

I.L.R., 18 BOMBAY.

18 B. 1.

ORIGINAL CIVIL.

Before Mr. Justice Starling.

BYRAMJI JEHANGIR LAMNA AND OTHERS (*Plaintiffs*) v.
RATNAGAR JAMSETJI RATNAGAR AND OTHERS (*Defendants*).*

[18th April, 1893.]

1893

APRIL 18.

ORIGINAL
CIVIL.

18 B. 1.

Will—Construction—Gift of income for life with power to appoint—Power of appointment—Invalid power of appointment—Gift over in default of appointment—Gift of residue equally between two sons and then to next of kin—Construction.

A Parsi by his will devised a certain house to his executors on trust after payment of repairs, &c., out of the income thereof to pay the balance of such income to his daughters Cuverbai and Jerbai in equal moieties and after their death "to the use of such of the issues only of the said Cuverbai and Jerbai as they should respectively appoint, such appointment to affect their own respective moiety only and not that of the other of them," and in default of appointment on trust to sell the house and divide the proceeds as directed in the will.

Held, that each daughter took half the house in question for her life with power to appoint it among her children as she thought fit. Even if the power to appoint had been invalid, the gift over on default should be upheld on the authority of *Peacock v. Frigout* (1).

A Parsi testator by his will bequeathed the residue of his moveable property to his executors in trust out of the income thereof to apply the sum of Rs. 50 for the maintenance of his son Ratnagar until he should attain 21 years of age and to invest the surplus of such income in Government securities, which should be added to the original *corpus* of his moveable property for the benefit of his said son Ratnagar, and upon his attaining the age of 21 to pay over to him "the whole of the interest, dividends and produce only of the *corpus* of the whole of the moveable property," and after the death of Ratnagar in trust to divide the said *corpus* of the moveable property with all its additions and accumulations among the next of kin of the said Ratnagar. By a codicil subsequently executed the testator directed that the above bequest should extend and be applicable to his son Nusserwanji and that the executors should divide the income of the moveable property between [2] Ratnagar and Nusserwanji instead of giving the whole to Ratnagar. The Court was of opinion that under the will and codicil Ratnagar and Nusserwanji were each to have a moiety of the income for their respective lives, and that on their death one moiety of the *corpus* was to go to their next of kin. The Court, however, declined to make a declaration to that effect, as Ratnagar, who, at the date of suit, was unmarried, might afterwards marry and have children, who would not be bound by a declaration made in this suit.

SUIT by executors for the construction of a will.

Jamsetji Ratnagar, a Parsi, died at Bombay on the 21st May, 1877. He left a will, dated the 31st January, 1874, and two codicils, dated, respectively, the 25th March 1875 and the 20th May, 1877; and his executors, the plaintiffs, duly obtained probate on the 19th September 1877.

The first plaintiff was the son-in-law, and the second plaintiff (Nusserwanji Jamsetji Ratnagar) was the eldest son of the testator.

* Suit No. 114 of 1893.

(1) L.R. (1893) 1 Ch. 54.

1893
 APRIL 18.
 —
 ORIGINAL
 CIVIL.
 —
 18 B. 1.

The will, after appointing executors and making certain bequests, contained a clause whereby the testator devised to the executors a certain house situated at Breach Candy on trust, out of the income thereof to keep it in repair, &c., and after such payments—"to pay and divide the net rent of the said house to and amongst my daughters, Cuverbai, wife of the said Byramji Jehangir Lamna, and Jerbai not yet married during the term of their respective natural life as tenants in common for their sole use and benefit on their own respective receipts only, free from the control, debts and marital rights of their respective husbands, and after the death of the said Cuverbai and Jerbai to the use of such of the issues only of the said Cuverbai and Jerbai respectively and for such estate and estates, uses, ends, intents and purposes of such issues only as they, the said Cuverbai and Jerbai, notwithstanding their or her coverture and whether they or she shall be sole or covert shall respectively from time to time by any deed or deeds, instrument or instruments, in writing, with or without power of revocation to be by them respectively sealed and delivered in the presence of and attested by two or more credible witnesses or by their respective last will and testament, in writing, direct, limit or appoint—such direction, limitation or appointment to affect their own respective moiety or share only, and not that of the other of them, and in default of such direction, limitation or appointment upon trust to sell or dispose of the said house and to pay and divide the proceeds thereof equally to and among their respective lawful issue *per stirpes* and not *per capita* according to the law then in force relating to intestate succession among the Parsis, &c."

As to the residue of his estate the testator directed as follows:—

"And I give and bequeath all my Government promissory notes or loans of the Government of India, Bombay municipal debentures, post bills, or drafts of the local or any other banks, money deposited in any such banks on current or fixed deposit [3] account, money lent on the mortgage or security of immoveable properties, ready cash, and all the rest residue and remainder of my personal and moveable estate whatsoever and wheresoever of which I may be possessed at the time of my decease and not otherwise disposed of by this my will, unto the said Hormusji Dadabhoy Parnik, Dosabhoy Dadabhoy Parnik, Byramji Jehangir Lamna and Nusserwanji Jamsetji Ratnagar or the survivor of them and the executors, administrators of such survivors, upon the trusts and for the intents and purposes, hereinafter expressed and declared, of and concerning the same,—that is to say, upon trust to deposit all such Government promissory notes, municipal debentures, post bills, drafts, ready cash, &c., in the new Bank of Bombay, Limited, or any other bank constituted under the Royal Charter or formed and registered under the Indian Companies Act for safe custody and to pay and apply, out of the interest, dividends, produce or income of such moveable estate, the sum of Rs. 50 for the maintenance and education or otherwise for the benefit of my son, Ratnagar Jamsetji, until he shall attain the age of 21 years, and in the meantime to accumulate and invest the surplus of such interest, dividend and produce in the promissory notes of the Government of India or such other securities as may have been guaranteed by such Government, such investment to be made through or by the hands of the banks aforesaid in which the said moveable property may have been deposited at that time for safe custody as hereinabove directed and to be added to the original or *corpus* of the said moveable property for the benefit of my said son, Ratnagar Jamsetji, and on his attaining the age of 21 years to pay over to him the whole of the interest, dividends and produce only

of the *corpus* of the whole of the moveable property as well as the interest, dividend, and produce of all the accumulations and additions which may have been made to the original or *corpus* of the said moveable property in the manner aforesaid or howsoever otherwise made or which may be then due and accrue thereon, and upon and after the death of my said son, Ratnagar Jamsetji, upon trust to deliver over, pay and divide the original *corpus* of the said moveable property with all its accumulations, additions and further interest, dividends and produce accrued and due thereon to and among all the lawful issues of the said Ratnagar Jamsetji according to the statute or law then in force in Bombay relating to intestate succession among the Parsis, but if there be only one issue then to such one issue only, but in the event of the death of the said Ratnagar Jamsetji without any lawful issue then upon trust to give, deliver over, pay and divide the whole of the said moveable property with all its accumulations and additions, &c., to the rightful heirs of my body, share and share alike."

The second codicil, dated the 20th May, 1877, after reciting this last mentioned clause of the will, continued:—

"Now I hereby declare and direct that the bequest, which I have made as aforesaid of the whole of my moveable property to the executors and trustees of my said will upon the several trusts and declarations therein made on behalf and for the benefit of my said son, Ratnagar Jamsetji, shall extend to and be applicable and be also for the benefit of my said son, Nusserwanji Jamsetji Ratnagar—that is to say, that the executors and trustees of my said will shall pay and divide in equal shares and proportions the whole of the income of all my moveable property to and amongst my said sons, the said Ratnagar Jamsetji Ratnagar and Nusserwanji Jamsetji Ratnagar [4] in lieu of paying the same over to the said Ratnagar Jamsetji only, and that the payment of the moiety of such income and produce to the said Nusserwanji Jamsetji Ratnagar shall be in addition to what I have already by my said will and first codicil given and bequeathed to him."

The suit now came on, as a short cause. The questions submitted to the Court were the following:—

(1) Whether the power of appointment conferred by the said will and codicils on the defendants Cuverbai and Jerbai of the rents of the house No. 692, Breach Candy, in favour of their issues respectively and the limitation, in default of exercise of such power, of the said house in favour of the said issues are respectively valid and effectual, and if so, what is the true construction and legal effect of the same?

(2) What is the true construction and legal effect of the dispositions contained in the said will and codicils of the testator's moveable property, and in particular whether the minor defendants Meherbai Nusserwanji Ratnagar, Aimai Nusserwanji Ratnagar, Jamshedji Nusserwanji Ratnagar, Shapurji Nusserwanji Ratnagar, Banubai Nusserwanji Ratnagar, Buchubai Nusserwanji Ratnagar and Kharsedbai Nusserwanji Ratnagar take any and what benefit under and by virtue of such disposition?

The above-mentioned minors were the children of Nusserwanji Jamsetji Ratnagar, the testator's eldest son.

Macpherson, Raikes and Lowndes appeared for the various parties.

They referred to the Indian Succession Act (X of 1865), ss. 100 and 103; and *In re Abbott; Peacock v. Frigout* (1).

(1) L. R. (1893), 1 Ch. 54.

1893

JUDGMENT.

APRIL 18.

ORIGINAL
CIVIL.

18 B. 1.

STARLING, J.—This is a suit brought for the purpose of obtaining from the Court a declaration of the meaning and effect of two portions of the will and codicil of one Jamsetji Ratnagar who died on the 21st May, 1877. This will and the codicils thereto appear to have been drawn by some person who had an extensive acquaintance with legal phraseology, but a very limited one with the way in which it ought to be employed.

The first question arises on the bequest of a house at Breach Candy to his executors and trustees upon certain trusts. The [5] words of the will are as follows :—(His Lordship read the clause of the will above set forth (1), and continued :—)

In these provisions there is, in the first instance, a devise of the whole estate of the testator in the said house to his executors and trustees upon certain trusts, *viz.*, out of the income thereof to keep the same in repair and to effect insurance thereon and to pay the net balance of the income to his daughters Cuverbai and Jerbai in equal moieties and after their death "to the use of such of their issues as they should appoint," *i.e.*, the *whole house* is devised to the executors and trustees to the use of some one else upon the death of Cuverbai and Jerbai. Now it seems to me that this is practically equivalent to a devise to the trustees upon trust to pay the net income to Cuverbai and Jerbai for life, and on their death to stand possessed of the *corpus* for the benefit of some one else. The only difference the employment of the words "to the use of" would make would be that probably those words would be held to vest the *corpus* at the appointed time in the beneficiaries without any conveyance from the trustees. Then, the provision that the beneficiaries shall be "such of the issues only of the said Cuverbai and Jerbai and for such estate, &c., as Cuverbai and Jerbai by deed or will shall appoint," seems to me to create a good and valid power of appointment, and I do not understand that counsel have suggested that so far it is not valid. The difficulty seems to have arisen on the next clause :—"Such direction, limitation or appointment to affect *their own respective moiety or share* only, and not that of the other of them." It has been argued that this clause renders the power of appointment invalid, on the ground that as Cuverbai and Jerbai only had a life-interest, neither of them had a moiety or share in the *corpus*, and that consequently the only power of appointment, in view of their death, was a power to appoint an interest which ceased at their death, and, therefore, was a power of appointing nothing. In my opinion this is far too technical way of reading and interpreting this provision. Among ordinary laymen these two ladies would be looked upon as each having the usufruct of half the house, and thus, in ordinary though somewhat [6] unprecise language, it might be said that half the house belonged to each of them; and this is what I think the testator intended, and that the limitation of the power of appointment should be read as if it were provided that the said Cuverbai and Jerbai should respectively be entitled to appoint one moiety only of such house and no more. I consequently hold that the power of appointment is valid, and that Cuverbai and Jerbai are each of them entitled to appoint by deed or will one moiety of the *corpus* of the trust property among their respective children in such way as she may think fit according to the provisions of the will. If I had come to the conclusion that this power was invalid, I should nevertheless

(1) 18 B. 2.

uphold the gift over on failure of the exercise of the power. I need not do more than say that I fully agree with and follow the decision on this point of Stirling, J., in *Peacock v. Frigout* (1).

The next point is a much more complicated one and arises on the bequest by the will of the residue for the benefit of the testator's son Ratnagar, and a direction in the second codicil directing that Nusserwanji shall share equally in that bequest. The direction of the will is as follows :—(His Lordship read the clause of the will above set forth (2) and continued :—)

Then in the second codicil the testator recites fully the provision that he has made for Ratnagar, and proceeds :—(His Lordship read the codicil as above(3), and continued :—)

This, to my mind, clearly amounts to a devise of the income of the residue to Ratnagar and Nusserwanji in equal moieties for their respective lives; but no provision is expressly made in this codicil as to what is to happen to a moiety of the *corpus* on the death of Nusserwanji; whereas there is in the will full provision made for the application of the *corpus* after the death of Ratnagar. Taking everything into consideration, however, I am of opinion that what the testator meant by the will and codicil was that Ratnagar and Nusserwanji were each to have a moiety of the income for their respective lives, and that on their respective deaths one moiety of the *corpus* was to go to their next-of-kin under the Parsi Succession Act (XXI of 1865). I do not, however, [7] think I can make a declaration to that effect. Ratnagar has no children at present, but he is a young man and may marry and have children, and the effect of such a declaration would be to limit the right of such children to half the *corpus* of the residue: consequently, as they cannot be represented in this suit, they would not be bound by any declaration I might make affecting their interests, and I must refrain from doing more than express any opinion on the point.

Attorney for all parties :—Mr. *Darashai Bazonji*.

18 B. 7.

ORIGINAL CIVIL.

Before Mr. Justice Starling.

TRIBHUVANDAS RUTTONJI MODY and another (Plaintiffs)
v. GANGADAS TRICUMJI and another (Defendants.)* [15th August, 1893.]

Will—Construction—Gift to a class—One member of such class in existence at date of gift—Will directing deed to be executed—Date of deed is date of gift.

One Ruttonji Rupji Mody died in 1856 leaving a will whereby he directed his widow and executrix Ladcure to purchase an estate worth Rs. 20,000 for his grandson Tricumji, and that this estate should be conveyed to trustees, to be held by them in trust for Tricumji for his life or until his insolvency, and after his death for his son or other male heir. At the time of the testator's death Tricumji had no son. The executrix purchased the estate, but no trust-deed was executed. Tricumji, therefore, brought a suit in 1871 to have the will carried out and a trust-deed executed. Tribhuvandas Ruttonji (the plaintiff herein), who was Tricumji's uncle, was made a party to that suit and a consent decree was passed which ordered that the executrix Ladcure and Tribhuvandas should execute a trust-deed in accordance with the directions in the will. A deed was

* Suit No. 190 of 1893.

(1) L. R. (1893), 1 Ch. 54. (2) 18 B. 2. (3) 18 B. 3.