

consider it necessary in the interests of justice to raise the point of joint ownership, he should do so by a distinct issue and allow the parties an opportunity of adducing evidence. The lower appellate Court can deal with all the costs including the costs of this appeal.

Decree reversed and case remanded.

ORIGINAL CIVIL.

Before the Honourable Chief Justice Farran and Mr. Justice Strachey.

KRISHNARA'O BA'MCHANDRA AND ANOTHER (ORIGINAL DEFENDANTS 1-2),
APPELLANTS, v. BENA'BA'I (ORIGINAL PLAINTIFF) AND OTHERS, RESPONDENTS.*

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December 3.

Will—Construction—Bequest to children—Meaning of the expression “children”—Unexpected bequests—How Court treats—Gift to a class—Rule in Tágore case—Executors—Right of executors to have sums lent to the estate allowed them in account—Limitation—Legacy—Gift of income as required with trust for accumulation of balance—No right to arrears once accumulated.

Considerations which only show that a testator has made a disposition in his will which the Court is surprised to find there, though they might have determined the sense in which the testator had used an ambiguous expression, cannot of themselves lead the Court to refuse to give effect to the plain language he has employed, *e. g.* to read a bequest to “children” as a bequest to “sons” only.

A bequest to “the children of R, living at his decease” where some such children are in existence at the date of the will, need not be construed as a gift to a class of which some members might come into existence after the testator's death, when such a construction would manifestly defeat the primary object of the testator.

The right of executors, who have used their own monies for the purposes of the estate to be allowed them in their accounts, cannot be affected by limitation before such accounts are taken.

A direction in a will to trustees to pay to a Hindu lady so much of certain dividends as she might from time to time require for her own use and support, &c., and to accumulate the surplus not required by her upon certain trusts specified, entitles the legatee to receive, if she requires it, the whole interest as it falls due, but not to claim afterwards amounts which she did not require as they fell due and which have been accumulated, and this is so whether the trust for which accumulation is directed is valid or invalid.

SUIT for the construction of a will.

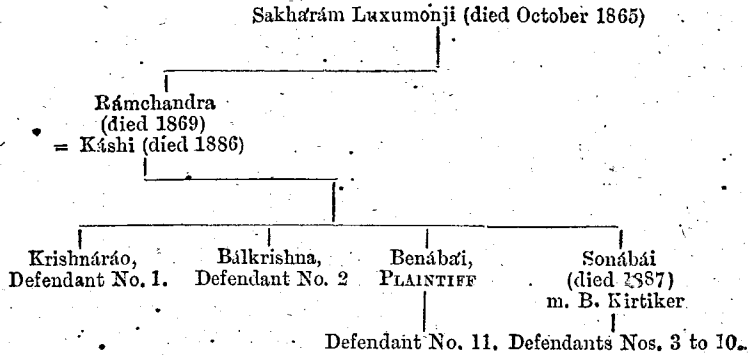
The plaintiff was the grand-daughter of one Sakháram Luxumonji who died in October, 1865, leaving him surviving a son

* Suit No. 221 of 1893; Appeal No. 874.

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Rámchandra (who was of weak mind) and grand-children, as shown by the following table:—



By his will and codicils Sakhárám Luxumonji bequeathed to his executors and trustees a sum of Rs. 7,000 on trust to invest it, and to pay the income thereof to the plaintiff during her life. The will also gave directions as to the disposal of this money after the plaintiff's death.

The testator also directed that the income of the residue of his estate should be applied during the life-time of his son Rámchandra towards his maintenance, and after his death should be given to his widow for life, and after her death the residuary estate was given in trust for all the children of Rámchandra living at his death in equal shares.

The following are the material portions of the will. Under it the sum left to the plaintiff was Rs. 4,000, but by a codicil the amount was increased to Rs. 7,000. The sum (Rs. 4,000) given to Sonábái by the will was similarly increased to Rs. 8,000.

"I give and bequeath to my son-in-law Bhagwantráo Rámchandraji and one Eshwant-ráo Wittoji, their executors and administrators, the sum of rupees four thousand upon trust that they and the survivor of them, and executors and administrators of such survivor or other the trustees or trustee for the time being of this my will, do lay out and invest the same in the names or name of the trustees for the time being of this my will in any of the public stocks or funds or Government securities of the United Kingdom or India or upon freehold or leasehold securities in India or in or upon the stocks, funds, shares, debentures, mortgages or securities of any corporation, company or public body, municipal, commercial or otherwise, in Great Britain or India or any other colony or dependency of Great Britain, but not in any other mode of investment, and do from time to time alter, vary or transpose such stocks, funds, shares or securities into or for others of any nature hereby authorized at their or his

discretion, and do and shall pay so much and such part of the dividends, interest and income of the same monies or of the stocks, funds and securities in or upon which the same may be invested as she may from time to time require for her own use and support, unto my beloved grand-daughter Sonabái, the wife of Bálkrishna Vásudeo, during her life for her sole and separate use independently of her husband and of his debts, control or engagements, and so that she shall not have power to dispose or deprive herself of the benefit thereof by anticipation, and the receipts of my said grand-daughter shall alone be good and sufficient discharges for the same. And do and shall accumulate the surplus of such dividends, interest and income (if any) which shall not be required by my said grand-daughter in the way of compound interest by investing the same and the resulting income thereof in or upon any such stocks, funds, shares or securities as are hereinbefore mentioned for the benefit of the persons or person who under the trust herein contained shall become entitled to the principal fund from which the same shall have proceeded.

“And from and after the death of my said grand-daughter do and shall stand possessed of the said sum of four thousand rupees and of the stocks, funds, shares and securities in or upon which the same may be invested and the interest and income thereof and all accumulations thereof (if any) in trust for all or any the children or child of my said grand-daughter who shall be living at her death or who shall leave lawful issue living at her death if more than one in equal shares and proportions.

“And I hereby declare that the said trustees or trustee for the time being of this my will shall after the death of my said grand-daughter, apply the interest, dividends and income of the share to which any child or more remote issue shall for the time being be entitled under the trusts aforesaid for or towards his or her maintenance or education during his or her minority, and if there shall be no child or other issue of my said grand-daughter who shall be living at her death, then the said trustees or trustee for the time being shall stand possessed of the said sum of four thousand rupees and the stocks, funds, shares and securities in or upon which the same may be invested and the dividends, interest and income thereof respectively upon and for the trusts, intents and purposes which are hereinafter declared of and concerning my residuary real and personal estate.

“Also I give and bequeath to the said Bhagwantráo Rámchandráji and Eshwantráo Wittoji, their executors and administrators the like sum of rupees four thousand upon trust to lay out and invest the same in the names or name aforesaid in or upon any of the stocks, funds, shares or securities hereinbefore authorized for the investment of the like sum of four thousand rupees firstly hereinbefore bequeathed to them and to stand possessed thereof and of the stocks, funds, shares and securities in or upon which the same may from time to time be invested upon the like or similar trusts for or for the benefit of my grand-daughter Benábái, the wife of Keshav Vinayak, and her children or other issue and with the like power and provisions in every respect as are hereinbefore contained for or for the benefit of my said grand-daughter Sonábái as to and concerning the sum of rupees four thousand firstly hereinbefore bequeathed and with the like remainders over. Also I give and bequeath to the said Bhagwantráo Rámchandráji and Eshwantráo Wittoji, their executors, and administrators the further sum of four thousand rupees upon trust to lay out and invest the same in the names or name aforesaid upon any of the stocks, funds, shares or secu-

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rities authorized by this my will for the investment of the sum of four thousand rupees firstly hereinbefore bequeathed and to stand possessed of the said sum and the dividends, interest and income thereof upon the same or similar trusts for or for the benefit of my grand-daughter Māncubāi, the wife of Rāmhandra Sakhārām, and with the like powers and provisions in every respect as are hereinbefore contained for or for the benefit of my grand-daughter Sonābāi as to and concerning the sum of four thousand rupees firstly hereinbefore bequeathed by me and with the like remainder over.

"I give and bequeath to the said Bhagwantrāo Rāmhandrāji and Eshwantrāo Wittoji, their executors and administrators the sum of nine thousand rupees upon trust that they and the survivor of them and the executors and administrators of such survivor or other the trustees or trustee for the time being of this my will do lay out and invest the same in their or his names or name in any of the stocks, funds, shares or securities hereinbefore authorized for the investment of the sum of four thousand rupees firstly hereinbefore bequeathed to them, and do alter and vary such stocks, funds and securities for others of a like nature as often as they shall think fit, and do and shall pay the dividends, interest and income thereof when and as the same shall become payable unto my grand-daughter Angubāi, the wife of Bhagwantrāo Dwārkanāth, during her life for her sole and separate use independently of her husband or his debts, control or engagements and so that she shall not have power to dispose or deprive herself of the benefit thereof by anticipation, and the receipts of my said grand-daughter shall alone be good and sufficient discharges for the same. And from and after the death of my said grand-daughter Angubāi do and shall stand possessed of the said sum of rupees nine thousand and the stocks, funds, shares and securities in or upon which the same may be invested and the interest, dividends and income thereof in trust for all or any the child or children of my said grand-daughter who shall be living at her death or who shall leave lawful issue living at her death in equal shares and proportions if more than one, and I hereby declare that the said trustees or trustee for the time being of this my will shall, after the death of my said grand-daughter, apply the dividends, interest and income of the share to which any child or more remote issue shall for the time being be entitled under the trust aforesaid for or towards his or her maintenance and education during his or her minority, and if there shall be no child or other issue of my said grand-daughter who shall be living at her death, then the trustees or trustee for the time being of this my will shall stand possessed of and interested in the said sum of rupees nine thousand and the stocks, funds, shares and securities in or upon which the same may be invested upon and for the several trusts, intents and purposes which are hereinafter expressed and contained of and concerning my residuary personal estate hereinafter bequeathed.

"And as to all the rest, residue and remainder of my real and personal estate whatsoever and whatsoever I give and devise and bequeath the same unto the said Bhagwantrāo Rāmhandrāji and Eshwantrāo Wittoji, their heirs executors administrators and assigns according to the nature and quality thereof upon trust that they and the survivors and survivor of them and the heirs executors and administrators of such survivor or other the trustees or trustee for the time being of this my will do and shall in their or his discretion allow the whole or any part or parts of my said residuary real and personal property to remain as long as they shall think fit in its present form of investment or do or shall sell, collect or otherwise convert into money according to the nature of the premises all such parts of the same premises as shall not

consist of money in such manner and under such stipulations and upon such terms and conditions in all respects as they he or she shall in their his or her uncontrolled discretion think fit, and may for the purposes aforesaid execute and do all such assurances as they he or she shall think fit, and shall invest the monies arising from any such sale collection or conversion and all other monies arising from or forming part of my said residuary estate in their his or her names or name in or upon any of the stocks, funds, shares and securities hereinbefore authorized for the investment of the aforesaid sum of four thousand rupees firstly hereinbefore bequeathed, and may alter, vary and transpose such stocks, funds, shares and securities for others of a like nature at their his or her discretion and shall during the life-time of my son Rám-chandra *alias* Fakir apply the dividends, interest and income thereof and the rents of my said residuary real estate until sale for the benefit, maintenance and support of my said son in such manner as the said trustees or trustee for the time being of this my will shall in their or his own absolute discretion think fit, my intent and meaning being that the said trustees or trustee shall have an absolute discretion either to apply the same rents, interests, dividends and income or any part thereof immediately for the purposes aforesaid or to pay the same or any part thereof into the hands of the present wife of my said son to be by her applied for his benefit, maintenance and support.

“And from and after the death of my said son to pay the said rents, dividends, interest, and income to his present wife if she shall survive him until her death.

“And I hereby declare that from and after the determination of the trusts aforesaid the said trustees or trustee for the time being of this my will shall stand possessed of and interested in the said residuary real and personal estate and the stocks, funds, shares, and securities in or upon which the same or any part thereof may be invested, and the rents, dividends and income thereof. In trust for all or any the children or child of my said son who shall be living at the time of his decease or who shall leave lawful issue living at the time of his decease in equal shares and proportions if more than one and if there shall be no such child who shall be living or whose issue shall be living at the time of the decease of the survivors of them my said son and his present wife, then the said trustees or trustee for the time being of this my will shall stand possessed of and interested in the said residuary estate and the stocks, funds, shares and securities in or upon which the same or any part thereof may be invested in trust for the persons or person who would become entitled thereto in case the same had belonged absolutely to my said son, and he had died intestate.”

At the date of this suit the first two defendants were the trustees in the place of those originally appointed by the will, and they were in possession of the estate.

The plaintiff complained that the sum of Rs. 7,000 to which she was entitled under the will had never been invested and set apart for her, nor had she been paid the income thereof. She alleged that the first and second defendants, in breach of their duty as trustees, were about to divide between themselves the whole estate of Sakháram Luxumonji. She claimed that her rights under the will should be

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declared, that fit persons should be appointed trustees instead of the first two defendants, and for a declaration that she was entitled to have the Rs. 7,000 set apart and invested, and also to the interest and income thereof since the death of the testator, and to be paid the income for her life.

Rámchandra died in 1869 and his widow Káshi in 1886.

The first and second defendants contended (1) that the plaintiff was only entitled to so much of the income of the sum of Rs. 7,000 as she might from time to time require for her support; (2) that she was not entitled to any of the arrears of the said income; (3) that, with respect to the said sum of Rs. 7,000, the trusts subsequent to the death of the plaintiff were void; and (4) that the plaintiff was in no event entitled to any share in the residuary estate, that the trusts with reference to it were void, and that, as to it, Sakháram died intestate, and that the same now belonged to them.

The defendants further alleged that a sum of Rs. 16,700, which had come to the hands of the executors of Sakháram, was ancestral property; that the money had been mixed up by the executors with the other property and had been used in defraying necessary expenses, and they submitted that they were entitled to this sum absolutely, and that it should be made good to them out of the estate.

B. Tyabji and Scott for the plaintiff:—They cited *Lewin on Trusts* (9th Ed.), p. 377; *Indian Trusts Act* (II of 1882), section 23; *Mangaldás Parmánandás v. Tribhuvandás* ⁽¹⁾; *Manjamma v. Padmanabhayya* ⁽²⁾; *Tribhuvandás Ruttonji v. Gangadás Tricumji* ⁽³⁾; *Soudaminy Dossey v. Jogesh Chunder Dutt* ⁽⁴⁾; *Kherodemoney Dossée v. Doorgamoney Dossee* ⁽⁵⁾; *Rám Lál Sett v. Kanai Lál* ⁽⁶⁾; *Jarman on Wills* (4th Ed.), pp. 443—5; *Theobald on Wills*, p. 78; *Succession Act* (X of 1865), sections 167—177.

Lang (Advocate General), *Macpherson and Lowndes* for defendants Nos. 1 and 2:—They cited *Mayne on Hindu Law* (5th Ed.), para. 387; *Succession Act* (X of 1865), sections 104, 167; *Rancliffe v. Parkyns* ⁽⁷⁾; *Jarman on Wills* (4th Ed.), pp. 445-6; *Williams on*

(1) I. L. R., 15 Bom., 652.

(4) I. L. R., 2 Calc., 262.

(2) I. L. R., 12 Mad., 393.

(5) I. L. R., 4 Calc., 455.

(3) I. L. R. 18 Bom., 7.

(6) I. L. R., 12 Calc., 663.

(7) 6 Dow., 149.

Executors, pp. 1447-8; *Padbury v. Clark* ⁽¹⁾; *Fitzsimons v. Fitzsimons* ⁽²⁾; *Whitley v. Whitley* ⁽³⁾; *Miller v. Thurgood* ⁽⁴⁾; *Varley v. Winn* ⁽⁵⁾.

Modi and *Cama* for defendants Nos. 3 to 10 (children of Sonábái).

Modi for defendant No. 11 (daughter of plaintiff).

CANDY, J :— In this case the main questions depend upon the construction of the will and codicils of Sakháram Luxumonji, who died in October, 1865, leaving issue as shown by the family tree. The will dated 12th August, 1865, and codicils dated 2nd and 11th October, 1865, provided that the trustees should invest Rs. 8,000, and pay so much and such part of the dividends, interest and income as she might from time to time require for her own use and support, to Sonábái during her life, for her sole and separate use, independently of her husband; and should accumulate the surplus of such dividends, &c., which should not be required by Sonábái, in the way of compound interest, by investing the same and the resulting income thereof for the benefit of the persons who under the trusts contained in the will should become entitled to the principal fund from which the same should have proceeded, and from and after the death of Sonábái should stand possessed of the Rs. 8,000 and interest and income and accumulations thereof, if any, in trust for all or any the children of Sonábái living at her death, or who should have lawful issue living at her death, and if there should be no child or issue of Sonábái then the Rs. 8,000 and the income thereof should form part of the residuary estate.

A like sum of Rs. 7,000 was to be laid out in the same way upon like or similar trusts for Benábái and her children or other issue, with like power and like remainder over. As to the residuary estate of the testator, the trustees were during the life-time of the testator's son Rámchandra to apply the income for the maintenance of the said son, and after the death of the said son to pay the income to Rámchandra's wife Káshi, till her death, and after her death the trustees were to stand possessed of the residuary estate in trust for all or any the children or child of Rámchandra who should be living at the time of his decease, or who should leave lawful issue living at

(1) 2 Mac. and Gord., 298.

(3) 31 Beav., 173.

(2) 28 Beav., 417.

(4) 33 Beav., 496.

(5) 2 J. and H. at p. 706.

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the time of his decease, and if there should be no such child who should be living or whose issue should be living at the time of the decease of the survivor of Rámchandra and Káshi, then the residue was to go to the person or persons who would become entitled thereto in case the same had belonged absolutely to Rámchandra and he had died intestate.

It is admitted that the testator intended the bequest of Rs. 8,000 to Sonábái and Rs. 7,000 to Benábái (present plaintiff) to be on exactly the same terms. It was argued that the testator intended these bequests to be the only benefits which his grand-daughters, Sonábái and Benábái, should take under his will, and that they have no interest in the residuary estate. It certainly seems more probable that the testator intended that the grand-sons should take the residuary estate, the grand-daughters and their children having the bequests of Rs. 8,000 and Rs. 7,000 rather than that the grand-daughters should take an equal share in the residuary estate with the grand-sons, and should also in addition have the benefit of the bequests of the Rs. 8,000 and Rs. 7,000. But the arguments in favour of this view drawn from the language of the will fail to support it. Thus, in support of this contention, the learned Advocate General pointed to the fact that by his will the testator appointed the two trustees named in the will to be guardians of his "infant grand-children, Krishnaráo and Bákrishna," the sons of Rámchandra. It was suggested that these were the children of Rámchandra who, he intended, should take the residuary estate. But the answer to this contention is that there was no need to appoint guardians to his grand-children, Sonábái and Benábái, who were both married at the time of the execution of the will.

Then the Advocate General pointed to the provision that the residuary estate was after Káshi's death to go to the children of Rámchandra who should be living at the time of his decease, "or who shall leave lawful issue living at the time of his decease," and he argued that the latter *his* referred to the death of Rámchandra's son. But this clearly is not so. It refers to the death of Rámchandra, or, as is explained by the provision a few lines further on, the decease of the survivor Rámchandra or Káshi. There can be no doubt that according to the strict language of the will the testator provided

that the children (sons and daughters) of Rámchandra should take the residuary estate. In another part of his will he spoke of a certain allowance to his daughter-in-law Rakhmábái, to be made "out of the residue hereinafter devised," and bequeathed in trust for or for the benefit of my said son *and his issue*. Possibly Sakhárám thought that "issue" meant sons only. But whatever may have really been his intention, and whatever may have been the opinions of members of the family at various times on this point (as to which something will presently be said), the words of the will are too clear to admit of any doubt. The two sons and the two daughters of Rámchandra were alive at the time of the death of the testator, and they were alive at the time of the death of Káshi in 1886, when the trust came to an end. Each of them, therefore, on the death of Sakhárám became possessed of a vested interest in a one-fourth share in the residuary estate. Each became in 1886 absolutely entitled to possession of that one-fourth share. Sonábái died subsequently in 1887. Her one-fourth share has now become vested in her children, defendants Nos. 3 to 10. Benábái is still alive. Her child, defendant No. 11, has, therefore, no interest at present in her mother's one-fourth share.

A contention was raised on behalf of defendants Nos. 1 and 2 (the sons of Rámchandra) on the authority of *Soudaminey Dossee v. Jogesh Chunder Dutt*⁽¹⁾ and *Kherodemoney Dossee v. Doorgamoney Dossee*⁽²⁾ that the bequest of the residue, after the death of Rámchandra and Káshi, to a class, *viz.*, the children of Rámchandra, was bad, because there might in 1886 have been children of Rámchandra who had not been born at the time of the death of the testator.

But the view taken in the cases just quoted was not followed by another Bench of the Calcutta High Court in *Ram Lal Sett v. Kanai Lal Set*⁽³⁾ and the later view taken by the Calcutta High Court has been adopted by the Madras High Court in *Manjamma v. Padmanbhaya*⁽⁴⁾ and twice by the Bombay High Court, *viz.*, *Mangaldás v. Tribhuvandás*⁽⁵⁾ and *Tribhuvandás v. Gangadás*⁽⁶⁾. In the absence, therefore, of any serious argument why I should not follow

(1) I. L. R., 2 Calc., 262.

(4) I. L. R., 12 Mad., 393.

(2) I. L. R., 4 Calc., 455.

(5) I. L. R., 15 Bom., 652.

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the view now generally adopted, I am content to accept the later authorities, and hold that the bequest of the residue was good.

I now come back to the bequests of Rs. 8,000 and Rs. 7,000. Sonábái, as before stated, was married to a well-known solicitor, Mr. Bákrishna Kirtiker. Benábái was married to a gentleman with whom she has not for several years been on good terms. She admits that since her grand-father's death she lived mostly with her mother. All her five children who have been born to her, and of whom one only now survives, were (with the exception of the first) born in her mother's house. Her father Rámchandra was admittedly a man of weak intellect; but her mother Káshi was evidently a capable person and managed the family affairs. It may be taken that for many years Benábái lived with her mother and brothers and was supported by them. In 1886 Káshi died, Benábái continued for a short time to live with her brothers. Then they separated, Benábái assisting in the partition of the family cooking pots. She remained on with the younger brother for a time and then went to nurse her sister Sonábái, who was ill. Sonábái died in 1887, and Benábái has continued since then to live with her brother-in-law Mr. Kirtiker, acting as mother to his numerous children. On 30th July, 1892, she made a formal demand through the solicitors, Messrs. Wádia and Gándhi, addressed to her brothers, defendants Nos. 1 and 2, who had by that time become trustees under Sakháram's will, calling on them to pay to her arrears of interest due on the bequests of Rs. 7,000, and also to set apart and invest in Government loan notes the said amount of Rs. 7,000 without any further delay. The letter also recited a claim on behalf of Benábái to be interested in the residuary estate of Sakháram.

No answer was given by defendants Nos. 1 and 2 to that letter. They now admit their liability to set apart the Rs. 7,000 in trust for Benábái, and to pay her the interest as she may require, including of course the interest from the date of the demand in July, 1892. The question as to Benábái being interested in the residuary estate of Sakháram has already been dealt with above. But it has been further pleaded for Benábái that she had made many previous demands on defendants Nos. 1 and 2 for the interest due to her on the Rs. 7,000. This plea is not established. The evidence of Benábái and witness Shewantibái is, on the face of it, quite insufficient to establish the

plea. On the contrary, if any previous demands had been made, it is clear that the facts would have been alluded to in the letter of July, 1892. Mr. Bálkrishna Kirtiker was not called, and it is clear, from facts to be alluded to presently, that the members of the family were on perfectly amicable terms, Benábái and Mr. Kirtiker (who may be said to have represented Sonábái) being well aware of what the brothers were doing and not doing as regards their grand-father's estate.

Bhagwantráo and Eshwantráo were the persons named in Sakhárám's will as executors, administrators and trustees of his estate. They took out probate of his will in October, 1866. Bhagwantráo died in November, 1868. Eshwantráo then by deed appointed Wásudeo Pándurang to be his co-trustee.

On 3rd October, 1872, Káshi and her sons Krishnáráo and Bálkrishna filed Suit No. 561 of 1872 against Eshwantráo and Wásudeo, joining Sonábái and Benábái as party-defendants, setting forth the will and codicils of Sakhárám, and complaining that the trustees had not set apart or invested many of the legacies or ascertained the residuary estate, and no accounts had been filed till August, 1872, as to the particulars of which and as to the act and omissions of the trustees the plaintiffs complained. They, therefore, prayed that the trustees might be removed and that the estate should be properly administered. It may be remarked that, in the 4th paragraph of this plaint, Krishnáráo and Bálkrishna and Sonábái and Benábái were recited as entitled to Sakhárám's residuary estate after the death of Káshi, but the names of Sonábái and Benábái were subsequently struck out.

On the 17th December, 1872, a consent decree was passed in the said Suit No. 561 of 1872. It was ordered that the suit should be withdrawn without liberty to bring a fresh suit for the same matter against Eshwantráo and Wásudeo; that one Sarvotam and Krishnáráo, one of the plaintiffs (now first defendant), should be appointed trustees of the will of Sakhárám in the place of Eshwantráo and Wásudeo, all charges of misconduct being withdrawn and all costs being paid out of the residuary estate of Sakhárám.

It is admitted that in the same year 1872 Sonábái and Benábái received all arrears of interest on their bequests of Rs. 8,000 and Rs. 7,000, respectively.

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Allusion was made above to the fourth paragraph of the plaint in Suit No. 561 of 1872. It may be remarked that in the same year in the matter Eshwantrao being called to furnish accounts of his administration of the estate of Sakharam, an affidavit was prepared and sworn by Krishnarao, dated 18th June, 1872, in which he spoke of himself and his brother and his sisters Sonabai and Benabai being residuary legatees under his grandfather's will. In another affidavit in the said Suit No. 561 of 1872 filed by Krishnarao on the 4th October, 1872, he spoke of himself and his brother as being the residuary legatees.

In the year 1877, on the application of Krishnarao in the said Suit No. 561 of 1872, Sarvotam was allowed to withdraw from his trusteeship, and Balkrishna (now defendant No. 2) was appointed in his place to be co-trustee with his brother Krishnarao. Since then the two brothers have managed Sakharam's estate.

As remarked above, the members of the family were apparently then on amicable terms and continued to be so for several years. In 1888 the brothers Krishnarao and Balkrishna by the aid of their brother-in-law Mr. Kirtiker, with whom Benabai was then residing, drew up an agreement of partition of immovable property, which (*inter alia*) provided for the payment of the legacies of Rs. 8,000 and Rs. 7,000 described above, but evidently did not contemplate Sonabai's children or Benabai being interested otherwise in Sakharam's residuary estate. Subsequently to 1888 some family quarrel must have arisen. Benabai's demand through her solicitors was made in July, 1892, and in April, 1893, the present suit was filed by Benabai against defendants Nos. 1 and 2, her brothers Krishnarao and Balkrishna, the present trustees under Sakharam's will, defendants Nos. 3 to 10, the children of Sonabai, deceased, and defendant No. 11, the child of the plaintiff Benabai, being subsequently joined. It is admitted that of Sonabai's children defendant No. 3 is the only one who was born at the time of Sakharam's decease. Benabai's child, defendant No. 11, was admittedly not then born.

The above being the facts proved or admitted, I find that Benabai is entitled to have the Rs. 7,000 invested and to be paid arrears of interest from the date of her demand in July, 1892.

I find that she is not entitled to arrears of interest prior to July, 1892. Not that I agree with the argument used by the learned counsel for defendants Nos. 1 and 2, that Benábái by the terms of Sakhárám's will was not entitled to the interest on the Rs. 7,000 as long as she lived with her mother and brothers, I do not think that the words "for her own use and support" cut down the bequest or made it less than an absolute gift to be at Benábái's own disposal whenever she demanded it. But I think that it is equally clear that the money was only to be paid to her *as she might from time to time require it: i. e.* as the interest accrued, if Benábái asked for it, it was to be paid to her; if she did not ask for it, it was to be accumulated and eventually added to the principal fund. Benábái not having before July, 1892, demanded the interest, cannot now recover arrears of interest before that date. The fact that in 1872 Benábái and Sonábái recovered the arrears of past years' interest (presumably from 1866) will not prevent the present trustees from taking their stand on the express directions of the will.

Next, according to the will, if the Rs. 7,000 had been properly invested, the interest as it accrued and had not been required by Benábái would from time to time have been invested, and after the death of Benábái the principal fund of Rs. 7,000 and the fund of accumulations would go to the children of Benábái living at her death, or who should leave lawful issue living at her death. Benábái is not dead, but all the parties interested being before the Court, the Court is in a position to give direction as to the ultimate disposal of the Rs. 7,000. The direction must be that as Benábái's child (defendant No. 11) was not born at the death of Sakhárám, the bequest of the Rs. 7,000 to Benábái's child or children is void. When, therefore, Benábái dies, the Rs. 7,000 will be distributed as part of the residue, and should Benábái subsequently to this suit not require the interest on the Rs. 7,000 from time to time as it accrues (obviously there is not much chance of this) then the interest not so required being as far as possible itself invested will also be distributed like Rs. 7,000.

The question, then, arises as to the interest which should, according to the provisions of the will, have been accumulated between

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1873 and 1892. It is admitted that the present defendant cannot be held liable for any accumulations of interests before January, 1873, when the first defendant as trustee came into charge of the estate. But plaintiff through her counsel seeks now to recover the arrears of interest (with compound interest) on the ground that the trustees failed in their duty to invest the Rs. 7,000. This, however, cannot be allowed. The trustees may have been negligent, but they are entitled to take their stand on the provisions of the will, and contend that plaintiff is only entitled now to interest as she did demand it, the interest not so demanded being otherwise disposed of. The fact that the Rs. 7,000 have not been invested according to the provisions of the will would not entitle plaintiff to claim the interest of the same in any way contrary to the will. And, as noticed above, the present trustees are not concluded by what took place in 1872. So far the point is clear enough. The plaintiff is not entitled to present possession of any accumulations of interest prior to 1892. And, according to Mr. Budrudin's reply for plaintiff, that was the limit of the plaintiff's case. The question as regards the accumulations, he said, can only arise on the death of the plaintiff; the surplus interest is only to be invested on the death of the lady; no point arises as to the directions in the will regarding accumulations, because there are none, and they would fall into the residue. The answer to this is clear. The provision of the will is explicit; the interest not required by Benabai was to be invested from time to time by way of compound interest, and on the death of Benabai the fund formed by these further investments was to go to the person who would take the Rs. 7,000. But, as has just been shown, the Rs. 7,000 fall into the residue. On Benabai's death her representative may claim the one-fourth share of the Rs. 7,000, which will then be distributed among the four residuary legatees or their representatives. It may be argued that the interest in that sum of Rs. 7,000 is vested in interest in Benabai though not in possession, and that with that share of the Rs. 7,000 there will also be the arrears of the interest which was not required, and which should itself, according to the will, have been formed into a fund to be added to the Rs. 7,000.

The learned Advocate General, for defendants, argued that the direction in the will as to accumulations of interest was wholly

void, quoting Mayne's Hindu Law (5th Ed.), para 387. But of the two cases quoted by Mr. Mayne, one (*Kumara Asima v. Kumara Krishna*⁽¹⁾) was a case in which the direction was to accumulate for ninety-nine years, while no direction was given as to the appropriation of the fund at the end of the time. In the other (*Krishnaramani v. Ananda*⁽²⁾) the trust for accumulation was wholly bad as being, in fact, part and parcel of the creation of a perpetuity. I can find no case in which a direction such as the present one was held bad, *viz.* a gift of Rs. 7,000 to Benábái for life with a gift over of Rs. 7,000, to which was to be added so much of the income of the Rs. 7,000 as had not been required by Benábái. The fact that section 104 of the Succession Act was not made applicable to Hindus by Act XXI of 1870 seems to show that a direction in a will to accumulate the income arising from any property is not necessarily void.

Then it was argued that as the sum of Rs. 7,000 forms part of the residue, therefore by the will the interest not required by Benábái belonged to Rámchandra and then to Káshi, and thus could never be a vested interest to which Benábái or her representative could lay claims. But this is not so. Supposing that by the terms of the bequest, and not by operation of law, the accumulated interest not required by Benábái was on her death to go with the Rs. 7,000 to the residuary legatees, the trustees would not have been justified either in taking that money for themselves or in paying it over to Rámchandra and Káshi. If the direction to accumulate is good at all, it is good for its disposal with the Rs. 7,000 as part of the residuary estate.

Then it was argued that as the gift over of the Rs. 7,000 to Benábái's child is void, therefore the direction to accumulate for the benefit of Benábái's child is void also. But this is not the case of a bequest being void, and, therefore, any bequest contained in the same will and intended to take effect *after or upon failure of such prior bequest* being also void (*cf.* section 163 of the Succession Act). This is the case of the bequest of Rs. 7,000 plus interest being void, and, therefore, the said bequest falling to the four residuary legatees. Of these defendants Nos. 1 and 2 do not, of course, ask that any accumulated interest between 1873 and 1892 should be calculated

(1) 2 B. L. R., o. c. J., 11.

(2) 4 B. L. R., o. c. J., p. 231.

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in taking the account of the residuary estate. Nor do the children of Sonábái; their counsel expressly disclaimed any such plea. It is only the remaining $\frac{1}{4}$ th share on whose behalf such a plea can be said to require consideration. Apart from the fact that plaintiff did not explicitly raise it, but on the contrary asked for the present possession of the said money, I find that it would not be equitable to give such a direction to the Commissioner in taking an account of the residuary estate; for it was with the full knowledge of Benábái that the Rs. 7,000 were not invested, but used for other family purposes. Defendant No. 1, who holds a responsible position under Government, gave his evidence in a straightforward manner, and I accept his statements without hesitation.

I hold, therefore, that interest which should have been accumulated between 1873 and 1892 cannot be given, wholly or in part, to plaintiff now, nor can it be taken into consideration in taking an account of the residuary estate.

I now come to consider the question regarding the sum of Rs. 16,436-5 which Eshwantráo as the surviving executor of Sakhárám Luxumón on 30th November, 1870, received from the Master in Equity, as representing a share payable to Sakhárám according to a decree of the High Court dated 20th February, 1864. That decree was in a suit to which Sakhárám with several other members of his family was a party, and related to certain ancestral estate which the Master was to sell and to give Sakhárám $\frac{1}{4}$ share of the proceeds. It is clear, from the accounts which Eshwantráo furnished in August, 1872 (alluded to above) that Eshwantráo received and dealt with the sum of Rs. 16,436-5 as part of the estate of Sakhárám covered by Sakhárám's will. No one up to the present suit seems to have had any opinion as to this money, but that it formed part of "all the rest residue and remainder of my real and personal estate wheresoever and whatsoever" devised by Sakhárám as shown above. But defendants Nos. 1 and 2 now plead that, if an account is directed to be taken of Sakhárám's residuary estate, this sum of Rs. 16,000 odd with interest from the date of its receipt must be deducted from the monies which have come into their hands, as they are entitled to hold the cash received from the Master as ancestral estate in which Sonábái and Benábái would have no share. In my opinion, they are not so

entitled. The circumstances under which the Master called upon the executors of Sakháram's will to receive the money cannot now be made clear. But it would be very difficult to suppose that Sakháram had, when he made his will in 1865, entirely lost sight of the decree which had been passed in 1864 and under which he would be eventually entitled to receive a large sum of money representing his share of the ancestral estate. Seeing the details recited in the will, *e. g.* the debt due to testator from Jamnábai, it is strange that the testator did not mention the money coming to him under the decree of 1864. But, having regard to the very wide terms in which the testator described his residuary estate, including real as well as personal, it must, I think, be taken that he did profess to dispose of the money coming to him under the decree. When defendant No. 1 took upon himself the trusteeship he knew that the previous trustee and executor had received and dealt with the money as part of the residuary estate disposed of by the will. At that time, as shown above, the members of the family seem to have been uncertain whether defendants Nos. 1 and 2 were the sole residuary legatees. But, at any rate, both these defendants were perfectly competent to apply to the Court for a correction of the accounts so that the fund received from the Master could have been excluded from the account of the residuary estate covered by the will. They did not do so. It would be inequitable now to allow defendants Nos. 1 and 2 to re-open the accounts which they have accepted and acted on for so many years. I have now dealt with all the points arising on the pleadings, and can dispose of the issues *seriatim*.

1. I find that plaintiff is entitled to the interest of the Rs. 7,000 only as she may require it; that if she demands it as it accrues it must be paid over to her. Of course she would be entitled to a reasonable time for demand, and there would be no lapse simply because she did not ask for the interest on the very day it accrued. In the same way I see no objection to her giving a standing order that the money should be paid over to her or to a certain person on her account till further notice.

2. I find that defendants Nos. 1 and 2 have not been always ready to set apart the Rs. 7,000. That is admitted by defendant No. 1. No doubt all the members of the family were aware of the way in which defendants Nos. 1 and 2 were dealing with the estate, and

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expressed no disapproval, but that does not alter the fact that defendants Nos. 1 and 2 so acted as to be unable to set apart the Rs. 7,000 when called on to do so. They admit their liability now to set apart the money.

3. I find that plaintiff made no demand prior to 30th July, 1892.

4. I find that plaintiff is entitled to demand the interest, whether she is supported by any member of the family or otherwise.

5. I find that plaintiff cannot demand arrears of interest prior to 30th July, 1892. The arrears from July, 1892, may fairly be taken to cover the first half-yearly interest for 1892.

6. I find that the gift over of the Rs. 7,000 after Benabai's death is void, and that the same falls into the residuary estate of Sakharam.

7. I find that the bequest of the residuary estate, after the death of Kashi, is not void.

8. I find that plaintiff has a $\frac{1}{4}$ th share in that residuary estate.

9. I find that defendants are not entitled to deduct any sum on account of ancestral estate.

10. I find that defendants Nos. 1 and 2 are not solely entitled to Sakharam's residuary estate.

11. I find that the agreement of 1888 made between defendants Nos. 1 and 2 was made with the knowledge of the plaintiff, but that fact does not estop the plaintiff from claiming her just rights under the will.

12. I find that, to ascertain the residuary estate for which defendants Nos. 1 and 2 are liable, a reference must be made to the Commissioner.

13. (General issue.)

14. I find that defendant No. 3 is entitled to the Rs. 8,000 which on the death of Sonabai by the will of Sakharam became the property of Sonabai's child, defendant No. 3; who was alive at the death of the testator. In so finding I follow the view adopted in regard to the bequest of the residuary estate. I find also that defendants Nos. 3 to 10 are entitled to Sonabai's $\frac{1}{4}$ th share in the residuary estate of Sakharam.

15. I find that under the will of Sakháram defendant No. 11 is not entitled to the Rs. 7,000 on the death of the plaintiff. Her mother (the plaintiff) is entitled absolutely to one-fourth share of the residuary estate of Sakháram.

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It only remains to deal with the prayers of the plaint in accordance with the above findings.

(a) Plaintiff's right, having been ascertained as just shown, will be declared and there will be a direction to carry out the trusts of the will as regards the investment of the Rs. 7,000. There will be a similar direction to secure the Rs. 8,000 for the benefit of defendant No. 3.

(b) I cannot consent to the proposal to remove the present trustees, defendants Nos. 1 and 2, unless they themselves are anxious to be relieved from the trust. I cannot adopt the very strong language used by the learned counsel for the plaintiff in regard to the conduct of defendants Nos. 1 and 2. They have acted unwisely but not fraudulently.

(c) The necessary declaration will be made to have the Rs. 7,000 set apart and secured to plaintiff for her life, provided she demands the income thereof.

(d) And to entitle her to receive the interest from 30th July, 1892, the same should be calculated at compound interest with half-yearly rests.

(e) I do not think that any injunction is necessary, nor is the appointment of a receiver necessary.

(f) No arrears of interest can be allowed prior to 30th July, 1892, the same covering the first half-year's interest of 1892.

(g) As to the costs. Plaintiff must bear all costs occasioned by the plea that there had been a demand prior to 30th July, 1892. Her other costs up to date and the costs of defendants Nos. 1 and 2 up to date must be borne by defendants Nos. 1 and 2 personally. Their omission to give any answer to plaintiff's demand necessitated the suit. In any case, defendants Nos. 1 and 2 are not entitled to have separate costs.

The costs of defendants Nos. 3 to 11 to come out of the residuary estate, for the ascertainment of which there must be a reference to the Commissioner.

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At the request of the Advocate General the findings to be inserted in the decree.

The first and second defendants appealed. They contended (1) that Benábái was not entitled to a share in the residuary estate; (2) that the children of Sonábái were not entitled to a one-fourth share in the residuary estate; (3) that the defendants should be declared entitled to deduct from the estate, before the residue thereof was available for distribution, the sum of Rs. 16,436 and interest thereon received by the executors of Sakháram.

The plaintiff Benábái filed cross-objections to the decree:

Macpherson and *Lowndes* for the appellants (defendants Nos. 1 and 2).

Starling and *Scott* for respondent (plaintiff).

The following authorities were referred to:—William on Executors, p. 1114; Seton on Decrees (5th Ed.), p. 1355; Theobald on Wills, p. 404; Henderson on Wills, pp. 217—219; *Mangaldás Parmánandás v. Tribhuvandás*⁽¹⁾; *Ram Lal Sett v. Kanai Lal Sett*⁽²⁾; *Rai Bishen Chand v. Asmaida Koei*⁽³⁾; *Dorrell v. Dorrell*⁽⁴⁾; Lewin on Trusts (9th Ed.), pp. 377—79.

FARRAN, C.J.:—This is an appeal from the judgment of Candy, J., upon the construction of the will of Sakáhrám Luxumonji. The appellants complain of the learned Judge's decision in so far as it gives the plaintiff Benábái and the defendants Nos. 3 to 10 collectively, who represent Sonábái, shares, respectively, in the residuary estate of the testator.

The will is dated the 12th August, 1865. The family for a lengthened period were under the impression that the sons of Rámchandra Sakháram to the exclusion of his daughters were entitled to the residuary estate. The judgment appealed against has determined that the daughters equally with the sons are entitled to share in it.

The clause which gives rise to the question is this:—

“And I hereby declare that from and after the determination of the trusts aforesaid the said trustees or trustee for the time being of this my will shall stand possessed of and interested in the said residuary real and personal estate and the stocks, funds, shares and securities in or upon which the same or any part of that may

(1) I. L. R., 15 Bom., 652.

(3) L. R., 11 I. A., 164.

(2) I. I. R., 12 Calc., 663.

(4) (1895), 2 Ch., 698.

be invested, and the rents, dividends and the income thereof *in trust* for all or any the children or child of my said son who shall be living at the time of his decease or who shall leave lawful issue living at the time of his decease in equal shares and proportions if more than one, and if there be no such child who shall be living or whose issue shall be living at the time of the decease of the survivors of them my said son and his present wife, then the said trustees or trustee for the time being of this my will shall stand possessed of and interested in the said residuary estate and the stocks, funds, &c. *in trust* for the persons or person who would become entitled thereto in case the same had belonged absolutely to my said son and he had died intestate."

Upon this it is firstly contended that the context of the will shows that the testator used the expression "children" in the above clause as the equivalent of sons who alone, he desired, should take. The will was written in English, and it is suggested that the testator had not an accurate knowledge of that language, and that, therefore, it is by no means improbable that he misunderstood the term which he employed and used it in an unusual sense. As giving colour to this contention it is pointed out that legacies, which are strictly tied up, are given to the testator's grand-daughters Benábái and Sonábái, and it is argued that it is highly improbable that in addition the testator should have given them absolute and uncontrolled shares in the residue which would place them in a better position than their brothers to whom nothing is given but their shares in the residue. It is also provided in the will that, in the event of the failure of issue of the grand-daughters, the legacies to them shall fall into the residue. This is, it is contended, a clear indication that the testator did not intend that his grand-daughters should share in the residue.

These considerations, though they are calculated to induce a very careful scrutiny of the whole will with a view to ascertain whether its context does not show that the testator used the term "children" in other than its usual grammatical sense, are in themselves insufficient to control or vary the meaning of the term. They only show that the testator has made a disposition by his will which the Court is surprised to find such a testator or indeed any testator making. If there was any ambiguity in the expression, such considerations might determine the sense in which the testator used it, but they cannot lead the Court to refuse to give effect to the plain language which he has employed. In support of the contentions that the context of the will indicates that the testator used the expression

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“children” instead of “sons” the appellants rely upon the fact that the testator when referring to Sonabai and Benabai in the early portions of the will designates them his “grand-daughters,” while in the final clause of the will he appoints the executors of the will guardians for his infant “grand-children” Krishnarao and Balakrishna, not for his infant “grand-sons.” We should readily lend ourselves to this contention if we thought we should be justified in doing so. But it appears to us too slender a basis from which to draw the suggested conclusion. There is no antithesis between the two expressions. The testator merely uses one appropriate expression to designate Krishnarao and Balakrishna instead of another hardly more, or, we should rather say, equally appropriate. This is the only foundation for the argument; and in other clauses of the will the testator uses the expression children where it is not contended that he means to confine it to sons. If we were to accept the argument of the appellants, we should have to attribute two entirely different meanings to the same word in the same instrument without any context to justify us in doing so, contrary to one of the most fundamental canons of construction. We, therefore, come to the conclusion that the judgment of the Division Court upon this point is correct.

It is further contended that the gift to the children of Ramchandra who shall be living at his decease is a gift to a class of which some may have come into existence after the death of the testator, as to whom the gift would be void under the rule in the *Tágoré case*, and that, therefore, the whole gift is void. At the time when the testator made his will, his son Ramchandra had two daughters, Sonabai and Benabai, and two sons, Krishnanath or Krishnarao and Balakrishna; who are all named in the will, though not in this particular clause. It would manifestly defeat the intention of the testator if the whole bequest were declared to be inoperative, merely because the testator indicated his wish that, if further children should be born to Ramchandra, the class should be enlarged so as to embrace them. A uniform series of decisions ending with that of *Tribhuvandas v. Gangadas*⁽¹⁾ show that we are not bound to adopt a construction which would in many, if

(1) I. L. R., 18 Bom., 7

not in most cases defeat the primary intention of the testator, because effect cannot be given to his secondary intention. We think that we ought to follow these decisions in preference to some earlier cases that are opposed to them. Upon this question also we agree with the view taken by the Division Court.

The next ground of appeal is with reference to a sum of Rs. 16,436-5-0 which the Division Court has treated as forming part of the testator's estate or liable to be treated as part of such estate. This was a sum admittedly arising from the sale of the testator's share in certain ancestral estate by the Master in Equity, which the executors of the testator received after his death and dealt with as though it belonged to his estate. It is admittedly money over which the testator had no power of disposition, but which upon the death of the testator passed to his son Rámchandra. The will does not refer to this money specifically and there is nothing in its terms to indicate that the testator intended to dispose of or deal with it. No question of election can, therefore, arise in reference to it. It was apparently allowed to be received and dealt with by the executors as part of the estate in consequence of the understanding in the family, that it in common with the rest of the residuary estate would devolve ultimately upon the sons of Rámchandra. That understanding having now been found to be erroneous, the sons of Rámchandra are of course entitled to have it from the estate and restored to them, unless the law of limitation bars their right. We do not think that it does.

When the sum was received by the executors, one of the sons of Rámchandra, the appellant Krishnaráo, was acting as an executor and the other son, the appellant Bákrishna, soon afterwards assumed that office. Their case is that this money was used for the purposes of the estate, or, in other words, lent to it. The executors have thus used their own monies or money procured by one of them for estate purposes. In taking the accounts of the estate, executors are entitled to be allowed such money—*Spackman v. Hilbrook*⁽¹⁾; *Seton on Decrees* (4th. Ed.), p. 894. Under certain circumstances they are allowed it with interest. We are unable

(1) 2 Gif., 198.

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to see how the Statute of Limitation applies to such a case, as the account of the executors has still to be taken. Whether this sum has been advanced to, or used in, the estate will be decided when the account is gone into. For these reasons we are of opinion that the finding on the 9th issue must be set aside and the decree varied so as to give effect to our judgment in this respect.

The respondent Benábái has filed cross-objections to the decree in reference to her claim for interest on her legacy of Rs. 7,000. By the clause in the will upon which her contention is based, the testator gives a sum of Rs. 4,000 (by a codicil raised to Rs. 7,000) to his executors upon trust that they do invest the sum in the name of the trustees and "do pay so much and such part of the dividends, interest and income of the same monies or of the stocks, &c., upon which the same may be invested as she may from time to time require for her own use and support" to Benábái during her life for her sole and separate use independently of her husband without power of anticipation and upon trust that they do and shall accumulate the surplus of such dividends, interest and income (if any) which shall not be required by Benábái, in the way of compound interest by investing the same and the resulting income thereof for the benefit of the persons or person who under the trusts of the will shall become entitled to the principal fund from which the same may have proceeded. These trusts were for all or any of the children or child of Benábái who shall be living at her death or who shall leave lawful issue living at her death, failing whom they were to fall into the residue. The bequest to the children of Benábái having been void under the rule in the *Tágoré case*, the accumulations are held in trust to form part of the residue. Benábái's legacy has never, in fact, been set aside. The interest upon it was paid to her down to 1872. After that she lived on amicable terms with, and was supported by, her mother and her brothers, the executors and other members of the family, down to the time of the disputes between them; and the Division Court has held that she did not, after 1872, require or demand payment of the interest upon her legacy until 30th July, 1892. The latter finding has not been seriously contested before us, and we

think we ought to accept it. Upon the construction of the clause we agree in the view taken by the Division Court. The plaintiff was entitled, we think, as she required money for her support from time to time, to receive it from the executors up to the full amount of the interest, but if she did not require the interest, or any part of it, the trustees are directed to invest the amount not required, and are directed to hold such accumulations upon trust for the persons who will be ultimately entitled to the fund. After it is once accumulated, the accumulations appear to us to become impressed with that trust, and Benábái is no longer entitled to receive them. The failure of this ultimate trust cannot alter or enlarge the meaning of the bequest for life in favour of Benábái. That remains the same as if the ultimate trusts were good and could be given effect to. Benábái cannot, therefore, claim to have the interest prior to 30th July, 1892, which she did not require and demand as it accrued due, now paid to her.

She demands, however, as a person interested in the residue to have the fund now made up to the amount at which it would have stood had the trustees set apart and invested this legacy as they should have done at least in 1873. The learned Judge in the Court below has refused to give directions to that effect on the ground that Benábái was well aware of the dealings of the executors with the estate since 1873 until the disputes, and acquiesced in them, and we think that he was justified in taking that view. The executors themselves and Sonábái's children are entitled to $\frac{3}{4}$ of the residue, and they do not seek to have this provision made. The legacy money appears to have been employed in estate purposes, and it is not shown that it has not benefited the estate to the same extent as if it had been invested and the surplus income accumulated. It has not, in fact, been shown that the residue has suffered any actual loss by reason of this direction not having been carried out. Under these circumstances we do not, on the whole, consider that equity requires us to take the extreme steps of giving this alternative direction which Benábái asks for against the wish of the other beneficiaries. We, therefore, disallow the cross-objections.

As to costs, we do not think that the Division Court has assigned adequate reasons for departing from the usual rule in such

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cases and making the executors personally liable to pay them. Since we have varied the decree in a material point we consider that the whole question as to costs is open to us.

The parties respectively will have their costs out of the estate in the Court below and will pay their own costs, respectively, of the appeal as it has in part succeeded and in part failed. We do not, under the circumstances, make any order as to attorney and client costs.

Decree varied.

Attorneys for the appellants (defendants Nos. 1 and 2):—
Messrs. *Bhāishankar and Kānga*.

Attorneys for the respondent No. 1 (plaintiff):—Messrs. *Chitnis, Motilāl and Mālvi*.

Attorney for other respondents:—Mr. *Bālkrishna V. N. Kirtikar*.

ORIGINAL CIVIL.

Before Sir Charles Farran, Kt., Chief Justice, and Mr. Justice Strachey.

1896.

January 10.

TEJPUR DEWCHAND AND ANOTHER, PLAINTIFFS, v. MAHOMED JAMA'L
AND OTHERS, DEFENDANTS.*

Arbitration—Application to file award—Civil Procedure Code (Act XIV of 1882), Secs. 525, 526—Objections as to the factum or validity of submission and award—Sections 521 and 522 of the Civil Procedure Code (Act XIV of 1882)—Practice—Procedure.

Where on an application to file an award under sections 525 and 526, Civil Procedure Code (Act XIV of 1882), objections, which in the opinion of the Court are not merely frivolous or colourable, are raised to the factum or validity of the submission and award, the Court has no jurisdiction to deal with them and must refer the parties to a regular suit.

Samal v. Jaishankar(1) and *Surjan v. Bhikari*(2) followed.

Anvrit Ram v. Dasrat Ram (3) not followed.

CASE stated for the opinion of the High Court, under section 69 of the Presidency Small Cause Courts' Act (XV of 1882), by C. W. Chitty, Chief Judge:—

"This was a suit brought by the plaintiffs, who were father and son, against the three defendants to recover Rs. 1,228-8 as

* Small Cause Court Suit, No. 243 of 1895.
16989

(1) I. L. R., 9 Bom., 254.

(2) I. L. R., 21 Cal., 213.

(3) I. L. R., 17 All., 21.