Gordhandas and Vullubhdas and Kesarbai, the widow of my brother Karsandas Madhowji, a denizen of paradise (*i.e.*) to these three persons, to reside therein, and the remaining bungalows, chawls, stables and the large bungalow in which I live shall be let for rent. And out of the rent that may be realized therefrom, the expenses of repairs, Government taxes and the servants' wages being paid, the surplus shall be paid to my son Gordhandas. Out of such surplus this my son Gordhandas shall pay the expenses of my house, of the maintenance of the said two sons, and of my said sister-in-law, *i.e.*, all such expenses as I carry on, and also Rs. 15 *per* month for the worship of (the deity) Thakorji, of my house. In this manner moneys are to be paid as long as there may be sons' heirs in my family. And when there may be no son (*i.e.*) male as heir in my family, the whole property shall be all used on religious and charitable account, as stated in the below written clause."

[361] "8. My two sons and my sister-in-law, making three persons, shall reside in the bungalow No. 23. And if one of them, *i.e.*, my two sons, Vullubhdas shall disagree with the others, he shall go out of the said *vadi* at the Girgaum Back Road and reside elsewhere; and as to his (Vullubhdas's) expenses out of the money which my son Gordhandas may receive from the trustees for defraying the household expenses, he (Gordhandas) shall continue to pay at the rate of Rs. 30 *per* one month to Vullubhdas for his (Vullubhdas's) own expenses during his and his son's lifetime. And if this my son Vullubhdas should not act

\* Suit No. 316 of 1888; Appeal No. 666.

peaceably and harmoniously towards this my son Gordhandas and towards my (said) sister-in-law, then the abovementioned money shall not be paid to him for expenses."

The Judge of first instance held that, under the will, Gordhandas Damodhar was entitled to the property absolutely.

Held, by the Appeal Court, that the proper construction of the will was that Gordhandas Damodhar was not entitled to an absolute estate, but was entitled to be paid by the trustees the income for his life, to be assigned by him as mentioned in the will.

The circumstance that the estate was vested in trustees, and that the income was given as maintenance, forbade the estate given to Gordhandas and Vullubhdas, or either of them, being construed as an absolute estate. Moreover, as such an estate would admit females in the course of succession, this construction would not give effect to the intention of the testator, but would be to make a new will for him.

SUIT for construction of a will. One Damodhar Madhowji, of Bombay, died in Bombay in 1886, leaving two sons, Gordhandas Damodhar and Vullubhdas Damodhar. He executed his will on the 11th October, 1884, and appointed, as his executors and trustees, his son Gordhandas Damodhar and the plaintiffs in this suit, *viz.*, Thucker Vussonji Mowji and Lalbhai Gulabdas.

Disputes arose, and the plaintiffs (Thucker Vussonji and Lalbhai Gulabdas) filed this suit, praying that the estate of the testator might be administered and the trusts of the will carried out. The defendants to the suit were the testator's two sons (Gordhandas Damodhar and Vullubhdas Damodhar) and the Advocate-General of Bombay.

The principal questions argued at the hearing was as to the interest taken by the testator's sons respectively, under his will. The important clauses of the will were the following:—

2. "As executors and trustees of this my will I appoint my sister's son's son Bhai Vussonji Mowji and my own son Gordhandas Damodhardas and Sha Lalbhai Gulabdas (*i.e.*) these three persons, on condition as follows:— If any of these three [362] persons shall be unwilling to act, or should have been dead, then in his stead or in his place the remaining executors and trustees shall appoint a trustee of their selection, and shall make up the number of three persons. In this manner the number of three trustees shall always be made up."

5. "As to the immoveable property which I have, the particulars thereof are as follows:—There is one *vadi* (oart) situated on the Girgaum Back Road. In it there are small and large bungalows, chawls, stables, sepoy's and *mali*'s sheds, making in all thirteen buildings. Thereof one bungalow, bearing No. 23, shall be given to my two sons Gordhandas and Vullubhdas and Kesarbai, the widow of my brother Karsandas Madhowji, a denizen of paradise (*i.e.*) to these three persons, to reside therein, and the remaining bungalows, chawls, stables, and the large bungalow in which I live shall be let for rent. And out of the rent that may be realized therefrom, the expenses of repairs, Government taxes and the servants' wages being paid, the surplus shall be paid to my son Gordhandas. Out of such surplus this my son Gordhandas shall pay the expenses of my house, of the maintenance of the said two sons, and of my said sister-in-law, *i.e.*, all such expenses as I carry on, and also Rs. 15 per month for the worship of the deity Thakorji of my house. *In this manner moneys are to be paid as long as there, may be sons' heirs in my family.* And when there may be no son (*i.e.*) male as heir in my family, the whole property shall be all used on religious and charitable account, as stated in the below written clause."

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The Judge of the Court of first instance (Parsons, J.) held that, under the will, Gordhandas Damodhar, the first respondent, was entitled absolutely to the property on the Girgaum Back Road, other than the house No. 23, subject to the charges created by the will, and that the attempt to create an estate tail and the gift to charity were void.

Vullubhdas Damodhar appealed, contending that he and his brother Gordhandas were equally entitled to the property.

*Macpherson* and *Jardine*, for the appellant.

*Starling* and *Lang*, for the respondents.

[363] Counsel referred to the *Tagore Case* (1); *Sookhmoy Chunder Dass v. Srimati Monohurri Dasi* (2).

#### JUDGMENT.

SARGENT, C.J.—The question raised by these appeals turns upon the proper construction of cls. 5 and 8 of the will of the late Damodhar Madhowji. After appointing his sister's son Vussonji Mowji, his own son Gordhandas Damodhar and Sha Lalbbhai Gulabdas executors and trustees of his will, he directs by cl. 5 as to his immoveable property. (His Lordship read the clause, and continued:—)

The Judge of the Division Court held that Gordhandas took an absolute estate, subject to the charges created by the will, apparently on the ground that as the rest of the gift to the sons' heirs in the testator's family and, in default of male heirs, to charitable purposes, was, in his opinion, void, it might be struck out, in which case the gift to Gordhandas would be, in terms, an estate of inheritance. We agree with the Division Court that such gift was void. Whether the words—"in this manner moneys are to be paid as long as there may be sons' heirs in my family"—show an intention to create a beneficial estate tail according to English law, as there was in the *Tagore Case* (1), may be doubtful, but they clearly show an intention to confine the inheritance to males, which in *Kumar Tarakeswar Roy v. Kumar Shoshi Shikhareswar* (3) was held to be void, as "excluding the legal course of inheritance." There is also another view of this devise which renders it void. Reading cl. 5 as a whole in connection with cl. 2 it is clear, we think, that the testator's intention was not to pass the estate to any one, but to give the enjoyment of the profits of the estate to the persons mentioned in the will, commencing with his two sons and sister-in-law, and thus to "create a perpetuity as regards the estate, and to limit, for an indefinite period, the enjoyment of the profits of

(1) Supl. Vol. I. A. 47 (76).

(2) 12 I. A. 103.

(3) 10 I. A. 51.

it," as was held in *Sookhmoy Chunder Dass v. Srimati Monohurri Dasi* (1). Assuming the above devise to be void, the Division Court held that there would be a gift of an estate of inheritance in Gordhandas, or Gordhandas and Vullubhdas jointly, or, at any rate, that the [364] intention, as it was said, to create an estate of inheritance of some sort might be effectuated. This argument must, we think, fail, as it did in *Kumar Tara-késwar Roy v. Kumar Shoshi Shikhaheswar* (2), for reasons similar to those given in that case. The circumstance that the estate is vested in trustees, and that the income is expressed to be given as maintenance, forbids the estate given to Gordhandas and Vullubhdas, or either of them, being construed to be an absolute estate; and, moreover, as such an estate would admit females in the course of succession, this construction would not give effect to the intention of the testator, but would be making a new will for him.

We must, therefore, hold the proper construction of the will to be that Gordhandas is not entitled to an absolute estate, but is entitled to be paid by the parties the income for his life, to be assigned by him as mentioned in the will; and the decree must be varied accordingly.

Appellant to have his costs of this appeal. The trustees to have their costs of this appeal between attorney and client, to be paid, in the first instance, by the plaintiff, with liberty to apply to recover them from the respondent Gordhandas.

Attorneys for the appellant (defendant): Messrs. *Payne, Gilbert and Sayani*.

Attorneys for the respondents (plaintiffs): Messrs. *Jefferson, Bhatshankar and Dinsha*.

14 B. 365.

[365] ORIGINAL CIVIL.

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

THUCKER VUSSONJI MOWJI AND ANOTHER (Plaintiffs) v. CANJI PURBHUT AND OTHERS (Defendants).\* [27th June, 1890.]

*Practice—Appeal—Leave to appeal after time expired—Sufficient cause—Limitation Act XV of 1877, s. 5—Two suits brought at same time by executors raising same questions of construction in respect of the same will—Similar decision in both—Appeal by a defendant in one suit and decree of Court of first instance reversed—Consequent application by plaintiffs for leave to appeal in second suit.*

The plaintiffs filed the present suit (No. 317 of 1888), at the same time with suit No. 316 of 1888 (*supra* 14 B. 360). They filed both suits as executors of the will of one Damodhar Madhowji. In suit No. 316 of 1888 they sued the two sons (Gordhandas and Vullubhdas) of their testator for the purpose of having his will construed and of ascertaining the shares of his property taken under it by his said two sons respectively. The present suit (No. 317 of 1888) was filed by them against Gordhandas, one of the said sons of the testator, and against three other persons to whom he had mortgaged his interest in his father's estate. They alleged that the said Gordhandas had made over possession of the whole of his father's estate to the mortgagees, and that they refused to give it up. The plaintiffs submitted that, under the mortgage, no charge was created, save upon Gordhandas' individual interest in the estate, and they prayed for a declaration

\* Suit No. 317 of 1888.