

1895.

CALLIA'NJI
HARJIVAN
v.
NARSI
TRICUM.

difficulty in proving damages with any accuracy in such a case. It is, indeed, almost impossible, and I confess that this fact has caused me to feel much doubt as to whether an injunction is not the proper remedy for the plaintiff, but on the whole think that the considerations which I have mentioned should prevail.

The lower Court, however, while holding in its discretion that pecuniary compensation was the plaintiff's remedy, has dismissed his suit with costs. We think it ought either itself to have awarded damages to the plaintiff, or to have ordered an inquiry as to damages. The reason why an injunction was not given was because the Court considered damages to be the proper remedy. That being so, damages ought to have been awarded. In England, no doubt, a bill in equity would have been dismissed, but then the plaintiff would have his suit at law for damages. Here, however, a new suit would not lie, and consequently when the plaintiff is held entitled to a remedy, the appropriate remedy should be awarded.

An inquiry as to damages would be costly, and in any case a decree for damages against the defendant would not be of much value. We think a decree for Rs. 10 as nominal damages will be the proper decree in this case and without costs.

As to the costs of the appeal, we must award them to the plaintiff. It is a hard case, but he was no doubt entitled to appeal, and he has obtained a decree.

Order accordingly.

Attorneys for appellant:—Messrs. *Bháishankar and Kánga.*

ORIGINAL CIVIL.

Before Mr. Farran, Chief Justice, and Mr. Justice Starling.

1895.

August 3.

BECHAR AKHA AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS, v. P. DE CRUZ AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Will—Construction—Absolute gift—Gift over to widow or issue of donee—Life-interest—Costs.

Anna Maria Bocarro, a Portuguese inhabitant of Bombay, died in April, 1884, leaving three sons, Michael, Silveiro and Joaquim (defendant No. 3) and two daughters, Rose and Caroline. By her will she directed that her daughter Rose should enjoy

* Suit No. 57 of 1894.

the rents and profits of certain immoveable property for her life, and that after her death the said property should be sold, and the sale proceeds (after payment of two legacies thereout) be divided equally between her two sons Silveiro and Joaquim (defendant No. 3). The seventh clause of the will was as follows :—

7. "I further direct that the amount which may fall to the share of my son Joaquim Amador Bocarro under (c) of paragraph 6 above should be held in trust by my executors hereinafter named and converted by them into Government securities; the interest accruing therefrom should be paid for the maintenance of my said son Joaquim Amador Bocarro. Should my said son die leaving a widow or issue, his share shall be given to such widow or issue according as he may devise and bequeath. Should my said son Joaquim Amador Bocarro reform himself, and take off all his evil tendencies, and lead a steady, quiet and orderly life, or should he on account of illness or other reasonable cause be in urgent need of pecuniary assistance, I leave it to the discretion of my executors either to make over to my said son Joaquim Amador Bocarro for his absolute use the whole of the amount which he may be entitled to under (c) of paragraph sixth above, or such part or parts thereof as to my executors may appear proper."

Held, on appeal, confirming the decree of the lower Court, that under the above clause of the will there was a clear gift to the wife or issue of Joaquim, but that Joaquim was to have the power of designating how they were to take. To that extent the absolute gift to Joaquim was qualified. Should the gift over fail, the absolute gift to Joaquim would remain unimpaired.

APPEAL from Candy, J.⁽¹⁾

One Anna Maria Bocarro, a Portuguese inhabitant of Bombay, died on the 19th April, 1884, leaving three sons (Michael, Silveiro Joseph, and the third defendant Joaquim) and two daughters Rose Maria and Caroline.

Anna Maria Bocarro at the time of her death possessed both moveable and immoveable property. She left a will, dated 12th March, 1884, and a codicil of the same date, and the first and the second defendants were the executors. With reference to certain immoveable property belonging to the testatrix the will contained the following directions :—

"4. If my daughter Rose Maria Bocarro should survive me, I direct that so long as she lives, my large house No. 57 and such of my smaller buildings Nos. 55, 56 and 71 as may not be sold should be rented, and the rents which may be received therefrom should, after deducting such sums as may be necessary for the payment of all kinds of tax on property and for whitewashing and repairing the said houses, be applied for the maintenance of my aforesaid daughter Rose Maria Bocarro."

(1) See *supra* p. 221.

1895.

BECHAR
AKHA
v.
P. DE
CRUZ.

1895.

BECHAR
AKHA
v.
P. DE
CRUZ.

"5. But should my said daughter Rosa Maria Bocarro predecease me, or should she die after me, then I direct that my executors herein named should sell within a reasonable time, either privately or by public auction, my large house No. 57 and such of my smaller houses Nos. 55, 56 and 71 which may not be sold, preference being given to any of my sons and heirs hereafter named who may desire to purchase any or all of the said houses."

"6. After the houses, referred to in the preceding paragraph 5, are sold, I direct that out of the proceeds of the sale (a) a sum of Rs. 500 (five-hundred) should be made over by my executors to my daughter-in-law Anna Joaquina Bocarro, wife of my eldest son Michael Bocarro, to be assigned by her in such proportion and in such manner as she may deem proper for the benefit of her four daughters, namely, Anna L. Bocarro, Cecilia Bocarro, Rosaline Bocarro and Catherine Bocarro; (b) that a sum of Rs. 1,000 (one-thousand) should be given to my daughter Caroline Britto, wife of Julius Lucas Britto, for her own and absolute use; (c) and that the remainder should be divided among my two sons, Joaquim Amador Bocarro and Silveiro Joseph Bocarro, in equal proportions."

"7. I further direct that the amount which may fall to the share of my son Joaquim Amador Bocarro under (c) of paragraph 6 above, should be held in trust by my executors hereinafter named and converted by them into Government securities; the interest accruing therefrom should be paid for the maintenance of my said son Joaquim Amador Bocarro. Should my said son Joaquim Amador Bocarro die leaving a widow or issue, his share shall be given to such widow or issue according as he may devise and bequeath. Should my said son Joaquim Amador Bocarro reform himself, and shake off all his evil tendencies, and lead a steady, quiet and orderly life, or should he on account of illness or other reasonable cause be in urgent need of pecuniary assistance, I leave it to the discretion of my executors either to make over to my said son Joaquim Amador Bocarro for his absolute use the whole of the amount which he may be entitled to under (c) of paragraph sixth above, or such part or parts thereof as to my executors may appear proper."

The further facts of the case are fully stated in the report of the trial in the lower Court (*supra* p. 223). The points argued in appeal were as to the construction of the above will. Counsel for the appellants contended that Joaquim was absolutely entitled to a moiety of the sale-proceeds of the houses mentioned in the will. Counsel for the executors submitted that under the seventh clause of the will, Joaquim's wife (if she survived him) and his children (if any) took an interest in his share.

Macpherson (Acting Advocate General) and *Incerarity* for the appellants.

They cited section 225 of the Succession Act (X of 1865); Theobald on Wills (3rd Ed.), p. 353; *Brook v. Brook*⁽¹⁾; *Green v.*

(1) 3 Sm. and G., 280.

Spicer⁽¹⁾; *Gough v. Bull*⁽²⁾; *Younghusband v. Gisborne*⁽³⁾; *Mayer v. Townsend*⁽⁴⁾; *Whittell v. Dublin*⁽⁵⁾; *Martin v. Martin*⁽⁶⁾; *Re Boyd*⁽⁷⁾; Jarman on Wills, p. 829 and p. 443; *Percy v. Percy*⁽⁸⁾; *Byng v. Lord Strafford*, in appeal *Hoare v. Byng*⁽⁹⁾.

Kirkpatrick and *Lowndes* for the executors.

Robertson for defendants Nos. 4 to 12.

Respondents Nos. 3 and 13 did not appear.

FARRAN, C. J. :—The main difficulty which I have felt in dealing with the will which we have to construe upon this appeal is to determine whether the intermediate clause in paragraph 7 creates a power in Joaquim to appoint his half share to his widow or issue or whether the widow and issue are the direct and independent objects of the bounty of the testatrix. There can, I think, be no doubt but that the directions given in the concluding words of paragraph 6 to divide the residue of the sale-proceeds of the house between Joaquim and Silveiro would amount to an absolute gift of the half share of the residue to Joaquim, unless there is contained in the seventh paragraph a clear gift over, upon his death, of his half share to his widow or issue. The rest of the seventh paragraph which prescribes the mode in which he is to enjoy his half share, seems to me to be quite insufficient to qualify the preceding absolute estate. See, as to restrictions on enjoyment, *Wharton v. Maserman*⁽¹⁰⁾.

The words to which I have alluded are these. "Should my said son Joaquim Amador Bocarro die, leaving a widow or issue, his share shall be given to such widow or issue according as he may devise or bequeath." The general rule of construction is that where you find a gift in clear and express terms, you are not to permit subsequent and less distinct words to throw a doubt upon the former clear expressions. This is the law as laid down by Vice-Chancellor Wood in *Martin v. Martin*⁽¹¹⁾ and in the passage cited from Jarman on Wills, p. 443. That rule of construction and

(1) 1 Russ. and M., 395.

(2) 16 Sim., 45.

(3) 1 Colly., 400.

(4) 3 Beav., 443.

(5) 2 Jac. and W., 279.

(6) L. R., 2 Eq., 404.

(7) 63 L. T. N. S., 92.

(8) 24 Ch. D., 616.

(9) 5 Beav., 558, and 10 Cl. and Fin., 508.

(10) L. R. (1895) A. C., 186.

(11) L. R., 2 Eq., 404.

1895.

BECHAR
AKHA
v.
P. DE
CRUZ.

1895

BECHAR
AKHA
v.
P. DE
CRUZ.

the position of the clause with which I am dealing in the middle of the paragraph which is conversant with the mode in which the fund is to be enjoyed, caused me to doubt whether the construction put upon it by the Advocate General was not the correct one. Neither of these considerations ought, however, to have weight if the clause properly construed amounts to a clear executory gift over on the death of Joaquim. In that case, the later clause will control the earlier one. Upon consideration I have come to the conclusion that the clause amounts to a clear gift in favour of the wife or issue of Joaquim, but that he is to have the power of designating how they are to take.

Mr. Lewin in his work on Trusts thus states the law: "If a fund be limited upon trust for the children of A as B shall appoint, the construction is that the children of A take a vested interest by the gift subject to be divested by the exercise of the power. Therefore, on failure of the power the children who were the objects of the power become absolutely entitled just as if the discretion had not been annexed." Most of the cases upon the subject are referred to in *Lambert v. Thwaites*⁽¹⁾. If a mere power to appoint is conferred, no trust arises—Lewin p. 135; *Brook v. Brook*⁽²⁾—unless under particular circumstances—*Butler v. Gray*⁽³⁾.

Here there is an express gift of the share of Joaquim to his widow or issue. It is unnecessary to determine now how they would take in default of appointment. Probably the gift to the issue would be held substitutionary. I consider, therefore, that there is a gift over to the widow or issue of Joaquim, and that to that extent the absolute gift to Joaquim is qualified. Should the gift over fail, the absolute gift to Joaquim would remain unimpaired—Succession Act (X. of 1865), sec. 126. I have not referred in my judgment to the several cases mentioned in the argument, though I have read them. Their result is embodied in that section. This was substantially the result at which the Judge of the Division Court arrived, and I am of opinion, therefore, that the appeal must be disallowed.

⁽¹⁾ L. R., 2 Eq., 151.

⁽²⁾ 3 Sm. and G., 280.

⁽³⁾ 5 Ch. D., 26.

As to costs the decree will be varied. The executors' costs taxed as between attorney and client to be paid out of estate as well as the costs of defendants Nos. 4 to 12. Plaintiffs and defendant No. 3 to bear their own costs respectively. Plaintiffs to be at liberty to add their costs to their mortgage security. In other respects the decree of the lower Court is affirmed with costs other than the costs of defendants Nos. 4 to 12, whose costs may be added to their costs in the Court below.

Appeal dismissed.

Plaintiffs' Attorneys:—Messrs. *Little and Co.*

Defendants' Attorneys:—Messrs. *Bicknell, Mervánji and Motilál*, and Mr. *M. H. Khán*.

ORIGINAL CIVIL.

Before the Honourable Mr. Farran, Chief Justice, and Mr. Justice B. Tyabji.

MUNCHERJI BOMANJI PANTHAKI (ORIGINAL DEFENDANT), APPELLANT,
v. DORA'BJI JEHA'NGIR RANDIVA (ORIGINAL PLAINTIFF), RESPONDENT.*

189

August 16.

Limitation—Limitation Act (XV of 1877), Sch. II., Art. 60—Deposit—Loan.

The plaintiff claimed to recover from the defendant, who was his grandfather, the sum of Rs. 4,917, which was the amount standing to his credit in an account in the defendant's books. In November, 1869, the plaintiff being then one year old, his mother (the defendant's daughter) paid over to the defendant the sum of Rs. 650, and at her request the money was credited in the books of the defendant's firm in the name of her son the plaintiff. A further sum was similarly paid over by her in December, 1871, and at her request was credited to the same account. The plaintiff alleged, and the Court found, that these sums were presents which had been made to him on his birthday and other auspicious occasions. The said sums were carried over from year to year in the m's books, the interest being added each year, but no payment had ever been made to the plaintiff, or on his behalf, out of the sum so standing to his credit. Compound interest had been allowed in the account, and on the 9th November, 1893, the amount standing to the credit of the plaintiff was Rs. 4,917.

The plaintiff contended that the money had been paid to, and accepted by, the defendant as a deposit to be held in trust for him. The defendant alleged that the money in question had been lent to him by the plaintiff's mother, and contended that the plaintiff's claim was barred by limitation.

Held, that the defendant had held the money not as a loan but as a deposit: that article 60 of the Schedule II of the Limitation Act (XV of 1877) applied; and that the plaintiff's claim was not barred.

* Suit No. 368 of 1894.