

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).

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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 :—)

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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*.

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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.

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accordingly executed in 1876 whereby the property was conveyed to trustees on the trusts declared in the will. At the time of the testator's death Tricumji had no son, but at the date of the deed in 1876 he had one son Chunilal; and in 1883 another son Gangadas (the defendant) was born to him. Tricumji died in 1890. Chunilal died childless in 1891. The plaintiffs, who were the son and grandson of the testator, now claimed the property. They contended that as neither of Tricumji's sons were in existence at the date of the testator's death they could not take under his will or under the deed which was afterwards executed to carry out the will; that although at the date of the deed in 1876 one of the sons (Chunilal) was in existence, nevertheless he could only claim as one of a class, and that class was not ascertained or ascertainable at the date of the testator's death, nor at the date of the deed, Gangadas not having been born until 1883. The whole class was, therefore, excluded, and the property after Tricumji's death was undisposed of.

[8] *Held*, that, in view of the direction of the will that a deed was to be executed which should declare the trusts of the property, it was the date of the deed subsequently executed which should be regarded in order to determine the validity of the limitation of the property bequeathed, and not the date of the testator's death, and that under the deed on the death of Tricumji his son Chunilal became entitled to the property.

In the case of a gift to a class, if there is a person in existence at the time of the gift capable of taking and whom undoubtedly the donor intends to benefit, he is entitled to take, although others of the same class subsequently come into existence whom the donor meant the gift also to benefit, but who cannot take because of their non-existence at the date of the gift.

[F., 32 C. 992 (1010) = 1 C.L.J. 482 = 9 C.W.N. 749; Appl., 20 B. 571 (592); R., 22 B. 533 (538).]

THE first plaintiff was father of the second plaintiff and the first defendant was the grandson of the first plaintiff's brother. The plaintiffs sued to recover from the defendants certain property situate in Bombay.

On Ruttonji Rupji Mody had two sons, *viz.*, Tribhuvandas Ruttonji (the first plaintiff) and Premji Ruttonji. The latter died in his father's lifetime and left a son named Tricumji Premji. Tricumji died in 1890, leaving two sons, Gangadas (the first defendant) and Chunilal, who died in 1891, leaving his widow Kasturbai, the second defendant, him surviving.

Ruttonji Rupji Mody had died long previously, *viz.*, in 1856. He left a will, dated the 10th June, 1856, whereby he demised the residue of his property to his son Tribhuvandas (the first plaintiff) and to his (testator's) widow Ladcore, and appointed the latter to be his executrix. By this will he directed that an estate of the value of Rs. 20,000 should be purchased for his grandson Tricumji Premji, and that it should be conveyed to trustees to be held by them in trust for Tricumji Premji during his life or till his insolvency, and after his death for his sons or male heirs.

The words of the will were as follows:—

"Landed estate of the value of Rs. 20,000 shall be purchased in Bombay. Bhai Tricumji shall receive the rents thereof, and in the deed thereof it should be provided that it shall not be claimable by any of Bhai Tricumji's creditors. A deed of such tenor shall be caused to be made and delivered . . . The above-mentioned property shall be given to Bhai Tricumji. And, in the event of Bhai Tricumji departing this life, Bhai Tricumji's son, who may be the *waist chain* (1), is to enjoy the property, and should he have no son the whole shall belong to Bhai Tribhuvan."

[9] In pursuance of the direction of the will, Ladcore purchased the estate, but no trust-deed was executed. Tricumji Premji accordingly

(1) *I.E.* succeed his father as male heir and representative.

brought a suit (No. 817 of 1871) against her, in which he prayed that Ruttonji's will should be carried out and a trust-deed executed, and for an account, &c. The first plaintiff Tribhuvandas was made a party to that suit, which was finally settled by agreement between the parties, and a consent decree was taken, one of the terms of which ordered that Ladcore and the first plaintiff Tribhuvandas should execute a trust-deed in accordance with the directions contained in the will.

In pursuance of this decree a trust-deed was executed on 21st June, 1876, by Ladcore and the plaintiff Tribhuvandas, and by this deed the property now in dispute (*inter alia*) was conveyed to trustees, and due provision made for carrying out the intentions of the testator.

At the date of Ruttonji's death, in 1856, Tricumji Premji had no children, but in 1867 his son Chunilal was born, and in 1883 another son Gangadas (the first defendant) was born. Tricumji died in April, 1890, and Chunilal, as above stated, died in May, 1891, leaving his widow Kasturbai (defendant No. 2) him surviving. Ladcore died in 1879.

In the present suit the plaintiffs contended that on Tricumji's death the property which had been purchased as directed by the will was undisposed of and became part of the testator's estate to which they were entitled; that as Tricumji's sons were not born at the date of the testator's death they could not take either under the will or under the deed which was afterwards executed to carry out the will; that although at the date of the deed (1876) one of the sons (Chunilal) was in existence, nevertheless his claim was only as one of a class which was not finally ascertained or ascertainable at the testator's death or even at the date of the deed, Gangadas not having been born until 1883. The whole class was, therefore, excluded, and the property after Tricumji's life-interest was undisposed of. The plaintiffs further contended that the whole of the testator's property was ancestral, and that the will was, therefore, inoperative.

In their written statement the defendants denied that the property of Ruttonji Rupji was ancestral, and they contended [10] that he had full power to dispose of it by will. They further alleged that the first plaintiff had acquiesced in, and acted upon, the said will, and had recognized it as valid, and they contended that he was now estopped from disputing it.

They further pleaded that the consent decree in suit No. 817 of 1871 was a good and valid compromise of the disputes between the parties thereto and did not depend on the validity or invalidity of the will; that the deed of 1876 carried out the terms of the compromise, and that the plaintiffs were barred by it; that, apart from the compromise, the bequest in Ruttonji's will was valid, and enured for the benefit of Tricumji Premji for life, and after his death for his son Chunilal Tricumji; that Chunilal and his brother Gangadas (defendant No. 1), lived together as a joint family, and that on Chunilal's death the property survived to Gangadas (defendant No. 1).

At the hearing a number of issues were framed with reference to the will and the effect of the consent decree, but in the first instance only the following two were disposed of, *viz.* :—

Whether, in the events that had happened, the property comprised in the trust-deed of the 21st June, 1876, had not reverted to the estate of Ruttonji Rupji? and

Whether the first plaintiff was not estopped from disputing the title of Chunilal Tricumji to the said property?

Lang (Acting Advocate-General) and *Inverarity*, for plaintiffs.

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Macpherson and Scott, for the defendants.

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The following authorities were referred to:—The *Tagore Case* (1); *Mangaldas v. Tribhuvandas* (2); *Ram Lal Sett v. Kanai Lal Sett* (3); *Manjamma v. Padmanabhaya* (4); *Mayne's Hindu Law* (5th Ed.) para. 354.

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JUDGMENT.

STARLING, J.—In this case one Ruttonji Rupji, who died in 1856, made a will of which he appointed one Ladcore executrix. By that will he (*inter alia*) directed as follows:—“Landed estate of the value of Rs. 20,000 shall be purchased in Bombay. Bhai Tricumji shall receive the rents thereof and in the deed [11] thereof it should be provided that it shall not be claimable by any of Bhai Tricumji's creditors. A deed of such tenor shall be caused to be made and delivered.” Then, after enumerating certain other property, the will continues:—“As thus described the above-mentioned property shall be given to Bhai Tricumji, and, in the event of Bhai Tricumji departing this life, then Bhai Tricumji's son, who may be the *waist chain*, is to enjoy it; and should he have no son, the whole shall belong to Bhai Tribhuvan.”

Ladcore purchased the property, but did not execute any deed, in reference thereto, as directed by the will, nor did she allow Tricumji to receive the rents thereof. Consequently Tricumji filed suit No. 817 of 1871 against Ladcore, praying (*inter alia*) that she should be ordered to execute a deed in terms of the said will, conveying the property to trustees. Subsequently, the first plaintiff was added as a party-defendant, and afterwards on the 16th July, 1874, a consent decree was passed whereby Ladcore and the first plaintiff were ordered to execute a deed in terms of the will.

On the 21st day of June, 1876, a deed was executed by Ladcore and the first plaintiff by which the said property was conveyed to trustees on certain trusts. The trusts are in more detailed terms than appear in the will, but it is admitted that they are proper for the due carrying out of the intention of the testator.

At the date of the testator's death, Tricumji had no children. A son, named Chunilal, was born to him in 1867, and he died in 1891, leaving him surviving his widow, Kasturbai, the second defendant. Another son was born to Tricumji in 1883, the first defendant Gangadas. Tricumji died in 1890.

To what date, then, are we to look in ascertaining the validity or otherwise of the limitations attaching to his property? The will of the testator does not directly devise the property to Tricumji upon certain limitations, but directs the executrix to buy property and to make a deed in respect thereof, in which it is to be provided that the property is to be held on the terms therein expressed. I am aware that in the will it is provided that Tricumji shall enjoy the rents of the property, and that on his death it should go to his son, but it is quite evident that the testator [12] intended a deed to be made in respect of the house, and I must hold that the meaning of the words is “I direct my executrix to purchase a property worth Rs. 20,000, and convey the same to trustees, to hold the same upon the trusts in the will set forth.” Consequently, as the testator intended the trusts to be set out in a deed, I am of opinion that it is to

(1) 9 B. L. R. 377 (394). (2) 15 B. 652. (3) 12 C. 663. (4) 12 M. 393.

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the date of the deed that we must look for the purposes of determining the validity of the limitations, and not to the date of the testator's death. The decree in suit No. 817 of 1871 has no effect upon this matter, as it does nothing more than direct Ladcote to carry out the terms of the will, and does not, in my opinion, otherwise determine the right of the parties.

At the date of the deed, Tricumji had a son Chunilal, and he consequently was capable of taking advantage of the gift of the property to him on the death of his father, and would undoubtedly be entitled to it, unless the gift to him is made bad by the subsequent birth of the first defendant. The deed provides that on the death of Tricumji the property is to go to his son, if only one, and to be divided among his sons, if more than one. As Chunilal was alive at the date of the deed, I must assume that it was intended that he should be benefited, although there might also be an intention that others should be benefited. Must I, therefore, hold that a limitation which was good at the date of the deed became bad by reason of others of the same class having subsequently come into existence, who could not take under the limitation? In my opinion, the cases of *Rai Bishen Chand v. Mussumut Asmaida Koer* (1), *Ram Lal Sett v. Kanai Lal Sett* (2), *Mangaldas v. Tribhuvandas* (3), *Manjamma v. Padmanabhayya* (4) show that, if there is a person in existence at the time of the gift capable of taking, and whom undoubtedly the donor intends to benefit, he is entitled to take, although others of the same class subsequently come into existence whom the donor meant the gift also to benefit, but who cannot take because of their non-existence at the date of the gift.

Therefore, I am of opinion that under the deed, on the death of Tricumji, his son Chunilal became entitled to the property in [13] dispute; and as he died without issue, on his death the property descended to the first or the second defendant, but to which of them it is unnecessary, in the present suit, to determine.

So far this judgment has proceeded on the assumption that the property of Ruttonji Rupji was self-acquired, the determination of the question as to whether it was self-acquired or ancestral having been reserved until the determination of the foregoing points. If it was ancestral, although the first plaintiff may not have had power to dispose of the property in question in the way he did, I see no reason why the deed should be not binding upon both plaintiffs, so far as the life-interest of the first plaintiff in the income of the half of the property in dispute, which would have come to him on partition with the second plaintiff, is concerned.

For the reasons above given I find that, in the events which have happened, the property comprised in the trust-deed has not reverted to the estate of Ruttonji Rupji. I also find on the fifth issue that the first plaintiff is estopped from disputing the title of Chunilal to the said property. I record no finding at present on the other issues, as they would be affected by the determination of the question whether the property of Ruttonji Rupji was ancestral or self-acquired.

Attorneys for the plaintiffs :—Messrs. *Edgelow and Gulabchand*.

Attorneys for the defendants :—Messrs. *Bhaishanhar and Kanga*.