

the appellant, the cross-examination of these witnesses shows clearly that from the first they were acting in full sympathy with the instructions of the police, and it was on that account that they were treated with special indulgence, and finally the prosecution was withdrawn against them. The considerations which influenced the Presidency Magistrate to give his consent were judicial considerations such as those referred to in section 337. The distinction made by Whitworth, J., appears not to be borne out by the evidence in this case, and I feel satisfied that the decisions referred in the judgment of Candy, J.—*Reg. v. Narayan*<sup>(1)</sup> and *Reg. v. Hanmanta*<sup>(2)</sup>—fully apply. In one of these cases the accused had been, as in the present case, discharged, yet it was held that the accused were competent witnesses. On the whole I am disposed to agree with Mr. Justice Candy in holding that Karim and Ibrahim were competent witnesses, and that their evidence along with the other police testimony fully justified the conviction and sentence passed by the Magistrate.

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## APPELLATE CIVIL.

*Before Mr. Justice Ranade and Mr. Justice Crowe.*

RAMDHAN (ORIGINAL DEFENDANT), APPELLANT, v. MANIBAI (ORIGINAL PLAINTIFF), RESPONDENT.\*

1900.

December 12.

*Will—Construction—Executor—Suit by legatees against executor for arrears of rent—Limitation.*

A Hindu died leaving a son, a daughter, a widow and a brother's widow. He left a will whereby he directed that the two widows should receive "half and half" the annual income realized from the four houses which he specified and that on the death of one of them the survivor should take the whole for her life. The son was to make repairs and to pay the municipal taxes payable in respect of the said houses, but he was to have "no manner of right whatever to the income" thereof. He was also to provide the widows with food and clothing for their life and to provide the expenses of the marriage of the testator's daughter. Except as above mentioned the whole of the testator's property, moveable and immovable, was left to the son. The plaintiff (one of

\* Second Appeal No. 392 of 1900.

(1) (1868) 5 Bom. H. C. R. 1.

(2) (1877) 1 Bom. 610. p. 619.

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the widows) sued to recover the rent of the four houses which had accrued since the testator's death. It was contended that by the will the four houses were given to the widows.

*Held*, that the son was the sole owner of the whole property. The will, however, had imposed upon him the duties of an executor and he should be treated as such. There was thus a fiduciary relation established between him and the widows and they were entitled to the arrears of rent for the whole period claimed.

SECOND appeal from the decision of Ráo Bahádur K. B. Marathe, First Class Subordinate Judge, A.P., of Dhulia, confirming the decree of Ráo Sáheb M. V. Kathavate, Second Class Subordinate Judge at Jalgaon.

One Chhoturam died in April, 1893, leaving a son Ramdhan, a daughter Narmada, a widow Bái Mani, and a brother's widow Bái Baktavari.

He left a will which provided *inter alia* as follows :

"I have one son named Ramdhan, and there are my elder brother's widow, who lives joint (with me, *viz.*) Baktavari Bái, widow of Balmukund Set, (my wife named Mani, and one daughter named Narmadabái, who is a minor. For about three years past I have been ailing. I think that now there is no certainty of my life. Therefore by this will I make a disposition as follows :

(1) As to the moveable and immoveable estate belonging to me which there is in the tálukas of Jalgaon and Bhusaval, in the district of Khándesh and at other places, the same is the self-acquired property, property of both me and my full brother Balmukund Sivlal, who lived joint with me. Balmukund Set died some time back, *i.e.* about four years ago, whilst joint. Since then up to this day I am the sole owner of the whole of the moveable and immoveable estate. Originally there was no ancestral estate ; nor is there any (now).

(1) In order that both my brother's widow Baktavari Bái and (my) wife Mani may be independently enabled after my death to practise '*Dharma*' (charity) in accordance with the position of our family and in accordance with their wishes, and in order that there may be no hindrance or obstacle in the way of their (being able to) do so, (I give them) the undermentioned moveable and immoveable property which belongs to me as owner thereof and which is situate at the village of Jalgaon Budruk in Táluka and Sub-district Jalgaon, in the zilla and district of Khándesh. (Here followed the description of four houses owned by the testator.)

Baktavari Bái and my wife Mani should take the above mentioned property independently. As to the rent which may be annually realized from this property, these two ladies should take the same half and half and they should bestow money in '*Dán Dharma*' (charity) as mentioned above or they should dispose of it in any manner they like. The said Baktavari Bái and Mani have every right to carry on the *wahivat* of the said property. My son Ramdhan

has no manner of right whatever to the income of the said property. Baktavari Bái and Mani have no right to sell the said property.

(1) Baktavari Bái and Mani, these two ladies, should take the income of the rent of the said property half and half. Should one of the above two ladies die earlier, the survivor should take the whole of the income of the rent of the said property so long as she lives and my son Ramdhan is to make repairs and pay the committee's taxes in respect of all the houses.

(1) For the marriage of my daughter named Narmadabái, my son Ramdhan is to spend Rs. 6,000 (six thousand).

(1) Out of my dwelling *haveli* (house) at Badvat, a suitable portion is to be given to Baktavari Bái for her residence so long as she lives, and a suitable portion of my dwelling *haveli* (house) at Jalgaon is to be given to my wife Mani for her residence so long as she lives.

(1) Besides the income in respect of rent which has been agreed (to be paid) to my sister-in-law Baktavari Bái and my wife Mani for '*Dán Dharma*' (charity, &c.) as mentioned above, my son Ramdhan is to pay to each of them during their (respective) lifetime food and clothing according to their position in life.

(1) Baktavari Bái and (my) wife Mani have a full right to the ownership of the ornaments which are on their (respective) persons and in their (respective) possession and of the cash in their respective possession. They should dispose of the same according to their pleasure. Ramdhan has no right to the ownership of the same.

(1) As to the whole of the moveable and immoveable estate except the above-mentioned moveable and immoveable property, my son Ramdhan is entitled to the same.

After the death of the testator, his son Ramdhan entered into possession of the whole of the estate.

In 1898 the testator's widow Bái Mani brought this suit to recover the arrears of the rent which had been received from the four houses mentioned in the will since the date of the testator's death.

The Court of first instance awarded the claim, and on appeal the decree was confirmed.

Defendant preferred a second appeal to the High Court.

It was contended that under the will the houses had become the property of the widows.

*P. M. Mehta* (with *M. B. Chaubal*) for appellant (defendant).

*Robertson* (with *M. V. Bhal*) for respondent (plaintiff).

RANADE, J.:—The only point raised before us relates to the

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construction chiefly in regard to that portion of the will which relates to the interest which the ladies Baktavari and Mani could claim under it. It was contended that the four houses were given to the ladies, and not merely a right to receive the income of the same as held by both the lower Courts.

It appears to us that reading the whole will, the testator's intention was to leave the defendant sole owner of the whole property. In regard to the two houses in dispute, the widows had, during the lifetime of both or one of them, only a right to receive the income. They were not to sell the same. Defendant, as the son of the testator, was required to pay the taxes and keep the houses in repair. He was also charged with the duty of providing the expenses of Bái Amba's marriage and he was also charged with the duty of providing maintenance to the widows. These are all functions which belong to the office of executor, and the defendant must thus be treated as executor, especially when he took possession of the whole property and admittedly managed it himself. There was thus a fiduciary relation established between the parties, and the Courts below have correctly held that the arrears of rent were properly awarded not for three years but for the whole period claimed. We dismiss the appeal with costs.

*Appeal dismissed.*