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17 B. 341 (P.C.) = 20 I.A. 1 = 6 Sar. P.C.J. 256 = 17 Ind. Jur. 40.

that it is right to suspend the judgment until the facts are accurately ascertained.

It should be observed that this matter is not mentioned in the pleadings. If it were the case that the two sums were taken into account by the arbitrator, and the shares thereby liberated from the charge, it would have been more natural to have disclosed that fact in the pleadings, in order that it might be sifted and elucidated in the course of the evidence and the hearing. But that has not been done, and therefore there is a certain amount of obscurity and darkness hanging over the point, which makes their Lordships desirous that the account should be taken in the general form settled by the first Court.

The result is that the decree of the appellate Court will be varied, by omitting therefrom the direction that the defendant is not to be allowed credit for the sums of Rs. 68,838-4 and Rs. 22,785-8 so far as the said two sums are included in the sum of Rs. 1,17,520, and affirmed in all other respects.

With regard to the costs of the appeal, their Lordships think that the variation now made ought to make no difference. Though it may prove to be a point of importance, the appeal was presented, not on this ground, but on the much broader and [351] more vital grounds which have been dealt with and decided adversely to the appellant.

Their Lordships think, therefore, that substantially this appeal has failed, and that the appellant must bear the costs.

Solicitors for the appellant: Messrs. *Lattey and Hart.*

Solicitors for the respondent: Messrs. *Payne and Lattey.*

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**17 B. 351.**

## ORIGINAL CIVIL.

*Before Mr. Justice Starling.*

MORARJI CULLIANJI (*Plaintiff*) *v.* NENBAI AND OTHERS (*Defendants*).* [25th November, 1892.]

*Will—Construction—Charity—Bequest to charity*—Sadavarat—*Bequest to a definite* sadavarat—*Bequest to two charitable objects, one of such bequest being invalid—Bequest of interest of a fund to A. with invalid gift over of interest after A.'s death—A. takes corpus of fund.*

Where a testator by his will directed certain rents to be used "for *sadavarat*," and where from the wording of the will it appeared that the testator intended his executors to establish a definite *sadavarat* in some definite place, and not merely, at their discretion, themselves to distribute the income of the property at any indefinite place, and perhaps at many places, to Brahmins and travellers,

*Held*, that the bequest to charity was good, and an enquiry was directed as to the place at which such *sadavarat* should, at the proper time, be established, and a scheme for its administration was ordered to be prepared.

A testator by his will directed that, if his daughters died without issue, the property of his daughters should be used by his executors for *dhurm* and for *sadavarat*,

*Held*, following *Hoare* v. *Osborne* (1), that the bequest was good to the extent of one-half in favour of the *sadavarat*. The gift to *dhurm* being invalid, the other half was undisposed of.

A testator by his will directed that his wife should enjoy for life the interest of Rs. 4,000 which were deposited with a certain firm, and that after her death

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* Suit No. 96 of 1891.

(1) L.R. 1 Eq. 585.

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the interest should be given to *dhurm*. There was no residuary clause in the will.

*Held*, that the gift to *dhurm* being clearly bad, and there being no residuary clause in the will, the *corpus* of the Rs. 4,000 was undisposed of, and went to the testator's widow.

[F., 12 C.W.N. 1083 (1086); R., 31 C. 895=8 C.W.N. 653 (655); 4 Ind. Cas. 1154=3 S.L.R. 185 (187, 188); 25 M.L.J. 556.]

[352] SUIT by an executor for the construction of a will and for administration, &c.

Jetha Pudumsey, the testator, died in 1875, having made his will, dated 24th August, 1875, which was duly proved in 1878.

The following are the clauses of the will which the plaintiff prayed to have construed :—

"After the decease of my wife shall have taken place, my executors shall use for *sadavarat* (purposes) the rent of the abovementioned house No. 7 situated in Dariasthan Lane. And should they deem it proper, they may sell off the same and realize interest (on the proceeds) and duly pay over (the interest) into the *sadavarat*. And there are two houses belonging to me, situated at Mody Bazar. Out of the rent of the said houses and the interest which may be realized in respect of my moneys in ready cash, whatever the same may be, my executors shall use Rs. 50 (namely, fifty) per mensem for *sadavarat* (purposes) and they shall pay Government (and) assessment bill and shall get repairs made."

"As regards the two houses situated at Mody Bazar and as regards the money, whatever the same may be, should there be no issue of the womb of my daughters, the same (*i.e.*) the property of (my) daughters shall be used by my executors for religious and charitable purposes (*dhurm*) and for *sadavarat* (purposes). Further, Rs. 4,000 (four thousand), credited to the name of my wife, Nenbai, at Thakor Dundar Gangji's place. My wife during her lifetime shall enjoy the interest of those rupees. After the decease of my wife, religious and charitable donations (*dhurm*) shall be made (given) out of the interest of those rupees."

"And as regards the above-mentioned Rs. 50 fixed for the *sadavarat* the same are to be paid at Shri Narayan Saraoji."

The testator's two daughters (Mulbai and Nenbai) survived him, but had died without issue before the date of this suit.

The first defendant was the testator's widow. The second and third defendants were co-executors with the plaintiff, and the fourth defendant was the husband of the testator's daughter [353] (Nenbai). The last-mentioned defendant, as heir of his wife, claimed the share of the residue to which he alleged she was entitled if the gifts to charity were held to be void.

The Advocate-General was a party defendant.

*Lang* (Acting Advocate-General) and *Inverarity*, for plaintiff.—They cited *Jamnabai* v. *Khimji Vullubdass* (1); Tudor on Charitable Trust (3rd ed.), pp. 29, 279; *Dawson* v. *Small* (2); *In re Birkett* (3); Theobald on Wills (3rd ed.), p. 378, para. 3.

*Jardine* and *Anderson*, for defendants Nos. 1, 2 and 3.—They cited Tudor on Charitable Trusts (3rd ed.), p. 38; Theobald on Wills (3rd ed.), p. 378.

(1) 14 B. 1. (2) L.R. 18 Eq. 114. (3) 9 Ch. D. 576.

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JUDGMENT.

STARLING, J.—In this suit there are three points to be determined: (1) whether the gift to "*sadavarat*" of the income of the house in Dariasthan on the death of the testator's wife is valid? (2) whether the gift to the "*dhurm*" (*i.e.*, religion) and "*sadavarat*" (*i.e.*, charity) of the residue of the income of the two houses at Mody Bazar, after the death of the testator's two daughters, is valid? (3) whether the gift to "*dhurm*" of the Rs. 4,000, on deposit with Dunji Gangji, is valid, and if not, whether the provisions regarding the two houses could apply to it, or whether it would be undisposed of residue?

With regard to the first question, the words of the will are: "After the decease of my wife shall have taken place, my executors shall use for '*sadavarat*' the rent of the above-mentioned house." Power is then given to sell the house, and invest the proceeds, and pay the income "into the '*sadavarat*'." Looking to the wording of the will, I am of opinion that the testator intended his executors, after the death of his wife, to establish a definite "*sadavarat*" in some definite place with the income of that house, and not merely, at their discretion, themselves to distribute the income at any indefinite place, and perhaps at many places to Brahmins and travellers. I, therefore, hold that this is a good charity, and there must, therefore, be an inquiry as to the place at which such "*sadavarat*" should at the proper time be [354] established, and a scheme must be prepared for its administration.

As to the second question, the wording of the will is different. It provides that, if the testator's daugnters die without issue, "the property of my daughters shall be used by my executors for '*dhurm*' and '*sadavarat.*'" The gift to "*dhurm*" is invalid; consequently it becomes necessary to determine whether one portion of the gift, the extent of which is uncertain, being invalid, the whole is invalid; or whether the valid portion takes a share or the whole of the gift. Under earlier authorities the whole gift would be held to be invalid, but later decisions have gone on the principle that, if possible, the valid portion should be upheld. I shall follow the later cases, and it will therefore be necessary to decide whether the whole or a portion is to go to the "*sadavarat.*" Mr. Inverarity argued that the whole should go, on the authority of *Dawson* v. *Small* (1) and *In re Birkett* (2). There are several other cases of a similar nature—*Hoare* v. *Osborne* (3); *Fisk* v. *Attorney-General* (4); *Hunter* v. *Bullock* (5); *In re Williams* (6); and *Vaughan* v. *Thomas* (7). In *Fisk* v. *Attorney-General*, *Hunter* v. *Bullock*, and *In re Birkett*, the gift was to a person other than the testator's executors or trustees, and the principle which seems to me to run through these cases is that a definite gift being made to "a paticular person," with a trust for an invalid purpose attached to it, and a trust for the balance for a valid purpose, and not merely directions given to the testator's executors or trustees to act in a certain manner, the Court will not deprive the donee of the amount set apart for the trust, which he need not perform, but will let it fall into the balance which is applicable to the valid purpose. This view, I know, is dissented from by Malins, V. C., in *In re Williams* (6). In *Dawson* v. *Small* (1) and in *In re Williams* (6) it was the executors who were to carry out the wishes of the testator, and the Court held that the

(1) L.R. 18 Eq. 114. (2) 9 Ch. D. 576. (3) L.R. 1 Eq. 585.
(4) L.R. 4 Eq. 521. (5) L.R. 14 Eq. 45. (6) 5 Ch. D. 735.
(7) 33 Ch. D. 187.

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whole of the income should be applied to the valid trusts. In *Hoare* v. *Osborne* (1) and *Vaughan* v. *Thomas* (2) the Court, on the contrary, held that the value of the invalid trusts went into the residue, adopting in each case a different [355] method of ascertaining what was to be apportioned to the valid and the invalid trusts respectively.

Thus, of the cases which seem to me to be nearly on all fours with the present, there are two deciding one way and two the other, and three others the principle of the decision in which can, I think, be distinguished from these four. In the present case, however, the directions are much more vague than in any of the foregoing seven cases, and I should have held that the whole gift to "*dhurm*" and "*sadavarat*" was invalid if it had not been for the modern tendency to uphold as much as possible where charity is concerned. I shall, therefore, follow the case of *Hoare* v. *Osborne* (1), and hold that the gift of the rent of the two houses and the income of money in ready cash is good to the extent of one-half in favour of the "*sadavarat*," and there must be an inquiry as to where the "*sadavarat*" is to be established, and a scheme framed for its administration; and there should also be a report as to whether the "*sadavarat*" to be established out of the income of the house in Dariasthan should be entirely separate from this one, or whether the income of the other property, when it falls in, should be added to this. The other half of these two properties and of ready cash will thus be undisposed of, and will go to the first defendant for a widow's estate.

The only question now to be disposed of is that regarding the Rs. 4,000. The gift to "*dhurm*" is clearly bad, and I do not think that a deposit of moneys with a firm at interest would come under the term "money in ready cash," which seems to me a more restricted term than "money" or "ready money." There is no residuary clause in the will, and there are no other words than "money in ready cash" which occur in connection with the bequest of the houses of Mody Bazar, by which it can be held that this Rs. 4,000, in the events which have happened, are subject to the same trusts; consequently I hold that the "*corpus*" of the Rs. 4,000 being undisposed of, it will go to the widow. She was, therefore, entitled to remove it from the place where it had been deposited by the testator.

Declare that the defendant Nenbai is entitled to the possession [356] of the house in Dariasthan and to recover the rents and profits thereof, applying them as directed by the will of the testator. Declare that the gift of the rent of the house in Dariasthan, in the plaint mentioned, after the death of the testator's wife is valid, and that the same be and is hereby established. Refer to the Commissioner to report whether the same should be separated from the other "*sadavarat*" hereinafter referred to, and if necessary to inquire and report where the same should be established, and to prepare a scheme for the administration thereof. Declare that the trusts declared as to the income of the two houses in Mody Bazar, and of the interest which may be realized in respect of the testator's moneys in ready cash, is invalid so far as regards "*dhurm*," but valid to the extent of one-half of such income and interest in favour of the "*sadavarat*." Refer to the Commissioner to enquire and report where the same should be established, and to prepare a scheme for the administration thereof. Declare that the directions to expend the sum of Rs. 4,000, in the will mentioned, by "*dhurm*," are invalid, and that the said

(1) L.R. 1 Eq. 585. (2) 33 Ch. D. 187.

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sum is undisposed of by the said will, and belongs to the defendant Nenbai as widow of the testator. Refer to the Commissioner to take an account of the property of the testator received or taken possession of by the executors, or any and which of them, and of their application thereof, &c. Fourth defendant to pay his own costs. Costs of all other parties, as between attorney and client, to be paid out of the estate.

Attorneys for the plaintiff: Messrs. *Little, Smith, Nicholson,* and *Bowen.*

Attorneys for the defendants: Messrs. *Payne, Gilbert,* and *Sayani.*

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## [357] APPELLATE CIVIL.

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

NANDRAM DALURAM (*Original Defendant*) *Appellant, v.* NEMCHAND JADAVCHAND (*Original Plaintiff*), *Respondent.**

[19th April, 1892.]

*Arbitration—Award—Decree in terms of award—Appeal—Award by three out of four arbitrators—Illegal award.*

Where a decree has been passed in terms of an award, an appeal lies only where the question is whether the award was illegal, being void *ab initio.*

[F., 24 C. 469 (471); Appl., 2 N.L.R. 81 (83); R., 18 A. 422 (426, 427) (F.B.)=16 A.W.N. 137; 29 B. 285=6 Bom. L.R. 1132 (1134); 18 M. 423 (430) (F.B.); 9 Ind. Cas. 173=21 M.L.J. 263=9 M.L.T. 251=(1911) 1 M.W.N. 151 (164); 5 O. C, 13 (14); 74 P.R. 1894 (F.B.); 112 P.L.R. 1901 (F.B.); 6 S.L.R. 169.]

SECOND appeal from the decision of Rao Bahadur Chunilal Maneklal, First Class Subordinate Judge of Ahmedabad with Appellate Powers.

Suit (No. 348 of 1886) and cross suit (No. 389 of 1886) for account. On the application of the parties both suits were referred to the arbitration of four arbitrators. In January, 1888, one of the arbitrators resigned, and another was by consent appointed in his place.

In April, 1888, the last mentioned arbitrator ceased to take part in the proceedings, and on the 12th July, 1888, the other three arbitrators gave their decision: two of them publishing one award, and the third, differing from his colleagues, publishing a separate award.

The plaintiff, Nandram, objected to both the awards, and contended (*inter alia*) that they were illegal, not being the award of the four arbitrators who had been appointed.

The Subordinate Judge held that the award of the two arbitrators, being that of the majority, should be filed, and he made a decree in terms of that award.

Against that decree Nandram (plaintiff in suit No. 348 of 1886) appealed, and the appellate Court confirmed the order, observing: "On a consideration of the authorities cited on either side, the tendency appears to allow an appeal only in a case in which there is no award either in fact or in law, but not to allow an appeal in any other case, and the determination of the question raised on behalf of the respondent [358] depends upon the question whether the disputed award is a mere nullity, and this latter question must be answered in the negative. The

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* Second Appeal No. 635 of 1890.