

## ORIGINAL CIVIL.

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

BA'I MOTIVAHU (ORIGINAL DEFENDANT), APPELLANT, *v.* BA'I-MAMUBA'I  
(ORIGINAL PLAINTIFF) AND KHIMJI LAKHMIDA'S (ORIGINAL DEFENDANT), RESPONDENTS.\*

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March 15.

*Will—Construction—Gift of residue of income of property “to be used for the purposes of A and B as trustees think proper”—Gift to future children of testator's daughter—Appointment—Power of appointment by will given to daughter in case no children born—Donee's power to appoint limited to persons in existence at death of testator.*

One Jethá Ludháni, a Hindu inhabitant of Bombay, by his will directed that his immovable property in Bombay should be formed into a trust of which he appointed certain trustees. Out of the net income of the trust, the trustees were to pay Rs. 50 to his wife Moti and his daughter Mamu for their personal expenses, and the residue was “to be used for the purposes of my wife Moti and my daughter Mamu and her children in such manner as my trustees think proper.” Mamu was thirty years of age at the hearing of the suit and had no children.

*Held*, that this was a gift of the residue of the net rents in equal shares to Moti and Mamu, and that the survivor of them would be entitled during her life to the entirety of the said rents.

The testator further directed that after Mamu's death the trust was to stand valid during the lifetime of her children (if any), and that afterwards the heirs of such children should divide and receive the property. But if Mamu had no children, then after the death of Mamu and Moti the trust should become void, and the property was to be delivered to such person as Mamu might by will appoint.

*Held* (1) that the provision for the future children (if any) of Mamu failed under the ruling in the *Tá Gore* case. If any children should be born, the question would arise as to what would become of the property ;

(2) that the direction that the property should be delivered to such person as Mamu should by will appoint, was a valid direction, subject, however, to the limitation that the person to whom Mamu appointed should be a person in existence at the death of the testator.

SUIT for administration and construction of a will. The plaintiff (Mamubái) was the daughter of one Jethá Ludháni, a Hindu merchant of Bombay, who died in November, 1869, leaving a large amount of moveable and immovable property. He left a widow (the defendant Motivahu) and the plaintiff Mamubái who was his only child, being the daughter of a predeceased wife. At the time of Jethá Ludháni's death, the plaintiff was fourteen years

\* Suit No. 57 of 1878.

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of age and had been married for two years to one Bhimji Bhánji. Up to the date of the hearing of this suit she had had no children, and she was then about thirty years of age. She brought this suit for the construction of the will and for the administration of her father's estate.

By his will dated 18th October, 1869, Jethá Ludhání appointed the defendants (Dossá Morárji and Khimji Lakhmidás and his widow Motivahu) his vakils and vakalatan (*i.e.*, his executors and executrix, and (*inter alia*) he directed that his immoveable properties should be formed into a trust, of which he appointed certain trustees who were to collect the income, and after defraying expenses were out of the net income to pay a certain sum for the personal expenses of his wife Moti and his daughter Mamu. In case Mamu should have children, the trust should stand valid during their lifetime and "afterwards" the property was to be distributed among their heirs. If, however, Mamu should have no children, then the trust was to become void, and the property was to go as Mamu should by her will appoint.

A later clause (the 18th) of the will specified the manner in which the property should be divided among Mamu's children, and provided that, if she had no children, the property should be expended in the *dharam* in the testator's name, or if the law would permit, that the property should go as Mamu should by her will appoint.

The following are the material clauses of the will :—

"The vakils and vakalatan therein appointed by me and mentioned below are unani- mously to carry on, in the event of my death which may God forbid, the management of the whole of my ready cash (landed) 'estate' and property agreeably to the particulars mentioned below. The particulars thereof are (as follows):—

"1. Should my death may take place, which may God forbid, I have appointed, Thákar Khimji Lakhmidás and Thákar Dossá Morárji my vakils and my wife Vow Motivahu vakalatan, three persons jointly. They are to carry on the whole manage- ment as 'executors' and 'executrix' agreeably to what I have written."

"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 *dharam* (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, im- moveable property, there is is not to be touched by my vakils or vakalatan 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 gardens), 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 to the trustees thereof, my two vakils and vakalatan and in conjunction with them my friend Seth Thákar Khatáo Makanji, (4) four persons, jointly are duly to become '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 used 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 7th 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 daughter Mamu should there be any children born of the womb of my daughter this 'trust' is to stand valid during the lifetime 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 this property is to be delivered to such persons as my daughter Mamu may direct it to be delivered to by making her will.

"13. For the purpose of defraying the expenses of my house and of the worship of the Thákur (God) in my house, Rs. 750, namely seven hundred and fifty, are to be paid every month to my wife Motivahu out of my fund in ready cash, and they are to be caused to be defrayed (by her), and should Motivahu be not fit to defray the expenses in a decent and respectable manner and with economy, then my abovenamed other vakils are to defray them with their own hands.

"14. To my wife Vow Motivahu Rs. 50, namely fifty, are to be paid every month for (her) personal expenses out of my trust fund mentioned in the 7th clause written above, and should my wife not conduct herself in conformity with my credit and respectability and according to the directions of my abovementioned other vakils, not even a single cent is to be paid (to her) for her personal expenses.

"15. To my daughter Bái Mamu Rs. 50, namely fifty, are to be paid every month for (her) personal expenses out of my 'trust' fund mentioned in the 7th clause written above, and besides that should any expenses 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 vakalatan 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.

"16. After receiving (and) paying my claims and debts and 'legacies' nothing is to be expended and paid out of my principal amount that may remain in ready cash.

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Out of the amount that may remain in ready cash out of the interest (and) out of the profits of the trade and makadam's business after deducting the loss as therefrom (*i.e.*) out of the net surplus that may remain every year the abovementioned house expense and the expenses connected with my daughter Mamu and her children and the expenses of the worship of the Thákur (God) in my house are to be defrayed. After defraying these expenses, as to the surplus that may remain in addition to the principal, my vakils and vakilatan are authorised to make such religious charities out of the same in my name as they may deem proper.

"17. No person connected with the parents of my wife Motivahu or with their party is to be employed in my house for service or trade, and should any be employed, the amount of the personal expenses of my wife Motivahu and the house expense and the payment of a single cent out of my income whatever are to be stopped. The authority respecting the same appertains to my abovementioned remaining vakils.

"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 Bái Mamubái after the lifetime 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, namely two thousand, are to be paid to each of the daughters on their attaining the age of (18) 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 Bái Mamu taking place my immoveable property is to be expended on such good *dharam* (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 *dharam* (religious or charitable purposes) by reason of the rules of the Sirkár, the same is to be given to such person as my daughter Mamu may direct it to be given to by making her will.

"19. There are my own and my wife Vow Motivahu's ornaments, jewels set with stones and of 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 Bái Mamu, if any be born of her womb, agreeably to what is stated in the 18th clause on (their) attaining the age of twenty-one years, and should no child be born of the womb of my daughter Bái Mamubái, which may God forbid, in that event after the decease of my wife Motivahu and of my daughter Bái Mamu shall have taken place, these ornaments and jewels or the money realised therefrom are to be expended in the same manner as my ready cash or moveable property for some good *dharam* (religious or charitable purpose) in my name that may continue as long as the moon lasts, or should (any one) prevent the money from being given away in this

manner for *dharam* (religious or charitable purposes) by reason of any rule of the Sirkár, the same is to be given to such persons as my daughter Mamu may direct it to be given to by making her will.

"20. My abovementioned vakils and vakalatan are to consult and take advice on every occasion of my friend Seth Thákar Khátao Makanji and Seth Muncherji Frámji Cámaji and Seth Sorábji Shápurji Bengáli, making (3) three persons, respecting the management of my will, and my vakils and vakalatan are to act agreeably to the advice which they may obtain; and should my vakils and vakalatan not act agreeably to the terms of my will, my three friends can compel my vakils and vakalatan to act agreeably thereto.

"According to these particulars I have of my free will (and) pleasure and in my sound sense (and) understanding made this day this my last 'will' or testamentary writing which is to be agreed to by me and my heirs and representatives. All the 'will' and testamentary writing which I have or may have made previous to this are null (and) void.—Bombay, Samvat 1925, Aso sood the 13th, the day of the week Monday the 18th day of October in the English year 1869."

The case was referred to the Commissioner to take accounts. He made his report on 7th October, 1890. No objection was taken to it, and by consent it was confirmed. The testator's property amounted in all to about seven lákhs of rupees.

The case now came before the Court for further directions and for the construction of the will.

*Latham* (Advocate General) and *B. Tyabji* for the plaintiff (Mamubái):—As to clauses 7 and 8, they cited Theobald on Wills (3rd Ed.), p. 352. A gift to be at the disposal of A by will or otherwise is a gift to A—*Robinson v. Dugate*<sup>(1)</sup>; *Hixon v. Oliver*<sup>(2)</sup>. There is no gift over—*Bradly v. Westcott*<sup>(3)</sup>. The plaintiff takes even if she does not exercise the power of appointment. If the plaintiff has a child, the alternative gift would be bad—Theobald, p. 406; *Miles v. Harford*<sup>(4)</sup>; *Moneyppenny v. Dering*<sup>(5)</sup>; *Evers v. Challis*<sup>(6)</sup>; *Crompe v. Barrow*<sup>(7)</sup>; *Re Thatcher's Trusts*<sup>(8)</sup>; *Kumar Tarakeswar v. Kumar Shoshi Shikhareswar*<sup>(9)</sup>.

A general power is really a gift to the donee. The subject of the power becomes the property of the donee if he exercises the

(1) 2 Vern., 181.

(2) 13 Ves., 108.

(3) 13 Ves., 445.

(4) 12 Ch. D., 691 at p. 703.

(5) 2 DeG. M. and G., pp. 145-180.

(6) 7 H. L. Ca., 531.

(7) 4 Ves., 681.

(8) 26 Beav., 365.

(9) L. R., 10 I. A., 51.

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power—Theobald, p. 410; *Raus v. Jackson*<sup>(1)</sup>; Williams' Personal Property, p. 443.

*Macpherson and Lang* for the defendant Motivahu:—English law does not apply. We can only have regard to the words of the will and the power of the testator as limited by authority and by the general Hindu law. The last provision in paragraph 7 is bad—*Manjamma v. Padmanabhayya*<sup>(2)</sup>; Mayne's Hindu Law, sec. 354. As to clause 8, the power given to plaintiff Mamu is bad by Hindu law. If not it is void as depending on a void gift. English rulings do not apply. The law of Hindu wills is the Hindu law of gifts. Mamu had no such control over the property as to enable her to give it: Mayne's Hindu Law, sec. 380. The testator meant to give Mamu a power to give it by her will. A Hindu cannot give that in which in his lifetime he had no interest. There is an absence of authority on the point, and that fact is in our favour. Such a power has never been known to Hindu law. The testator certainly never contemplated doing that which he can only be allowed to do by applying technical English rulings to the case. The rules on the Succession Act (X of 1865) do not apply to Hindus. Next, if the power was given, it is void—*Kumar Tarakeswar v. Kumar Shoshi Shikhareswar*<sup>(3)</sup>.

FARRAN, J.:—This was an administration suit to administer the estate left by the testator Thacker Jethá Ludháni and for the construction of his will. A decretal order was made, 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, and I took time to consider my decision.

By the 7th clause of his will the testator directed that all his immovable property in Bombay should be formed into a trust, of which the defendant and one Thacker Khatáo Makaanji were to

<sup>(1)</sup> 29 Ch. D., 521.

<sup>(2)</sup> I. L. R., 12 Mad., 393.

<sup>(3)</sup> I. L. R., 10 I. A., 60.

be the trustees. "And these 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 after her death agreeably to the 14th and 15th 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 8th clause directed that, if Mamu should have children, the trust should stand valid during their lifetime, and the trust property should then 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 is to be delivered to such persons as my daughter Mamu may direct it to be delivered to 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 clauses 14 and 15, to Motivahu and Mamu each for their personal expenses, and then the residue thereof 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), sec. 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 fund in equal 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

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Mamu (if any) must fail under the ruling in the *Tágore* case. If any should be born, this admission would not be binding on them. I cannot decide what would become of the property in that event.

In the event of no children being born of Mamu, the testator has directed that the property is to be delivered to such persons as his daughter 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 *Tágore* 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 provision for his wife Motivahu for her life while keeping a watchful control over her. See clauses 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 then 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 *Tágore* 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* (3rd Ed.), page 352. *Robinson v. Dugate*<sup>(1)</sup>, *Hixon v. Oliver*<sup>(2)</sup> are cases very like the 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

(1) 2 Vern., 181.

(2) 13 Ves., 108.

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.

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The next clause to be considered is the 13th. 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 on the household expenses, the executors have the power themselves to expend them with their own hands.

As to clause 15, it is sufficient to say that only Rs. 50 per mensem are payable out of the income of the trust created by clauses 7 and 8. The other expenditure there directed is to be made out of the general fund. This general fund is that specified in clause 16. The capital is not to be trenched upon. Out of the balance of the income the executor can make payments for religious charity. The bequest is allowable as the translation runs, and even if the word *dharam* 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 clause 18. If children should be born, my decision would not bind them.

The 18th clause contains an alternative gift of the property there described to *dharm* or failing that to such person as Mamu may direct by making her will. The whole gift, however, would fail on both branches if Mamu should have a child. Failing such child the alternative gift comes into play. The alternative gift to *dharm* fails for vagueness, but effect will be given to the valid one. See the cases collected in Theobald, p. 406 (3rd Ed.).

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My decision on clause 8 governs the gift to Mamu expressed in the same words in clause 18.

I do not think that clause 19 raises a question of election. Motivahu's *stridhan* ornament 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.

The defendant Motivahu appealed.

*Lang* (Advocate General) and *Macpherson* appeared for the appellant.

*Inverarity* and *Macleod* for the respondent.

The authorities cited in the lower Court were relied on, and reference was made to sections 103, 125 of the Succession Act (X of 1865); Mayne's Hindu Law, secs. 364, 354; *Jáverbái v. Kablibái*<sup>(1)</sup>; *Krishnanath v. Atmaram*<sup>(2)</sup>.

The Appeal Court (Sargent, C. J., and Bayley, J.) confirmed the the decree of Farran, J., with a slight variation. The following was the material part of the decree. The words in italics were added by the Appeal Court, thus limiting the class to which Mamu might appoint the property to persons in existence at the death of the testator:—

“ And this Court doth further declare that according to the true construction of the said will subject to the payment of the sum of Rs. 50 per month to the defendant Motivahu directed by the 14th para. of the said will and of the sum of Rs. 50 per month to the plaintiff Mamubái directed by the 15th para. of the said will to be paid respectively, the plaintiff Mamubái and the defendant Motivahu are during their joint lives entitled in equal shares to the net rents of the said immoveable properties, and that the survivor of them will be entitled during her life to the entirety of the said net rents. And this Court doth further order that the said trustees do divide and pay the said net rents accordingly, and in case of dispute this Court doth order that it be referred to Charles Edward Fox, Esquire, the Commissioner of this Honourable Court

(1) I. L. R., 16 Bom., 493.

(2) I. L. R., 15 Bom., 543.

for taking accounts, to ascertain what amount is now payable to the plaintiff Mamubai and to the defendant Motivahu respectively in respect of such net rents having regard to the sums (if any) already paid to them respectively on account of such net rents. And this Court doth further declare that the gift contained in para. 8 of the said will to such person in *existence at death of testator* as the plaintiff Mamubai may direct by her will is valid, but this Court cannot and doth not determine upon whom the property referred to in the said 8th clause will devolve in case the plaintiff Mamubai shall die without making or leaving a will. And this Court doth further declare that this order shall not prejudice the issue, if any, of the plaintiff Mamubai who may be born hereafter. And this Court doth further declare that according to the true construction of the said will the plaintiff Mamubai is entitled to reside with the defendant Motivahu and to have her household expenses conjointly with those of the defendant Motivahu paid out of the Rupees 750 per month by the 13th para. of the said will directed to be paid, but this Court doth further declare that the testator has made no provision in his will, so far as the said payment of Rupees 750 is concerned, for the plaintiff in the event of her withdrawing herself from the testator's family house. And this Court doth further declare that according to the true construction of para. 15 of the said will the sums by that para. directed to be paid other than Rupees 50 per month to the plaintiff Mamubai are properly payable out of the income of the said testator's general estate after payment thereof of the said sum of Rs. 750 per month to the defendant Motivahu as directed by the 13th para. of the said will. And this Court doth further declare that Government promissory loan notes of the nominal value of Rupees 36,300 and the house mentioned in the 2nd schedule hereto have been set apart by the executors and executrix of the testator out of his estate for maintaining the *sadavarats* mentioned in paras. 3, 4 and 5 of the said will. And this Court doth further declare that the alternative gift to charity in the 18th para. of the said will purported to be made is void for uncertainty, but that the gift in the same para. to such person in *existence at death of testator* as the plaintiff Mamubai may direct by her will is valid. And this Court doth further declare that para. 19 of the said will raises no question of election on the part of the defendant Motivahu. And this Court doth further order that the costs of all parties to the suit when taxed as between attorney and client and noted in the margin hereof be payed out of the testator's estate. And this Court doth reserve further consideration and liberty to parties to apply as there may be occasion."

Attorneys for the plaintiffs:—Messrs. *Brown and Moir.*

Attorneys for the defendant (Motivahu):—Messrs. *Thakurdás, Dharamsi and Cama.*

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