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missioner to ascertain the amount which it will take to put these premises into a state of good and substantial repair, having regard to the original character of the buildings and the purposes for which they are used.

There will be decree for the plaintiff against the defendants for the amount of rent Rs. 1,050, the cost of fire-insurance premium Rs. 37-8-0, and the amount found to be due for the damages. The amount of rent and fire insurance will be payable forthwith, but execution for the amount of damages for non-repair will be suspended for three months.

If the rent and fire insurance be paid forthwith and within three months, the premises be put into a state of good and substantial repair, and in the meantime all covenants in the lease other than that relating to repairs be observed, then I relieve from the forfeiture of the lease; otherwise the lease to stand forfeited and the defendants must give up possession of the demised property to the plaintiff and pay the damages hereinbefore given against them.

Defendants to pay plaintiff's cost of this suit.

Attorneys for the plaintiff:—Messrs. *Little and Co.*

Attorneys for the defendants:—Messrs. *Chalk, Walker and Smetham*, and Messrs. *Bháishankar and Kánga*.

ORIGINAL CIVIL.

Before Chief Justice Farran and Mr. Justice B. Tyabji.

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September 27, October 4.

ANANDRA'O VINA'YAK, PLAINTIFF, *v.* THE ADMINISTRATOR GENERAL OF BOMBAY AND OTHERS, DEFENDANTS.*

Hindu will—Construction—Indian Succession Act (X of 1865), Secs. 101, 102, 159—Power of disposition of moveable property, effect of—Subsequent void gift does not cut down—Gift of balance of rents of immoveable property in hands of trustees—Evidence of intention to limit duration of enjoyment of bequest—Gift by implication, what is necessary to constitute—Estates according to Hindu law in ancestral property, Court will not presume intention to create by will—Assent to provision of will by son of Hindu testator, effect of, where there is doubt whether property ancestral or self-acquired.

* Suit No. 577 of 1894.

Where it is doubtful whether the property with which the will of a deceased Hindu purports to deal is ancestral or self-acquired, the assent of his only son to the provisions of the will, some of which are favourable and some unfavourable to his interest and that of his sons, will bind the latter as well as himself.

A direction in the will of a Hindu to the following effect "my remaining moveable property shall be dealt with by my son G. according as he may think proper; and when the sons of my son G. shall attain the age of twenty-one years, the same shall be divided and duly received by G. and his sons in equal shares" confers an absolute gift on G. If the gift over to G.'s sons, on their attaining the age of twenty-one years, were valid, the absolute estate of G. would be liable to be divested on a son or sons of G. attaining the age of twenty-one years, and asking for a division; but that gift being clearly void under sections 101 and 102 of the Indian Succession Act (X of 1865) its insertion has no effect on the words of absolute gift preceding it.

A direction in the will of a Hindu that immoveable property should be retained in the hands of trustees appointed by the will and that the balance of the rents, profits, &c., after the payment of expenses should be used and enjoyed by the testator's son G. in such manner as he might think fit, with a provision empowering the sons of such son to call him to account for the management of the property on attaining the age of twenty-one and with a direct, though void, gift over to the grandsons of such son, confers only a life estate on the son G.,—the vesting the property in trustees, the right of G.'s sons to ask for an account, and the gift over to G.'s grandsons all showing an intention on the testator's part that the enjoyment of the bequest should be of limited duration within the meaning of section 159 of the Indian Succession Act (X of 1865).

To constitute a gift by implication in a will there must be a reasonable degree of certainty as to the persons intended to take and the nature of the estates which they are intended to take. A direction that until the son or sons of the tenant for life of immoveable property should attain a certain age, no person on behalf of such son or sons should ask the tenant for life for an account or raise any objection, does not sufficiently define the persons to take or the estates in which they are to take to constitute a gift by implication.

It would be difficult, if not impossible, for a Hindu to create by express terms the estates which arise by virtue of the doctrine of Hindu law in regard to the rights of male issue in ancestral property, and even where the hypothesis that the testator intended (under a misapprehension of the law) to create such estates affords a key to the will and gives an adequate explanation of the various estates which would have to be implied in order to give full effect to the different directions contained in the will, yet if the estates cannot be implied from the words used in the will, the Court can not create such estate for the testator by implication, since to do so would be to construct a will for him based upon his supposed intention, not on the words which he has used.

SUIT for construction of the will of one Parmánandás Jivandás.

Parmánandás Jivandás died on the 17th November, 1890. He left a son Govardhandás Parmánandás and two grandsons (de-

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fendants Nos. 3 and 4), the sons of Govardhandás, him surviving. Defendant No. 3 was born in August, 1886, and defendant No. 4 in May, 1888. Subsequently to the testator's death, *viz.*, on the 1st March, 1894, a third son (defendant No. 5) was born to the said Govardhandás.

By his will dated the 16th October, 1890, Parmánandás Jivandás appointed his son Govardhandás and the plaintiff A'nandráo Vináyak to be his executors. They duly proved the will on the 6th April, 1891.

The will was in the following terms:—

"1. The 'wills,' 'codicils' or other disposition papers which I may have made prior to this 'will' are all null and void.

"2. After my decease my funeral outlays and the outlays which will have to be made for twelve months agreeably to the custom of (my) caste, my son Bhai Govardhandás shall make out of my estate in such manner as he may think fit.

"3. Out of my estate Rs. 20,000, namely twenty thousand, shall be paid to my daughter Bái Vijkuvarbái as a 'legacy.'

"4. To each of my mehtás and clerks and servants and menials a sum amounting to twelve months' pay of each person respectively shall be paid as a legacy: from among them to the Bhaya Ajodha Prasád besides the said (legacy) Rs. 5 shall be paid every month as pension, and if the said Bhaya Ajodha should go to perform a pilgrimage, then Rs. 400 shall be paid (to him).

"5. There are my immoveable properties in Bombay and in places abroad. If it should be necessary to repair them, the same shall be repaired out of my estate.

"6. As regards my immoveable estate situate in Bombay and in places abroad or to which I am entitled, I appoint my son Bhai Govardhandás and Mr. Anandráo Vináyakrão, in all two persons, 'trustees' of the whole of such 'estate.' They shall administer my aforesaid immoveable property and recover the rents and profits (thereof), and if it should be necessary, or if a good price is realized, (they) shall sell (the same); (with) the money that may be produced by such sale another immoveable property shall be purchased, and the immoveable property which shall be purchased shall form part of my aforesaid 'trust' account, and until another immoveable property can be purchased, Government (loan) notes shall be purchased and kept (intact). With regard to the rents and profits of the aforesaid 'trust' property and interest on moneys which may be produced after the expenses shall have been deducted therefrom, the balance that may remain over is to be used and enjoyed by my said trustee my son Bhai Govardhandás in such manner as he may think fit.

"7. Excluding the same immoveable property as to my remaining moveable property, (consisting of) ready money, (Government loan) notes and shares and outstanding debts and ornaments and trinkets and jewellery and silver vessels and copper and brass vessels and house furniture, carriages and horses, &c., which may remain over out of the same after the amounts in respect of the abovementioned outlays and expenses

for repairs and legacies, &c., shall have been deducted, the residue that may remain over shall be dealt with by my son Bhai Govardhandás agreeably to what he may think proper. And when the (male) issues, that is to say, sons of my (son) Bhai Govardhandás, shall attain the age of twenty-one years, the same shall be divided and duly received by Bhai Govardhandás and his (male) issues, that is to say, sons in equal shares.

"8. I appoint my son Bhai Govardhandás and Anandráo Vináyakráo 'executors' of this 'will.' Dated this at Bombay the 15th of October in the year 1890.

"*Fresh Clause.*—As long as my son Bhai Govardhandás or any of his son (or sons) are alive so long the immoveable property mentioned in the aforesaid sixth clause cannot be sold, nor shall they make a partition of and take the same between themselves. But after the lifetime of my son Bhai Govardhandás and his (male) issues, that is to say sons, the same immoveable property shall duly be divided and given to Bhai Govardhandás' son's son (or sons) on (his or their) attaining the age of twenty-one years. Until the said Bhai Govardhandás' son (or sons) shall attain the age of twenty-one years, no person on behalf of his son (or sons) shall ask Bhai Govardhandás for an account, nor shall (he) raise any objection."

On the 22nd June, 1891, the plaintiff transferred the management of the moveable property of the testator to Govardhandás, and he managed it until his death.

On the 29th March, 1894, Govardhandás died intestate, leaving his widow (defendant No. 2) and his three sons (defendants Nos. 3, 4 and 5) him surviving.

On the 14th August, 1894, the Administrator General of Bombay (defendant No. 1) obtained letters of administration to the estate of Govardhandás, and claimed and obtained the possession and custody of the moveable property in the possession of Govardhandás at his death as belonging to his estate. The plaintiff as surviving executor of Parmánandás contended that Govardhandás left no estate of his own, but that everything left by him really belonged to the estate of his father Parmánandás.

The plaintiff as surviving executor of Parmánandás now brought this suit praying as follows:—

"(*a*) That the will of the said Parmánandás Jivandás may be construed by this Honourable Court, and the rights of the said Govardhandás Parmánandás and his widow and sons, the second, third, fourth and fifth defendants, may be ascertained and declared, and that the duties of the plaintiff as executor and trustee with regard to the estate of the said Parmánandás Jivandás may be defined and declared.

"(*b*) That it may be declared what portion of the property, immoveable and moveable, aforesaid belongs to the estate of the said Parmánandás Jivandás, and what portion thereof belongs to the estate of the said Govardhandás Parmánandás Jivandás.

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"(c) That the first defendant may be ordered to hand over to the plaintiff, as executor aforesaid, all the property in his possession belonging to the estate of the said Parmánandás Jivandás."

In his written statement the first defendant as administrator of Govardhandás submitted to the Court whether under the will Govardhandás was not absolutely entitled to the immoveable and moveable property of Parmánandás.

Defendant No. 2 (the widow of Govardhandás) died pending the suit.

Defendants Nos. 3 and 4 (sons of Govardhandás) contended that they having been in existence at the death of Parmánandás were alone entitled to his estate under his will.

Defendant No. 5 (son of Govardhandás born after the death of Parmánandás) contended that the property was ancestral in the hands of Parmánandás, and consequently that he had no right to dispose of it by will. The point arose in this way. The grandfather of Parmánandás Jivandás was one Cánji Chattur, who had carried on business with his two brothers (Rámji and Premji) whose property at their death came to him. He died in 1859 and by his will he divided his property between his two sons Ranchordás and Jivandás. Under this will they took the property in moieties as tenants-in-common[1]. Jivandás died intestate in 1859, leaving his son Parmánandás (the present testator) him surviving. Ranchordás died subsequently without issue, leaving a will in which he stated that by the death of his brother Jivandás he had become the heir to the whole of their father's property, and that regarding his nephew Parmánandás as his son his executors were to hand over the whole of the said property to him when he attained twenty-one years of age.

Defendant No. 5 now contended that, "having regard to the origin and nature of the property which Parmánandás purported to dispose of by his will," the property was not validly disposed of thereby—at all events so far as regarded the moiety to which Parmánandás had succeeded on the death of his father Jivandás intestate.

(1) See *Parmánandás* v. *Vináyakráo*, I. L. R., 7 Bom., at p. 22.

Defendant No. 5 further contended that in any event he was entitled to a one-third share of the property purported to be disposed of by the will of Parmánandás or found to belong to the estate of Govardhandás.

In addition to the issues raised by the defendants the plaintiff raised the following :—

1. Whether Parmánandás Jivandás died intestate in respect of any and what part of his property ?

2. Whether defendant No. 5 is entitled to raise the question of Parmánandás' property being ancestral property in the hands of Parmanandás ?

The suit was ordered to be heard before two Judges, and now came on for hearing before Farran, C. J., and B. Tyabji, J.

Macpherson (Acting Advocate General) and *Inverarity* for the plaintiff (the executor) :—As executor the plaintiff does not take a contentious part. He submits that the property was all self-acquired in the hands of Parmánandás, and that he, therefore, had power to dispose of it. As to the immoveable property, we submit that the effect of the will is to give a life estate in this property to Govardhandás, and beyond that there is an intestacy. As to the moveable estate, Govardhandás took a life interest in the income of it until his sons attained the age of twenty-one. They referred to the Succession Act (X of 1865), section 101.

Russell and *Scott* for defendant No. 1 (the administrator of Govardhandás) :—We say that Govardhandás under the will took an absolute interest in both the moveable and immoveable estate. They cited *Gibbs* v. *Rumsay*[1] ; *Dawson* v. *Clarke*[2] ; *Clarke* v. *Hilton*[3] ; *Williams* v. *Arkle*[4] ; *Mannox* v. *Greener*[5] ; *Haig* v. *Swiney*[6]; *Armitage* v. *Coates*[7]; *Bentinck* v. *Duke of Portland*[8] ; *In re Ridge's Trusts*[9] ; *In re Jobson*[10] ; *In re Featherstone's Trusts*[11] ; *Drakeford* v. *Drakeford*[12] ; *Pearks* v. *Moseley*[13];

(1) 2 V. and B., 294.
(2) 18 Ves., 247.
(3) L. R., 2 Eq., 810.
(4) L. R., 7 Eng. and Ir. App., 606.
(5) L. R., 14 Eq., 456.
(6) 1 Sim. and S., 487.
(7) 35 Beav., 1.
(8) 7 Ch. D., 693.
(9) L. R., 7 Ch., 665.
(10) 44 Ch. D., 154.
(11) 22 Ch. D., 111.
(12) 33 Beav., 43.
(13) 5 App. Cas., 714.

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Succession Act (X of 1865), sections 82, 90, 102, 107, 155, 310; William on Executors, p. 155; Hawkins on Wills, p. 224.

Kirkpatrick and *Raikes* for defendants Nos. 3 and 4:—Only these defendants can take, as they were in existence at the death of testator—*Mangaldás Parmánandás* v. *Tribhuvandás Narsidás* (1). The moveables are given jointly to Govardhandás and his sons; the property vesting at once, but made payable when the sons attain twenty-one. Meantime Govardhandás is to manage —Succession Act, section 106. There is also a joint gift of the immoveable property. They cited Succession Act, sections 69, 75, 82; *Sherratt* v. *Bentley* (2); *F. York Smith* v. *Tribhovandás Mangáldas* (3); Hawkins on Wills, pp. 178, 179; *Humphreys* v. *Humphreys* (4); *Sreemutty Kristoromoney* v. *Maharajah Narendra Krishna* (5); *Cally Nath* v. *Chunder Nath* (6); *Alangamonjori* v. *Sonamoni* (7); Jarman on Wills, p. 809.

Branson and *Lowndes* for defendant No. 5:—The property was ancestral, and the will recognises the fact, and merely expresses the testator's wishes as to how the ancestral property should be enjoyed by his family. The previous wills of the testator's uncle Ranchoddás and his grandfather Cánji are of a similar character. The testator's will deals only with the income of the property, leaving the *corpus* to go according to Hindu law *Shookmoy Chunder Dass* v. *Monohari Dassi* (8); *Ballin* v. *Ballin* (9).

FARRAN, C. J.:—This suit was filed by the plaintiff, who is the surviving executor of the will of Parmánandás Jivandás, to have the will construed by the Court and to obtain a declaration of the rights which Govardhandás Parmánandás, the son of the testator, took under the will; and of the rights which the widow and sons of Govardhandás, in the events which had happened, took in the estate after the death of Govardhandás. Since the suit was filed, Manghu Vahu, the second defendant, the widow of Govardhandás Parmánandás, has died. The only persons now who can have an

(1) I. L. R., 15 Bom., 652.
(2) 2 M. and K., 149.
(3) I. L. R., 19 Bom., 401.
(4) L. R., 4 Eq., 475.
(5) 16 Ind. Ap., 41.
(6) I. L. R., 8 Calc., 378 at p. 390.
(7) I. L. R., 8 Calc., 637.
(8) I. L. R., 7 Calc., 269.
(9) I. L. R., 7 Calc., 218.

interest in the estate of the testator Parmánandás, or in that of his son Govardhandás, are the infant defendants Dwárkádás and Haridás (defendants Nos. 3 and 4), the sons of Govardhandás by his first wife, and the infant defendant Káku, their half-brother, the son of Govardhandás by his second wife Manghu Vahu.

As the right of the testator Parmánandás to make the will in question has, on behalf of the defendant Káku, been called in question by reason of the alleged ancestral nature of the property dealt with by the will, it will be desirable to consider that question in the first instance. For this purpose it is necessary briefly to refer to the history of the family and the origin of the property of the testator disclosed by the evidence and exhibits in the cause.

As to Chatur, the remote ancestor of the testator, there is no evidence except that he had three sons—Rámji, Premji and Cánji. It may, however, be inferred that he left no family property, from the fact of each of his sons at their respective deaths dealing by will with the whole property which each of them left. Rámji died in 1835 leaving by his will the residue of his property to his brothers Premji and Cánji whom he appointed his executors. They proved his will. It is dated the 8th June 1835 (Exhibit A).

Premji died in 1836, leaving by his will the residue of his property to his brother Cánji. The brother proved this will. It is dated the 2nd July, 1836 (Exhibit B). Cánji survived his brothers by many years and died in 1859. He made his will which is dated the 25th October, 1852 (Exhibit C), and a codicil thereto, which is dated the 11th May, 1853 (Exhibit D.). The terms of his will and codicil show that he considered and dealt with all the property of which he died possessed as his own absolute property. As to the property which he acquired under the respective wills of his brothers, he writes "that every remaining property they gave to me and departed. I am the owner, having the full control thereof. No one has any claim or title thereto."

This property in the 9th clause of his will he includes in his own property, and (subject to legacies) deals with the aggregate as follows. We transcribe the clause :—

"After making the payments agreeable to what was written by my brothers, 2 persons, the remainder of their property having been given to me by my brothers Premji

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Chatur and Rámji Chatur, 2 persons, they assigned full authority to me and departed. All that property is mine. No one has any claim upon it. All their property is entered in my account books The same comprises 'estates' and 'notes' and outstanding claims to be recovered, and 'shares.' All that property is mine. Whatever debts there may be are to be paid out of the same, and of the balance which may remain I am the owner. And as to the vouchers and claims which there may be in the name of brother Rámji Chatur, or which there may be in my name, I am the owner of all these. As regards them, in the event of my decease, the funeral outlays after me and the religious and the charitable donations and what is to be transferred to my wife and daughter, and the legacies and what is to be paid outside, are mentioned below. The same being deducted out of my property, my sons Bhai Ranchoddás Cánji and Bhai Jivandás Cánji, 2 persons, are owners of the balance which may remain. In the event of my decease they have full powers."

Cánji died on the 13th February, 1859, and his younger son Jivandás Cánji died on the 2nd March following, leaving an only son the testator, Parmánandás Jivandás, then a boy of about eight years of age. Ranchoddás Cánji proved his father's will and entered into possession of the property left by the latter.

From the fact of the several wills which we have referred to having been made, and from their terms which are very definite upon this point, and from their having been proved and acted on, we think that the proper inference to draw is that the property left by Cánji Chatur was his self-acquired property. His sons Jivandás and Ranchoddás, therefore, took it under his will as their self-acquired property—*Jugmohandás* v. *Sir Mangaldás*[1]. Down to this point the case does not, we consider, present any difficulty.

Ranchoddás Cánji soon after proving his father's will died on the 14th May 1859 (Exhibit D). He left a will dated the 12th of May, 1859 (Exhibit E). In it he recites that by reason of his bother Jivandás having died without making a will, he had become the heir to the whole of the moveable and immoveable property which their father had left, apparently treating the devise to him and to his brother as a joint devise. He bequeathed several legacies and gave various directions and appointed Bhánábhai Dwárkádás and four other gentlemen as his executors. The residue of the property he dealt with as follows :—

"The right of inheritance of us two brothers to the moveable and immoveable property has been mentioned in the will made by our said father, and it is stated that

(1) I. L. R., 10 Bom., 528.

whatever property may be left, after defraying the expenses, shall be enjoyed by both the brothers; and my younger brother the said Jivandás, who is dead, has left a son named Bhai Parmánandás of the age of about eight years, and I have no issue. Therefore Bhai Parmanándás being considered by me as my son, the said Bhai Parmánandás has a right of inheritance to the whole of the moveable and immoveable property; and when he attains the age of twenty-one years, the executors appointed by me and mentioned below shall entrust to Bhai Parmánandás the whole of my property, moveable and immoveable, that may remain after defraying the expenses agreeably to all the conditions stated in this will."

In the event of Bhai Parmánandás dying before attaining the age of twenty-one years, the property was to be divided into moieties and given in charity.

The executors appointed by the will of Ranchoddás (with the exception of two) proved it and took possession of the property and managed it until Parmánandás Jivandás attained the age of eighteen years. On the 23rd January, 1868, Parmánandás Jivandás took out letters of administration to the estate of his late father Jivandás Cánji. In his affidavit dated 21st October, 1867, (Exhibit K) he had described the property which was likely to come to him under such letters "as an undivided half share of the property left by Jivandás Cánji."

On the 4th May, 1870, the executors of Ranchoddás Cánji reciting that the shares of Jivandás and Ranchoddás Cánji in the estate of Cánji Chatur had not been divided, and that they had managed both, and that Parmánandás Jivandás had taken out letters of administration to the estate of his father Jivandás, and was satisfied with their administration, made over the whole property, except some which had been given in trust for charity, to Parmánandás Jivandás on his executing a release in their favour (Exhibit F). In this release Parmánandás clearly recognized the will of his uncle Ranchoddás as a valid will; subsequently in his written statement in Suit No. 204 of 1876 (Exhibit K 4), in his plaint in Suit No. 566 of 1877 (Exhibit K 3), and in his written statement in Suit No. 237 of 1877 (Exhibit K 2), Parmánandás set up the case that the will of his uncle Ranchoddás was null and void on the ground that the property with which he dealt by his will was ancestral and joint, but his allegations were then made to defeat the legacies under his uncle's will and are not entitled to weight. The Privy Council in the case of *Parmánan-*

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dás Jivandás v. *Vináyak Wásudev*[1] found it unnecessary to determine what estate Ranchoddás had in the property which he purported to devise, but Sir Michael Westropp adopted a view upon that question unfavourable to the contentions of Parmánandás. With that view we agree and hold accordingly that Parmánandás had a self-acquired estate in the moiety of the property which he took under the will of his uncle Ranchoddás.

It will not be necessary for us to come to any decision as to the nature of the estate which he took in the other, in the view which we have taken as to the construction of his will. The will is dated the 16th October, 1890. Govardhandás, the only son of the testator, was then of adult years. He endorsed the will with these words: "This will is agreed to by me."

Dwárkádás, the eldest son of Govardhandás, was born on the 18th August, 1886. Haridas, his second son, was born on the 17th May, 1888. The testator died on the 17th November, 1890. Káku, the third and youngest son of Govardhandás, was born on the 1st March, 1894, and consequently after the death of the testator

The executors named in the will, namely, the plaintiff Anandráo Vináyak and Govardhandás, proved it on the 6th April, 1891 (Exhibit G). In accordance with an agreement between them (Exhibit K 2) the moveable property of the testator was made over to Govardhandás, while Anandráo Vináyak and Govardhandas jointly managed the immoveable estate until the death of Govardhandás, which took place on the 19th March, 1894. He died intestate. On the 14th August, 1894, administration of his estate was granted to the Administrator General. As we have already stated, he left three sons, the infant defendants and his widow Manghu Vahu, who has since died. The property in suit is of considerable value.

We now proceed to consider the construction and effect of the will. It opens with directions as to the funeral ceremonies of the testator and with the gift of certain legacies, and then in clauses 5 and 6 deals with his immoveable property. Clause 7 then deals with the residue of his moveable property, and the 8th

(1) 9 Ind. App., 86.

clause appoints executors. A fresh clause more fully explains his wishes as to the immoveable property, and with this the will closes.

It is contended by counsel for the fifth defendant Káku that the will does not dispose of the *corpus* of the property of the testator, but only recognizes the rights of his descendants in it and gives directions as to its management; and that the property consequently as ancestral property devolved upon Govardhandás, and after him upon his sons the infant defendants in co-parcenary. He argues that Ranchoddás by his will treated the property similarly, allowing it to descend to Parmánandás, and that it was ancestral property in the hands of the latter, and was considered and treated by him as such. The argument is not without force, but we think that the depositions in the will extend so far beyond mere directions as to management that we are unable to accept it, and that we must hold that Parmánandás by his will intended to direct the succession to, and to confer ownership in, his property after his death, and that his will must be construed on that footing, and according to the canons of construction laid down in the Indian Succession Act.

Though the testator intended to tie up the property for a lengthened period, he ultimately deals with the *corpus* and does make direct gifts in the *interim*. Both these circumstances differentiate the case from *Shookmoy* v. *Monohari*[1]. It is very different from the case before us. The testator has divided the property into two distinct classes, moveable and immoveable, according to its nature, and has dealt with each in a different manner. The directions which he has given as to the one do not appear to us to throw light upon or afford assistance in construing the directions which he has given as to the other, except the assistance which may be derived from contrasting the one set of directions with the other. The immoveable property he has manifestly regarded in the light of family property, and the directions which he has given in regard to it seem to be intended rather to provide that it should be kept in bulk for the benefit of the family than that any individual of the family, except perhaps Govardhandás, should have any separate beneficial ownership therein. The disposition which he has made of the residue of

(1) I. L. R., 7 Calc., 269.

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the moveable property is peculiar. He clearly contemplates, as to it, an absolute beneficial ownership being vested in his grandsons at a not very distant date. The difficulty is to determine how he has dealt with it—what estate (if any) he has conferred in it during the intervening period.

The provision as to the residue of the moveable property is as follows (His Lordship read the clause and continued:—)The "repairs" referred to in that clause have reference, we think, to those mentioned in the fifth clause of the will, and not to such as shall from time to time be necessary for the upkeep of the immoveable property which are otherwise provided for.

The fifth clause contemplates the immoveable property being at once put in repair out of the capital. It runs thus: "There are my immoveable properties in Bombay and in places abroad. If it should be necessary to repair them, the same shall be repaired out of my estate." This direction has to be provided for. The provision is accordingly found in clause 7: "out of the same" (the bulk of the moveable property), "after the amounts in respect of the above-mentioned outlays and expenses for repairs and legacies, &c., shall have been deducted, the residue that may remain over shall be dealt with by my son Govardhandás agreeably to what he may think proper."

The expenses for repairs are thus placed between two other capital outlays which have to be made before the residue of the personalty is ascertained, but when the residue is ascertained after the capital outlays have been made, it appears to us that no trust for the upkeep of the immoveable property is imposed upon it.

What, then, is to be done with the residue? It is all treated alike—horses, cash, pots, jewellery, shares, &c. It is all to be dealt with by Govardhandás as he pleases. It must, we think, have been intended that it should be made over to Govardhandás. How else could he deal with it as he pleased? It is not, be it observed, the income of the residue which Govardhandás is to deal with, but the residue itself. And it appears to us that when you come to the conclusion that the residue is to be made over to him, and that he is to deal with it as he pleases, you have all the

elements of an absolute gift. Such, in our opinion, the words of the testator confer upon him.

This conclusion is not, we think, weakened by the subsequent contingent provision for the sons of Govardhandás on their attaining the age of twenty-one years. The intention seems to be that if Govardhandás' son attain twenty-one, and ask for a division of the moveable property as it shall then exist, Govardhan is to divide it with them. Until that time he is to be the owner, but his absolute estate is then to be divested, as to all but his own share, by his sons. It is unnecessary to imagine what his share in this event would be, as the gift over in favour of the sons is clearly void under sections 101 and 102 of the Succession Act. See *Bentinck* v. *Duke of Portland*(1); *Jobson* v. *Richardson* (2); *Drakeford* v. *Drakeford*(3); *In re Featherstone's trust*(4).

This conclusion covers the whole of the moveable property, ancestral or not, as the assent of Govardhandás to the provisions of the will, some of which are favourable and some unfavourable to his interest and that of his sons, was, we think, binding on the latter as well as on himself. It was in the nature of an assent to a family arrangement intended for the welfare of the whole family.

We rule, therefore, that the moveable property in the suit belonged to Govardhandás and on his death devolved upon his sons jointly.

It is contended that Govardhandás similarly took the immoveable property absolutely. As to it the testator has directed that it shall be held in trust and administered by his executors Govardhan and A'nandráo, and after giving minute instructions as to changing its investment he concludes the original clause relating to it as follows:—"With regard to the rents and profits of the aforesaid 'trust' property and interest on moneys which may be produced, after the expenses shall have been deducted therefrom, the balance that may remain over is to be used and enjoyed by my said trustee my son Bhai Govardhandás in such manner as he may think fit."

(1) 7 Ch. D., 693.
(2) 44 Ch. D., 154.
(3) 33 Beav., 43.
(4) 22 Ch. D., 111.

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It is to be remarked upon that clause that, unlike the clause relating to the residue of the moveable property which the testator contemplates being made over to Govardhan, it provides for the property being retained and kept up by his trustees, and directs only the surplus income to be used and enjoyed by Govardhan. Now, it is true that under section 159 of the Succession Act, where the interest or produce of a fund is bequeathed to any person, the principal as well as the interest shall belong to the legatee; but that rule only applies where the will affords no indication of an intention that the enjoyment of the bequest shall be of limited duration. It is impossible, we think, to hold that the will before us does not indicate such contrary intention. The very clause itself in vesting the property in trustees and providing for its being kept up by the trustees and giving the balance of the income only to Govardhan, affords some indication that the testator did not intend Govardhan to take the estate absolutely, but the matter is, we think, placed beyond doubt by the terms of the fresh clause. That contemplates the sons of Govardhan calling him to account for his management when they attain twenty-one, and makes a direct gift over to his grandsons after the death of Govardhan and his sons. That gift over no doubt may be void, but it is none the less indicative, on that account, of the intention of the testator not to confer an absolute estate on Govardhan. That is really the answer to Mr. Scott's argument that the provisions of the fresh clauses are inoperative to cut down the absolute estate previously given by the sixth clause (which he supported by the case of *Shaw* v. *Ford*[1]), *viz.*, that they do not cut down the absolute estate, as no absolute estate is either given or intended to be given by the sixth clause. We think, therefore, that Govardhan took, at the utmost, only a life estate in the immoveable property.

We have now to inquire how the property is dealt with after the death of Govardhan. And as to this we think that the gift in favour of the grandsons is clearly invalid both under the Succession Act and the rule laid down in the *Tágore Case*. It may be altogether disregarded. The question then remains, is there a gift to the sons or issue of Govardhan after his death, and is it

(1) 7 Ch. D., 669.

valid? There is clearly no direct gift. Is there a gift by implication? We think not. There is no doubt an inference suggested by the fresh clause that the testator expected that the sons of Govardhan should have some interest in the property, but it is impossible, we think, to imply a gift when there is no certainty as to the persons who are supposed to take under it or as to the estate which they are to take by implication. There must be a reasonable degree of certainty as to those important matters before a gift can be implied. Here all is uncertain. Who are to take? Is it the sons of Govardhan, or such sons and the sons of deceased sons together, or such sons and the sons of such living sons jointly? There is absolutely nothing to show the nature of the estate which is devised to the supposed devisees. It would be mere guess-work to construct a bequest out of the materials which the vague inferences to be drawn from the fresh clause suggest. One possible inference is that he intended Govardhan's sons to take no vested estate until the age of twenty-one years. But if that is so, the gift in their favour would be invalid as offending against the 101st and 102nd sections of the Succession Act. We feel quite unable to imply, from the provisions in the will before us, a gift of the immoveable estate or of its income in favour of any one between the death of Govardhan and the decease of his last surviving son.

We are, however, disposed to think that the most probable explanation of the different clauses of the will, and the best way of understanding and reconciling them, is by the hypothesis that the testator thought that his son Govardhandás would take under the will an ancestral estate in all the property, both moveable and immoveable. Until the decision of the appellate Court in *Jugmohandás* v. *Sir Mangaldás*[1] there was an impression, amongst many in Bombay, that property acquired by a son from his father by virtue of a will would be of the nature of ancestral property. If we suppose the testator to have been under the same impression, the whole of his will becomes intelligible. He would imagine that the property in the hands of Govardhandás although acquired by him under his father's will, would still be ancestral, and, therefore, Govardhandás' sons and grandsons would by virtue

(1) I. L. R. 10 Bom., 528.

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of their birth take an interest in it. Starting under this impression the testator's object would seem to have been to devise a scheme for the management of the property until partition, but to restrict the partition beyond the period at which the Hindu law would give the sons and descendants of Govardhandás the right to claim it. This hypothesis, we think, affords a key to the will and gives an adequate explanation of the various estates which would have to be implied in order to give full effect to the different directions contained in the will. These are estates, however, which cannot be implied from the words used in the will. They only arise by virtue of the doctrine of the Hindu law in regard to the rights of the male issue in ancestral property. It would be difficult, if not impossible, for a testator to create such estates by express terms. If we were to attempt to do so by implication, we should be constructing a will for the testator based upon his supposed intention, not on the words which he has used in his will.

The result, therefore, is that there has been an intestacy as to beneficial interest in the immoveable property of the testator after the death of Govardhan, and that the trustee now holds it in trust for the heirs of the testator who are the three sons of Govardhan. The conclusions which we have thus arrived at, will enable us to find on the issues.

We record our findings upon the issues as follows (the following are the findings on the issues material to this report) :—

Issue (1) that Govardhandás Parmánandás took an absolute interest in the moveable property of Parmánandás Jivandas and only a life estate in his immoveable property.

Issue (12) that Parmánandás died intestate in respect of his immoveable property after Govardhandas' death.

Cost of all parties to be taxed as between attorney and client and come out of the estate of Parmánandás.

Decree accordingly.

Attorneys for the plaintiff:—Messrs. *Little & Co.*

Attorneys for the defendants:—Messrs. *Brown and Moir*, Messrs. *Craigie, Lynch and Owen*, and Messrs. *Pestanji, Rustim and Kola.*