1890
NOV. 25.

ORIGINAL CIVIL.

15 B. 443.

15 B. 443.

## ORIGINAL CIVIL.

*Before Mr. Justice Farran.*

BAI MAMUBAI (*Plaintiff*) *v.* DOSSA MORARJI AND OTHERS (*Defendants*).*
[25th November, 1890.]

*Will—Construction—Gift to two persons for life jointly—Survivorship—Gift to a daughter and her children—Rule in Tagore Case—Power given to a daughter if she had no children to dispose of property bequeathed by will—Effect of such power—Bequest for house expenses—Bequest by testator of his wife's ornaments—Election.*

J., a Hindu inhabitant of Bombay, died in November, 1869, leaving a will, dated October, 1869. He left a widow (Motivahu) and one child, the plaintiff Mamubai, then about fourteen years of age. She had then been married for two years, but up to the time of this suit she had had no children. By his will the testator directed that his immoveable property in Bombay should be formed into a trust and that the trustees were to collect the income thereof. By the fourteenth and fifteenth clauses of his will he directed that out of the trust-fund Rs.50 per month were to be paid both to his wife and daughter for their personal expenses. In the 7th clause he directed as follows: "After deducting expenses *** money is to be paid out of the net income, whatever it may amount to, for the personal expenses of my wife Motivabu and my daughter Mamu, and for the children of my daughter Mamu after her death agreeably to the fourteenth and fifteenth clauses of this will; and after paying the same whatever income may remain is to be paid for the purposes of my wife Motivahu and my daughter Mamu and her children in such manner as my trustees may think proper." The eighth [444] clauses directed that if Mamu should have children, the trust should stand valid during their life-time, and the trust property should then be apportioned amongst the heirs. It then proceeded: "But should there be no children born of the womb of my daughter Mamu, then after the death of Mamu and my wife Motivahu this trust is to become void, and the property delivered to such persons as my daughter Mamu may direct it to be delivered by making her will."

*Held*,

1. That the direction in the seventh clause amounted to a gift of the residue for the use of Motivahu and Mamu; that Motivahu and Mamu were, under the clause, entitled to the income of the fund in equal shares during their joint lives, and that the survivor would take the whole for her life-time.

2. That Mamu having no children at the date of the testator's death the provision for her future children was void under the ruling in the *Tagore Case* (1).

3. That the direction that if Mamu had no children she might dispose of the property by will, was valid, and amounted to an absolute gift to her if she gave the requisite direction by will. The gift did not offend against the rule in the *Tagore Case* (1). The persons to whom the property is given would take it from Mamu and not from the testator.

The testator by his will further directed that Rs. 750 a month were to be paid to his wife Motivahu for the purpose of defraying the expenses of the house and the worship of Thakur (God).

*Held*, that no part of this sum could be awarded to Mamu. The testator expected that she would live with Motivahu, and made no provision for the event of her ceasing to do so.

The testator also disposed of ornaments described as "my own and my wife Motivahu's ornaments."

*Held*, that the clause did not raise a question of election. The wife's *stridhan* ornaments would not fall within the clause if there were other ornaments which she wore and of which the testator had power to dispose.

**[Affirmed**, 21 B. 709 (P.C.)=1 C.W.N. 366=24 I.A. 93=7 Sar. P.C. J. 140.]

* Suit No. 57 of 1878.

(1) I. A. Sup. Vol. 47.

1890
NOV. 25.
ORIGINAL CIVIL.
15 B. 443.

FURTHER consideration on Commissioner's report.

The plaintiff was the daughter of one Jetha Ludhani, of Bombay, who died in November, 1869, leaving a will, dated the 18th October, 1869. The three defendants were the executors of the said will, which was duly proved by them on the 1st March, 1870. The third defendant (Motivahu) was his widow.

The testator left him surviving the said Motivahu, his widow, and his daughter, the plaintiff Mamubai, who was then about fourteen years of age and had been married two years. At the time this suit was filed (6th February, 1878) she had had no children.

**[445]** The testator at his death was possessed of, or entitled to, self-acquired moveable and immoveable property in Bombay of the value of upwards of five *lakhs*.

The testator by his will directed payment of his funeral expenses and legacies and of certain charitable and religious bequests. The following clauses are material :—

" 7. Agreeably to what is written above the whole of the money which I have resolved to be paid or expended on account of the 'legacies' and for the expenses of my funeral ceremonies for twelve months and on account of the *sadavarat* and for other *dharma* (religious or charitable purposes according to the above particulars) is to be paid out of my funds in ready cash, but whatever my (landed) 'estate,' that is, immoveable property, there is, is not to be touched by my *vakils* or *vakilatan* for these purposes, but after my death shall have taken place a trust deed is to be made, as soon as practicable, of my garden, dwelling-house, rope walk, warehouses (or godowns), houses, stables, lands and whatever other immoveable property, that is, landed estate, there is belonging to me in the island of Bombay, and the whole is to be invested in a trust. As the trustees thereof, my two *vakils* and *vakilatan* and in conjunction with them my friend Seth Thakar Khatav Makanji, four persons jointly are duly to become trustees, and these trustees, four in number, are to collect the income of the whole property, and after deducting therefrom the expenses connected therewith, money is to be paid out of the net income, whatever it may amount to, for the personal expenses of my wife Motivahu and my daughter Mamu and for the children of my daughter Mamu after her death, agreeably to the fourteenth and fifteenth clauses of this will; and after paying the same whatever income may remain, is to be paid for the purposes of my wife Motivahu and my daughter Mamu and her children in such manner as my trustees think proper.

"8. In the seventh clause mentioned above it is resolved to invest the whole of my immoveable property in trust and to collect the income thereof ; but the trustees are not to demand any rent for the place out of my property which may be used as a residence for my family ; and should any of the trustees depart this life, the surviving trustees are to appoint another trustee, and after the death of my daugther Mamu should there be any children born of the womb of my daugther, this trust is to stand valid during the life-time of such children. Afterwards the heirs of the said children are duly to apportion and receive this property. But should there be no children born of the womb of my daughter, Mamu, then after the death of Mamu and my wife, Motivahu, this trust is to become void and the property is to be delivered *to such persons as my daughter Mamu may direct it to be delivered by making her will.*"

1890
NOV. 25.
ORIGINAL CIVIL.
15 B. 443.

The thirteenth is as follows:—

"For the purpose of defraying the expenses of my house, and the worship of Thakur (God) in my house, Rs. 750 are to be paid every month to my wife Motivahu out of my fund in ready cash; they are to be caused to be defrayed [446] by her, and should Motivahu be not fit to defray the expenses in a decent and respectable manner and with economy, then my above-named other *vakils* are to defray them with their own hands.

"14. To my wife Vahu Motivahu Rs. 50 are to be paid every month for (her) personal expenses out of my trust fund mentioned in the seventh clause written above; and should my wife not conduct herself in conformity with my credit (and) respectability and according to the directions of my above-mentioned other *vakils*, not even a single cent is to be paid (to her) for her personal expenses.

"15. To my daughter Bai Mamu Rs. 50 are to be paid every month for (her) personal expenses out of my trust fund mentioned in the seventh clause written above, and besides that should any expense have to be defrayed on account of my daughter Mamu or her children, or should any expense be required to be defrayed on any special occasion, my *vakils* and *vakilatan* are duly to pay for the same according to my respectability at the request of my daughter Mamu out of the income of my fund in ready cash."

"18. After receiving my claims and paying (my) debts and after paying the legacies and making the expenses whatever funds in ready cash belonging to me may remain are to be apportioned and distributed in the manner stated below among the children born of the womb of my daughter Bai Mamubai after the life-time of my daughter Mamu and my wife Motivahu. The particulars thereof are (as) follows:—

"1. Should any son or daughter be born of the womb of Mamu, Rs. 2,000 are to be paid to each of the daughters on their attaining the age of eighteen.

"2. To as many sons as there may be my remaining property is to be apportioned and distributed in equal shares after their attaining the age of twenty-one years.

"3. Should there be no son or sons, or should there be no children born of the loins of the son, the daughter or daughters or their children are to apportion and receive the same in equal shares. According to these particulars (and agreeably to what is written above), my property is to be apportioned and distributed; and should no child be born of the womb of my daughter Mamu, which may God forbid, in that event on the death of my wife Motivahu and of my daughter Bai Mamu taking place, my immoveable property is to be expended on such good *dharma* (religious or charitable works) in my name as may continue as long as the moon lasts; and should it appear that any one would prevent this property from being given away for *dharma* (religious or charitable purposes) by reason of the rules of the *Sarkar*, the same is to be given to such persons as my daughter Mamu may direct it to be given to by making her will."

The nineteenth is as follows:—

"There are my own and my wife Motivahu's ornaments, jewels set with stone and pearls, gold and silver. Nothing is to be given out of them to any one; and these ornaments also are to be apportioned and distributed in equal shares to the sons of my daughter Bai Mamu, if

1890
NOV. 25.
ORIGINAL CIVIL.
15 B. 443.

any be born of her womb, agreeably to what is stated in the eighteenth clause, on their attaining the age of twenty-one [447] years; and should no child be born of the womb of my daughter Bai Mamubai, which may God forbid, in that event, after the decease of my wife Motivahu and my daughter Bai Mamu shall have taken place, these ornaments and jewels or the money realized therefrom are to be expended in the same manner as my ready cash or immoveable property for some good *dharma* (religious or charitable purpose) in my name that may continue as long as the moon lasts; or should any one prevent this money from being given away in this manner for *dharma* (religious or charitable purpose) by reason of any rule of the *Sarkar*, the same is to be given to such persons as my daughter Mamu may direct it to be given by making her will."

The plaintiff filed this suit, complaining that the defendants had not carried out the directions of the will. She prayed for administration, &c., &c. A decretal order was made on the 26th August, 1878, referring the suit to the Commissioner to take administration accounts. His report was made on the 4th October, 1890, and it was confirmed without objection on the 25th November, 1890. The case now came before the Court to have the will construed, and to obtain directions with regard to the residue.

*Latham* (Advocate-General) and *B. Tyabji*, for plaintiff.—Clause 8 of the will gives the plaintiff a power to dispose by will. This is a good power if it is exercised. It is equivalent to a gift of the property to the plaintiff: Theobald on Wills, (3rd ed.), p. 352. A gift to be at the disposal of A. is a gift to A.—*Robinson* v. *Dusgate* (1); *Hixon* v. *Oliver* (2); *Bradly* v. *Westcott* (3). The plaintiff takes even if she does not exercise the power of appointment, but at all events she has power to appoint. The gift is not void for remoteness. It is not a limitation over. It is an alternative limitation. If she has a child, the alternative gift would be bad —Theobald on Wills (3rd ed.), p. 406; *Miles* v. *Harford* (4); *Monypenny* v. *Dering* (5); *Evers* v. *Challis* (6); *Crompe* v. *Barrow* (7); *Longhead* v. *Phelps* (8); *Re Thatcher's Trusts* (9); *Kumar Tarakeshwar Roy* v. *Kumar Shoshi Shihareswar* (10). The appointee of a power takes from the donor of a general power and not from the donee, and the validity of a gift is to be tested at the time of the death of the donor and not of [448] the donee of the power. Those who take are to be capable of taking under the will of the donor of the power and not of the donee—Theobald on Wills (3rd ed.), p. 410; *Rous* v. *Jackson* (11). The rule of the *Tagore Case* (12) only applies against perpetuities: Williams on Personal Property (12th ed.), p. 443. These general powers are really gifts to the donee of the power. The subject of the power becomes the property of the persons to whom the power is given if that person exercises the power.

*Macpherson* (*Lang* with him), for defendants.—We submit the last provision in cl. 7 is void—*Manjamma* v. *Padmanabhayya* (13); Mayne's Hindu Law, para. 354 (4th ed.). As to cl. 8, we say, first, the power given to the plaintiff is void by Hindu law; secondly, if not, it is void as depending on a void gift. English law does not apply to this case. The law of Hindu wills is the Hindu law of gifts. Motivahu

(1) 2 Vernon 180 (181).
(2) 13 Ves. 108.
(3) 13 Ves. 445.
(4) L.R. 12 Ch.D. 691 (703).
(5) 2 De G.M. & G. 145.
(6) 7 H.L.Cas. 531.
(7) 4 Ves. 681.
(8) 2 W. Bl. 703.
(9) 26 Bea. 365.
(10) 10 I.A. 51.
(11) L.R. 22 Ch.D. 521.
(12) I.A. Sup. Vol. 47.
(13) 12 M. 393.

1890 NOV. 25. ORIGINAL CIVIL. 15 B. 443.

never had control of the property so as to enable her to give it: Mayne's Hindu Law, para. 380 (4th ed.). The testator meant to give the plaintiff a power of giving by her will. A Hindu cannot give that on which in his lifetime he had no interest. No case has been cited in which such a power has been upheld. It is unknown to Hindu law and we should not make out a gift to the plaintiff from technical English authorities. Counsel commented on the cases cited.

JUDGMENT.

FARRAN, J.—This was an administration suit to administer the estate left by the testator Thakar Jetha Ladhani and for the construction of his will.

A decretal order was made on the 26th August, 1878, referring it to the Commissioner to take certain administration accounts. The Commissioner made his report on the 4th October, 1890. No objections were taken to it, and it was confirmed by consent on the 25th November, 1890. It only remained to construe the will and to give directions to the executors as to the future mode of dealing with the residue of the estate. This matter was argued before me on the same day when I took time to consider my decision.

[449] By the seventh clause of his will the testator directed that all his immoveable property in Bombay should be formed into a trust, of which the defendant and one Thakar Khatav Makanji were to be his trustees. "And the trustees are to collect the income of the whole property, and after deducting therefrom the expenses connected therewith, money is to be paid out of the net income, whatever it may amount to, for the personal expenses of my wife, Motivahu, and my daughter, Mamu, and for the children of my daughter Mamu after her death, agreeably to the fourteenth and fifteenth clauses of this will; and after paying the same, whatever income may remain, is to be used for the purposes of my wife, Motivahu, and my daughter, Mamu, and her children in such manner as my trustees think proper."

The eighth clause directed that if Mamu should have children, the trust should stand valid during their lifetime, and the trust property should after that be apportioned amongst their heirs. It then proceeded—"But should there be no children born of the womb of my daughter, Mamu, then after the death of Mamu and my wife, Motivahu, this trust is to become void and the property delivered to such person as my daughter, Mamu, may direct it to be delivered by making her will."

I first deal with the income in the lifetime of the ladies. The net income of the trust to be created during the joint lives of Motivahu and Mamu is to be applied first in paying Rs. 50, referred to in cls. 14 and 15, to Motivahu and Mamu each for their personal expenses, and then the residue is to be used for the purposes of Motivahu and Mamu and her children in such manner as the trustees think proper. This seems to me to amount, in effect, to a gift of the residue for the use of Motivahu and Mamu, and I think that they are entitled to it in equal proportions. The testator no doubt contemplated that the trustees should control the manner of the expenditure, but that is one of those directions which cannot be given effect to when the income of the fund is absolutely given: Succession Act X of 1865, s. 125. There is, therefore, no practical distinction between the Rs. 50 and the rest of the income of this fund. Motivahu and Mamu will be entitled to the income of the

1890
NOV. 25.
ORIGINAL CIVIL.
15 B. 443.

fund in equal [450] shares during their joint lives, and the survivor will take the whole for her lifetime.

The plaintiff has no children, and she is said to be about thirty. It is admitted that the provision for the future children of Mamu (if any) must fail under the ruling in the *Tagore Case* (1). If any should be born, this admission would not be binding on them. I cannot now decide what would become of the property in that event.

In the event of no children being born of Mamu, the testator has decided that the property is to be delivered to such persons as his daughter Mamu may direct it to be delivered to, by making her will. The question arises, whether that is a valid direction having regard to the ruling in the *Tagore Case*. I endeavour to put myself in the position of the testator, a Hindu, to ascertain what he meant. He manifestly desired to make adequate provisions for his wife, Motivahu, for her life, while keeping a watchful control over her: see cls. 13, 14, 17 and 7. He manifestly desired that she should not be his heiress. Mamu, subject to the provision for Motivahu and Mamu's children, he wished to inherit after him. He contemplates Mamu surviving Motivahu and the trust being kept up for her and her children; failing children of Mamu he wished that Mamu should do what she pleased with the property, and it is to emphasise that intention, I think, that he says she is to direct to whom it is to be given by making her will. Subject to Motivahu's interest she is to enjoy it in her lifetime, and after her death she is to will it away. This is, to all intents and purposes, an absolute gift to her. The intention of the testator is, I think, sufficiently plain, though it may fail if Mamu should not give the requisite directions by her will. He has not contemplated her not doing so.

If I am correct in this view, the gift does not offend against the rule in the *Tagore Case*. The persons to whom the property is given, take it from Mamu and not from the testator. Mamu became the owner. Courts in England have viewed similar wills in this light. The cases are collected in Theobald on Wills, p. 352. *Robinson* v. *Dusgate* (2), *Hixon* v. *Oliver* (3) are cases very like the [451] present. If I am in error in ascertaining the wishes of the testator from the words which he has used, I err in good company. When there is, as here, no gift over on failure to exercise the power, it is difficult to interpret the will in any other sense than this, that the testator when penning his intention expressed the incidents of an absolute gift instead of making an absolute gift in the more simple form, and omitted to specify some of them.

The next clause to be considered is the thirteenth. The meaning of this clause is that Motivahu is to receive Rs. 750 per month to keep the house and to defray the worship of the Thakur. Mamu, no doubt the testator expected, would live with her; but if she withdraws herself, the testator has made no provision for that. I should be making a new will for the testator and altering his expressed intention if I were to allocate any part of this sum to Mamu. If Mamu returns to the house, and Motivahu does not properly expend the money in the household expenses, the executors have the power themselves to expend them with their own hands.

As to cl. 15, it is sufficient to say that only Rs. 50 per mensem are payable out of the income of the trust created by cls. 7 and 8. The other expenditure there directed is to be made out of the general fund.

(1) I. A. Sup. Vol. 47. (2) 2 Ves. 180. (3) 13 Ves. 108.

1890 NOV. 25. ORIGINAL CIVIL. 15 B. 443.

This general fund is that specified in cl. 16. The capital is not to be trenched upon. Out of the balance of the income the executors can make payments for religious charities. The bequest is allowable, as the translation runs; and even if the word *dharma* only is used in the original, the parties will hardly dispute it, as it is only the surplus income out of which the expenditure can be made.

For the reason already given I cannot positively decide on the invalidity of the provisions in cl. 18. If children should be born, my decision would not bind them. The eighteenth clause contains an alternative gift of the property, those described to *dharma* or, failing that, to such person as Mamu may direct by making her will. The whole gift, however, would fail in both branches if Mamu should have a child; failing such child the alternative gift comes into play.

**[452]** The alternative gift to *dharma* fails for vagueness, but effect will be given to the valid one; see cases collected in Theobald on Wills (3rd ed.), p. 406. My decision on cl. 8 governs the gift to Mamu expressed in the same words in cl. 18.

I do not think that cl. 19 raises a question of election. Motivahu's *stridhan* ornaments would not, I think, be properly treated as falling within the clause if there were other ornaments which she wore, and of which the testator had power to dispose. If the point is insisted on by the plaintiff, I must have some evidence before me.

I may probably have overlooked some minor points. If so, the case had better be set down again, or they can be dealt with when the minutes of the decree, which will have to be spoken to, are being settled. Costs of all parties will come out of the estate.

Attorneys for the plaintiff: Messrs. *Conroy and Brown.*

Attorneys for the defendants: Messrs. *Nanu and Hormasji* and Messrs. *Thakurdas, Dharamsi and Cama.*

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**15 B. 452.**

## CRIMINAL REFERENCE.

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

QUEEN-EMPRESS *v.* DADA ANA.* [7th March, 1889.]

*Criminal Procedure Code (Act X of 1882), ss. 303, 307, 429—Practice—Procedure—Trial by jury—Power of Judge to put questions to jury under s. 303 after verdict delivered—General verdict—Special verdict—Reference to High Court under s. 307—Power of High Court to interfere with verdict—Judges of High Court differing in opinion—Reference to third Judge under s. 429—Letters Patent, 1865, cl. 36.*

A prisoner was tried for murder and acquitted by a majority of the jury. The Sessions Judge disagreed with the verdict and submitted the case to the High Court under s. 307 of the Criminal Procedure Code (Act X of 1882). The Judges of the High Court (Jardine and Candy, JJ.) differing in opinion, the case was laid before a third Judge (Sargent, C. J.), under s. 429, who held that the verdict of the jury should be set aside and that the prisoner was guilty of murder.

**[453]** *Per* SARGENT, C.J.—It is the uniform practice of the High Court, in cases referred under s. 307 of the Criminal Procedure Code (Act X of 1882), not

* Criminal Reference No. 106 of 1888.