

ORIGINAL CIVIL.

Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and
Mr. Justice Russell.

THE ADVOCATE GENERAL (ORIGINAL DEFENDANT), APPELLANT, v.
KARMALI RAHIMBHAI AND OTHERS (ORIGINAL PLAINTIFFS), RES-
PONDENTS.*

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November 13.

*Practice—Civil—Administration suit—Further directions—Advocate General
—By consent, added as party—Right to question validity of legacies—Estop-
pel—Laches—State demand—Will—Khoja Mahomedan Will—Gift to a
class—Construction.*

M., a Khoja Mahomedan, died in 1864. By his will and codicil he left his property to trustees, upon trust, *inter alia*, to pay his daughter, L., a monthly sum during her life, and, after her death, to pay it to her children. M.'s residuary estate was charged in favour of certain charitable objects. In 1868 the Advocate General commenced a suit (962 of 1868) for the administration of M.'s estate. In 1869 L. died, leaving 4 children surviving her. In 1871 a decree for the administration of M.'s estate was granted to R., the husband of L., in another suit (370 of 1870). In 1873 a decree for administration was passed in the Advocate General's suit (962 of 1868). By the decree the Advocate General was given liberty to join in taking the accounts and making the enquiries directed in suit 370 of 1870. In 1899 the Commissioner made his final report in suit 370 of 1870, to which, however, exceptions were filed. In 1902 the case came before Tyabji, J., for further directions. Up to this date the validity of the gift to L.'s children had not been questioned by the parties, and the Commissioner's report was based on the assumption that it was valid. The Advocate General was now, by consent of the parties, joined as a co-defendant, to simplify and regularize the suit. He thereupon contended that the gift to L.'s children was bad as transgressing the rule laid down in the Tagore case and claimed that the fund was applicable to the charitable purposes indicated in the residuary gift. The Division Court ruled that the Advocate General was not entitled at this stage to raise the point.

Held (reversing Tyabji, J.), that the Advocate General was not precluded, even at this stage, from questioning the validity of the gift to L.'s children.

* Suit No. 370 of 1870; Appeal No. 1226.

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Where the accounts actually taken and completed in one suit are adopted in another, the ordinary practice is to allow the result of those accounts and enquiries to be questioned in the suit wherein they are adopted.

A beneficiary is generally taken as sufficiently represented by his trustees; but this does not hold good where the contest lies between the beneficiaries themselves.

Held, on further hearing, on the construction of the will, that such of L.'s children as were in existence at the death of the testator were entitled to the annuity at L.'s death.

APPEAL FROM TYABJI, J. :—Khan Mahomed Habibbhoj, a Khoja Mahomedan merchant of Bombay, died on the 4th October, 1864.

By his will, dated the 4th September, 1864, he gave his property, moveable and immoveable, to trustees, upon trust, *inter alia* :—

“Out of the said interest and income to pay the sum of Rs. 150 per month or apply the same to or for the benefit of my daughter Lilbai, and a like sum to or for the benefit of each of my other daughters, who shall be either living at my death or born in due time afterwards, and amongst and for the benefit of the children of any such daughters of mine who shall die leaving children, provided always that such payment or application in the case of any female being the child of a daughter shall cease upon her death or marriage and in the case of a male being a child of a daughter shall cease upon his death, and so that upon the death of any male or the death and marriage of any such female entitled to receive or have applied any part of the said monthly sums, respectively, the said sums, respectively, shall fall into or form part of my residuary estate. Provided also, and I further declare, that if any person entitled to the said monthly sum or sums of Rs. 150, respectively, or any part thereof, shall for the time being be under the age of twenty-one years, the said trustees of this my will may either themselves or himself pay or apply for the benefit of such person the amount becoming payable to him or her, or applicable to his or her benefit, or may pay the same to his or her parent or guardian (if any), without seeing to the application thereof. Provided always, and I further declare, that in case I shall die without leaving male issue, who under the trust hereinafter declared shall become absolutely entitled to my residuary estate, then and in such case and from the time that such failure of issue shall take place, the monthly sum applicable out of the interest and income of my residuary estate under the trusts next hereinbefore contained to or for the benefit of my daughter Lilbai and her children shall be the sum of Rs. 250 instead of the sum of Rs. 150.”

The will also contained the following directions with reference to the residuary estate :—

“ And in case I shall die without leaving any son or the male issue of any son who under the trusts aforesaid shall become absolutely entitled to my said residuary estate, then and in such case and so soon as such failure of absolute vesting shall have taken place and subject to satisfying the purposes and trusts aforesaid so far as they shall have taken effect, the said trustees and trustee of this will shall stand possessed of my residuary estate in trust out of the income thereof to expend every six months such sum as the said trustees shall think fit, being not less than Rs. 500 or more than Rs. 1,000, in giving a dinner to that section of the Khoja community to which I belong.

And subject thereto shall pay and apply the residue of the said interest and income according to such rules and regulations in this behalf as the trustees or trustee of this my will for the time being shall from time to time make or agree upon and generally in such manner as they and he shall think fit and in and upon the maintenance, education, advancement or preferment and in and about the marriages and expenses of the marriages of poor and helpless orphans belonging to the Khoja community at Bombay.”

By a codicil, dated the 9th of September, 1864, the monthly sum payable to Lilbai and her children was increased to Rs. 1,000.

In 1868 the Advocate General commenced a suit for the administration of the testator's estate [being suit No. 962 of 1868].

On the 15th of December, 1869, Lilbai died, leaving 3 sons, viz., Karmali, Merali, and Ibrahim, the plaintiffs in the present suit, and a daughter, Rahimatbai, who is not concerned in it, as her survivors.

In 1870 Rahimbhai, the husband of Lilbai, and her children, commenced the present suit [No. 370 of 1870], praying, *inter alia*, that the arrears of the monthly sum, due at the death of Lilbai might be paid to Rahimbhai, that a sum might be set apart to cover future instalments, and that the payment to the children might be made through Rahimbhai. In default, the usual administration decree was sought.

On the 6th of November, 1871, a decree was passed in the suit. By it the infant plaintiffs were made parties as defendants instead of as plaintiffs, and, notwithstanding the fact that the Advocate General's suit was pending, a decree for the general

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administration of the testator's estate was granted to Rahimbhai as sole plaintiff.

On the 5th of December, 1873, a decree for administration was passed in the Advocate General's suit [962 of 1868].

By the decree the Advocate General was given liberty to join in taking the accounts and making the enquiries directed in suit 370 of 1870.

On the 4th of April, 1876, Rahimbhai having died, his children were substituted, as plaintiffs, in his place, in suit 370.

On the 31st of March, 1884, the Commissioner made his first report, and in July, 1899, his final report in that suit.

Exceptions to the report were filed, and in June, 1902, the case came before Tyabji, J., for further directions.

At this stage, at the instance of the executors, and with the assent of the other parties, the Advocate General was added as a co-defendant in the suit.

The Advocate General thereupon contended that the gift to Lilbai's children was bad as transgressing the rule laid down in the Tagore case, and claimed that the fund was applicable to the charitable purposes indicated in the residuary gift. The learned Judge, however, decided that the Advocate General was excluded by the Commissioner's report and, on other grounds, from questioning at this stage the validity of the legacy. The Advocate General appealed.

JENKINS, C. J. (after referring to the facts enumerated above):—The ground on which Tyabji, J., based his decision is thus expressed by him:

"I think that the question of the validity of the gift is not a question of fact such as might be referred to the Commissioner, but it is a question of principle. If no objection is raised and no issues raised and the matter is allowed to go to the Commissioner, it must be taken that the parties raised no objection. The Commissioner actually finds that certain legacies are still payable and no objection was raised to that on execution. I take the report as binding. I am of opinion that the Advocate General is barred now on further directions from raising the question."

Before us, however, the decision has been supported on other and more elaborate grounds, and it is clear that the point involved opens up a large field of discussion. To appreciate the

position it is necessary to examine somewhat more in detail certain of the matters to which I have already referred.

There can be no doubt that the suit 370 of 1870 was based and proceeded on the assumption, that the impugned legacy was valid. From the decree in the suit it appears that issues were raised and decided and among them the following :

3. Whether in terms of the will of the testator, plaintiff is entitled to have the money provided in such will for the benefit of his children paid to him, and, if not,

4. Whether in terms of the said will plaintiff is entitled to have the sum of Rs. 1,000, or what sum paid to him, for the maintenance and support of his said children ?

5. Whether the defendants ought not to be decreed forthwith to set apart a sufficient sum to produce Rs 1,000 a month ?

The Court found on the third and fifth issues for the two first-named defendants, and on the fourth issue substantially for the plaintiff.

The decree then went on to direct that the executor defendants should, out of the monthly allowance of Rs. 1,000 provided by the will of the testator, continue to pay to Rahimbhai, as father and guardian of the infant defendants, until further order, the monthly sum of Rs. 600 and accumulate the rest. Then (after certain provisions not now material) the usual accounts and enquiries of an administration suit were directed, and among them an enquiry, " What legacy or legacies is or are unpaid ? " On this the Commissioner reported : " I further certify and report to the said Court that I have taken an account of the legacies given by the will of the said testator, the particulars of which legacies are more fully set out in parts I and II of the schedule hereto annexed and marked with the letter G, and that the part I of the said schedule, marked with the letter G, shows which of the legacies given by the will of the said testator have been paid or satisfied by the said defendants as executors of the said testator, and that part II of the said schedule, marked with the letter G, shows which of the legacies given by the will of the said testator are still unpaid or partly paid or partly unpaid." The second

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part of the schedule shows the legacy to Lilbai and her children as follows:—

PART II.

Legacies unpaid or partly paid and partly unpaid.

No.	Nature and description of the legacy and the name of the legatee.	Date of payment or making over.			Account.		
2	Monthly allowance of Rs. 1,000 to Lilbai, daughter of the testator, and after her death to her children, the plaintiffs in this suit, to her sons for life and to her daughter until death or marriage.	1864 October.	4	48,000	0	0	
		1868 October.	4				
1868 October.	4						
	Lilbai died leaving four children, 3 sons and one daughter, one of whom, the daughter Bahimatbai, has since married, and this monthly allowance has proportionately abated and is now Rs. 750 only. The children now entitled to share are the three sons of Lilbai, namely, Karmali, Ebrahim and Mirally.	1869 December.	14	14,333	0	311	
		1869 December.	15	7,000	0	0	
		1870 July.	14				
		1870 July to	15	37,800	0	0	
		1875 October.	14				

The report was in due course confirmed with some small variations.

The Advocate General was not a party to that suit, and he therefore contends that he cannot be affected by anything decided in it. In answer to that, reference is made to the decree passed in suit 962 of 1868, whereby it was declared and directed as follows:—

“And this Court doth order and direct, that the accounts and enquiries directed and now being taken and made by the Commissioner for taking the accounts of this Honourable Court, in suit No. 370 of 1870 of the Honourable Court, by and under an order made therein and bearing date the 6th day of November 1871, shall, as far as the same shall be applicable, be adopted in this suit, with liberty to the Honourable the Advocate General and the Relators in this suit to join in taking the said accounts and in making the said enquiries.”

What power the learned Judge had in suit 962 to give the Advocate General and the relators liberty to join in taking the accounts and making the enquiries directed in another suit, not then before him, I do not know, but whether he had the power or not, there is no doubt that the Advocate General did by his attorney attend certain meetings. Now, where the accounts actually taken and completed in another suit are adopted, the

ordinary course is, to allow the result of those accounts and enquiries to be questioned in the suit, wherein they are adopted, but we are left in doubt as to what was intended by the liberty given to the Advocate General; whether it was intended that he should question the accounts in the suit to which he was not a party, or in that to which he was. In fact however it appears that though the Advocate General did attend from time to time before the Commissioner, he did not appear and took no part on the confirmation of the report, or the further directions in suit 370 of 1870, and I cannot see that he was bound or entitled to be present. What is there then to preclude him from now questioning the validity of the gift to Lilbai's children? It is true he is now a party to suit 370, where the validity of the legacy has been hitherto assumed, but it was arranged before Tyabji, J., that the present question should be dealt with as though he had not been made a party, that is to say, that he is to be in no better or worse position on that account. It is on that footing, therefore, that we must approach the case. But the Advocate General not being a party to the suit, he cannot ordinarily be directly bound by anything in it, beyond what may be imported by the terms of the decree in suit 962, the effect of which I have already discussed. But assuming, that as between the parties to the suit, the validity of the legacy cannot now be questioned, does that entitle the Court to decide, that the Advocate General has no right to contend, that the three sons of Lilbai are not entitled to the sums purporting to be bequeathed to them? For it must be noted that the decision as it stands would bar the right of the Advocate General, not only in this, but also in any other proceeding. It is argued that though the Advocate General may not be directly bound, still he in effect is, inasmuch as he was represented in that suit by the executors, who were parties to it. But I think this argument is founded on a misapprehension as to the effect of the rule under which a beneficiary is sufficiently represented by his trustee; it does not apply where, as here, the contest is between two beneficiaries. Can it then be said that the point is taken at too late a stage of the suit, bearing of course in mind the time, at which, and the circumstances under which, the Advocate General has inter-

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vened? There is nothing unusual in the validity of a legacy being determined at this stage of an administration suit; on the contrary, it was stated in *Gaskell v. Holmes*⁽¹⁾ to be the proper course for the Court not to decide on the construction of a will before the accounts are taken.

Then it is said, that on further consideration the Court will not depart from any principle contained in the original decree, and as a general proposition that is no doubt correct. But in applying this principle to the present case, we must have regard to the special circumstances.

In the first place there has been no definitive pronouncement in favour of the validity of the gift, though, as I have already said, the suit and the decree proceed on that assumption. But even as between the parties to the suit, a mere assumption of that sort is not conclusive. Thus in *Barton v. Barton*⁽²⁾ a bill was filed by the plaintiffs on the assumption that they were entitled to share in the testator's estate and the usual decree directing account and enquiries was passed. After they had been completed, the case was heard on further consideration, when the plaintiffs' right was questioned. For the plaintiffs it was urged that it was too late at that stage to take the objection: that it ought to have been taken by demurrer. The Vice-Chancellor, however, dismissed the bill, remarking, in answer to an objection, that after decree a bill could not be dismissed. "After a decree, merely directing accounts and inquiries, a bill can always be dismissed."

Here, however, objection is taken by one, not a party to the suit when the decree was passed, or at any time up to the present, but by one brought in under the circumstances I have described.

I fail to see why the Advocate General was brought in, if on this ground he is not to be heard; he was added for the purpose of "simplifying and regularizing the proceedings in the suit," and that being so, it would be illogical, on the ground with which I am now dealing, to close his mouth. If objection were being taken to the Advocate General's being allowed to intervene in

(1) (1844) 3 Hare at p. 443.

(2) (1857) 3 Kay & J. 512 at p. 517.

the suit at all, there might be something in the point (*Dyson v. Morris*⁽¹⁾), but here the Advocate General has not intervened on his own initiative; he has been brought in at the instance and with the consent of the parties for the purpose of being bound by the Court's decision and for their convenience.

This brings me to the argument of estoppel: the Advocate General, it is argued, has so conducted himself that he is now precluded from questioning the legacy. My learned colleague has brought to my attention the case of *In re Lart*⁽²⁾, which pointedly illustrates, in a case of this class, the application of the doctrine of estoppel [His Lordship referred to the case].

The ratio then is to be found in this passage: "Now, I have not said he is bound by the judgment—I think he was not; but by his conduct after the judgment and under the judgment; knowing all the circumstances and deliberately taking the benefit of it, knowing that in a certain event that judgment might prove adverse to his material interests, he stood by, and by taking the money has acquiesced if ever a man could acquiesce."

The facts of this case fall far short of those on which Mr. Justice Chitty relied: for here there is absent the all important feature of an actual benefit, taken under the adjudication.

In this Court we have to take the rule of estoppel from section 115 of the Evidence Act, which provides:—

"Where one person has, by his declaration, act, or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing."

But there is nothing on the record to show that Lilbai's children have acted on a belief, created by the Advocate General.

Mr. Justice Chitty relies on the fact that Mr. Wilkinson could have asked under Order XVI, Rule 11, to be added as a party, but it is at least doubtful, whether on the date of hearing on the further directions, any such power existed in this Court. I think probably this Court would have followed the practice laid down in *Dyson v. Morris*⁽¹⁾. Be that, however, as it may, the

(1) (1842) 1 Hare 418 at p. 420.

(2) (1896) 2 Ch. 788 at p. 795.

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other alternative suggested is that Mr. Wilkinson could have brought his own action, and asked the Court to put a different construction on the will. But here the Advocate General has another action of his own, in which it is open to him to ask this of the Court, except that if the decision of Tyabji, J., stands, he is debarred from this course.

Then it is said that the Advocate General is making a stale claim, but if by that is meant something distinct from estoppel, then the answer appears to me to be that, unless the Advocate General is barred by limitation, he is not barred by the staleness of his claim, and it was not seriously argued before us, that limitation applies, having regard to pending proceedings.

To sum up the position, it comes to this: to *simplify and regularize* suit 370 of 1870, and therefore presumably for the convenience of the parties to that suit, the Advocate General is brought in by or with the consent of those parties: this appears to me to mean that the suit could not be disposed of without him, that the plaintiffs could not establish their right in his absence: therefore it was an omission on their part not to have made him a party from the first.

Now that the Advocate General comes in, he claims, rightly or wrongly, that the Court cannot decide in favour of the legacy, but he is not merely refused a hearing, he is told that he is for all purposes barred from urging his claim; so that if his contention be right, the Court will, with its eyes open, sanction the payment of funds under its control to persons not legally entitled thereto under the testator's will.

In my opinion, the Advocate General ought to be heard, and if he makes good his case, it will then be for the Court to determine what order to pass: whether it will under the circumstances of the case be right to determine the matter in this suit, or whether the Advocate General must be referred to other proceedings (*Cf. White v. Hall*⁽¹⁾).

But however this may be, I think the present order cannot stand, much as I sympathize with the considerations which influenced Mr. Justice Tyabji. The appeal must, therefore, be allowed, and the case must proceed for determination of the rights of the parties under the will and codicil.

(1) (1830) 1 Russ. & M. 332.

RUSSELL, J.—I have had the opportunity of reading the judgment of the learned Chief Justice herein and do not intend to go over the ground covered thereby and would not add anything to it, but as the order of Tyabji, J., is being reversed, and as I have had great difficulty in coming to a conclusion, I deemed it proper to write my opinion.

In the first place I have great doubts as to the propriety of the amendment of the proceedings allowed by the learned Judge in suit No. 370 of 1870. I am by no means satisfied that it is not an amendment, which “was intended to overreach” the present plaintiffs in that suit, to use the words of Bowen, L. J., in *Cropper v. Smith*⁽¹⁾. But that point is not before us on this appeal, and the amendment appears to have been made without objection on the part of the plaintiffs.

In the next place the only grounds on which the Advocate General could be precluded from raising his present contention, which is set out in paragraph 10 of his written statement dated the 17th July, 1902, as follows:—

“This defendant submits that the legacy in favour of Lilbai’s children in the plaint mentioned is wholly or partly invalid and incapable of taking effect inasmuch as it is in favour of a class which was not in existence at the death of the said testator, the plaintiff Karmali being the only one of Lilbai’s children who was born in the life-time of the testator and that therefore the whole or at least two-thirds of the residuary estate which might have been applicable to satisfy the said legacy should now and should always have been applied in and towards the maintenance of the said charity in favour of poor Khoja orphans and this defendant submits that the plaintiffs should refund all moneys, if any, received by them on the footing of the validity of the said legacy,”

would be either by (1) release, (2) by limitation, (3) by the doctrine of estoppel, (4) by the doctrine of election, as stated thus by Lord Blackburn in *Scarf v. Jardine*⁽²⁾; “The principle I take it running through all the cases as to what is an election is this, that where a party in his own mind has thought that he would choose one of two remedies, even though he has written it down on a memorandum or has indicated it in some other way, that alone will not bind him; but so soon as he has not only determined to follow one of his remedies, but has communicated it to the other side in such a way as to lead the opposite party to believe that

(1) (1884) 26 Ch. D., p. 710. (2) (1882) 7 App. Cas. 345 at pp. 360, 361.

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he has made that choice, he has completed his election and can go no further; and whether he intended it or not, if he has done an unequivocal act—I mean an act which would be justifiable if he had elected one way and would not be justifiable if he had elected the other way—the fact of his having done that unequivocal act, to the knowledge of the persons concerned, is an election.” (5) By laches, (6) by trust or breach of trust.

As to (1) there is and has been no release by the Advocate General and none such is suggested.

(2) There is no ground for saying, and it was not argued, that he is barred by limitation.

(3) As to estoppel, I do not think it can apply. Section 115 of the Evidence Act provides that “when one person has by his declaration, act or omission intentionally caused or permitted another person to believe the thing to be true and to act on that belief, neither he nor his representative shall be allowed in any suit or proceeding between himself and such person or his representative to deny the truth of that thing.” Upon the authorities, *Grish Chandra v. Iswar Chandra*⁽¹⁾ and *Muhammad Imam Ali Khan v. Sardar Husain Khan*⁽²⁾ any action on such belief must be to the detriment of the person acting, and in this case the children of Lilbai derived a benefit from their belief and did not suffer any detriment. The detriment suggested by Mr. Lowndes, that in consequence of the provision made for them by the will they had not learnt a business is not to my mind sufficient.

(4) As to election; at first it seemed to me that the doctrine as stated above by Lord Blackburn would apply. But it is to be observed that the many and various orders, whereby the children of Lilbai were directed to receive moneys on account of their legacy were made in suit No. 370 of 1870 to which the Advocate General was not a party and again it is settled that the Court will not decide on the construction of a will until due accounts have been taken: *Gaskell v. Holmes*⁽³⁾.

(5) As to laches, the Advocate General would be entitled to rely on that case and not consider himself bound to intervene till the accounts have been taken, he would be entitled to wait

(1) (1869) 3 Ben. L. R. 387 (A. J.)

(2) (1898) 25 I. A. 161, 175.

(3) (1844) 3 Haro p. 445.

till the residue had been ascertained, before he raised the question as to the ultimate destination of the residue. Nor has there been any admission by him of the plaintiff's title to the legacy.

As to (6) there is no trust, and therefore no breach of trust.

I am of opinion, therefore, that the order appealed from must be reversed and the case remitted to the learned Judge to be dealt with. Whether the executors, by allowing large sums to be paid in respect of a legacy, which the Advocate General, at their instance, contends is wholly or partially invalid, may not have laid themselves open to a charge of "Devastavit" is a question which may arise hereafter.

Order reversed.

Further evidence was taken by Russell, J., as to the respective ages of Lilbai's children, and on the 25th of September, 1903, the case came up for the construction of the testator's will.

Scott (Advocate General) and *Bailey* for the appellant.

The bequest to Lilbai and her children was a charge on the residuary estate. It is governed by the Hindu law, which does not allow successive estates: *Gnanasambanda v. Velu Pandaram*⁽¹⁾. The fact that Merali, Lilbai's son, was not in existence at the death of the testator, makes the bequest bad under section 102 of the Indian Succession Act⁽²⁾ and section 15 of the Transfer of Property Act⁽³⁾. The principle laid down in *Leake v. Robinson*⁽⁴⁾, cited in *Kumar Tarakeswar Roy v. Kumar Shoshi Shikhareswar*⁽⁵⁾, and followed by *Lord Selborne* in *Pearks v. Moseley*⁽⁶⁾, should be applied. The case of *Soudaminy Dossee v. Jogesh Chunder Dutt*⁽⁷⁾ shows that the principle of the English Courts is applicable to the interpretation of Hindu wills. Wilson J.'s observations in *Ram Lal Sett v. Kanai Lal Sett*⁽⁸⁾ were purely *obiter*. The case of *Manjamma v. Padmanabhayya*⁽⁹⁾ does not apply, because here there was no "persona designata." Bayley, J., in *Jairam v. Kaverbai*⁽¹⁰⁾, Tyabji, J., in *Khimji Jairam v. Mararji*⁽¹¹⁾ and Stanley, J., in

(1) (1899) 27 I. A. 69 at p. 73.

(2) Act X of 1865.

(3) Act IV of 1882.

(4) (1817) 2 Mer. 363 at p. 382.

(5) (1883) 10 I. A. 51 at p. 55.

(6) (1880) 5 App. Cas. 714 at p. 723.

(7) (1876) 2 Cal. 262.

(8) (1886) 12 Cal. 663.

(9) (1889) 12 Mad. 393.

(10) (1885) 9 Bom. 491 at p. 508.

(11) (1897) 22 Bom. 539.

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Rajomoyee Dasee v. Troylukho Mohiney⁽¹⁾ were all in favour of applying the principle of *Leake v. Robinson*.⁽²⁾

Lowndes, with *Raikes*, *Setalvad*, *Jardine* and *Jinnab* for the respondents.

This is a gift to a class. The class has been ascertained and the only question to be determined is, which of Lilbai's children were capable of taking the benefit under the will. Section 15 of the Transfer of Property Act⁽³⁾ does not apply, nor does section 102 of the Succession Act⁽⁴⁾: see *Rai Bisben Chand v. Mussumat Asmaida*⁽⁵⁾ and the judgment of Wilson, J., in *Ram Lal Sett v. Kanai Lal Sett*⁽⁶⁾, in which the learned judge expressed a doubt whether section 102 was applicable to Hindu wills: see, also, *Manjamma v. Padmanabhayya*⁽⁷⁾ and the judgment of Farran, J., in *Mangaldas v. Tribhuvandas*⁽⁸⁾, in which the judgment of Wilson, J., was referred to with approval. The rule in *Leake v. Robinson*⁽²⁾ was purely an *obiter dictum* and, in any event, an English rule of construction, which would defeat the primary object of the testator, would not be applicable to a Khoja Mahomedan will: see *Krishnarao Ramchandra v. Benabai*⁽⁹⁾, and the judgment of Starling, J., in *Morarji Cullianji v. Nenbai*⁽¹⁰⁾.

JENKINS, C. J.—Reversing Mr. Justice Tyabji's decision, we have already held that it is open to the Advocate General as representing the charities claiming under the will of the testator (notwithstanding the lapse of time that has passed since the original decree) to question the legacy in favour of Lilbai's children. The questions therefore for our decision now are: 1st, What is the true and legal meaning and effect of the gift in favour of Lilbai and her children? and 2ndly, Which of her children were in legal existence (whether actually born or not) at the death of the testator?

The testator, Khan Mahomed Habibbhoy, was a Khoja merchant of Bombay, who died on the 1st of October, 1864,

(1) (1901) 29 Cal. 260.

(2) (1817) 2 Mer. 363.

(3) Act IV of 1882.

(4) Act X of 1865.

(5) (1884) 11 F. A. 164.

(6) (1886) 12 Cal. 653 at p. 662.

(7) (1889) 12 Mad. 393.

(8) (1891) 15 Bom. 652.

(9) (1895) 20 Bom. 571 at p. 592.

(10) (1892) 17 Bom. 351.

leaving a will and codicil in the English language. He thereby gave his moveable and immoveable property to trustees and after directions for conversion and investment he declared that his trustees or trustee should become possessed of the residue of his moneys and estate upon trust among other things:

“ Out of the said interest and income to pay the sum of rupees one hundred and fifty per month, or apply the same to or for the benefit of my daughter Lilbai, and a like sum to or for the benefit of each of my other daughters who shall be either living at my death or born in due time afterwards, and amongst and for the benefit of the children of any such daughters of mine who shall die leaving children: provided always that such payment or application in the case of any female being the child of a daughter shall cease upon her death or marriage and in the case of a male being a child of a daughter shall cease upon his death, and so that upon the death of any male or the death and marriage of any such female entitled to receive or have applied any part of the said monthly sums respectively, the said sums respectively shall fall into or form part of my residuary estate. Provided also and I further declare that if any person entitled to the said monthly sum or sums of rupees one hundred and fifty respectively, or any part thereof, shall for the time being be under the age of twenty-one years, the said trustees of this my will may either themselves or himself pay or apply for the benefit of such person the amount becoming payable to him or her or applicable to his or her benefit, or may pay the same to his or her parent or guardian (if any) without seeing to the application thereof. Provided always and I further declare that in case I shall die without leaving male issue who under the trust hereinafter declared shall become absolutely entitled to my residuary estate, then and in such case and from the time that such failure of issue shall take place the monthly sum applicable out of the interest and income of my residuary estate under the trusts next hereinbefore contained, to or for the benefit of my daughter Lilbai and her children, shall be the sum of rupees two hundred and fifty instead of the sum of rupees one hundred and fifty.”

On the 9th of September, 1864, the testator executed a codicil to his will, and he thereby modified the bequest in favour of Lilbai and her children as follows:—

“ This is a codicil to the last will and testament of me Khan Mahomed Habibbhoy, which will bears date as above the fourth day of September one thousand eight hundred and sixty-four. Whereas by my said Will I have created a trust for my daughter Lilbai and her children that in case I should die without leaving male issue, who under the trust therein declared should become absolutely entitled to my residuary estate, then and in such case and from the time that such failure of issue should take place the sum of rupees two hundred and fifty out of the interest and income of my residuary estate shall be paid to or for the benefit of my daughter Lilbai and her children. Now

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I revoke my said will so far as the said trust or direction is concerned or is the object thereof, and in its stead or place I direct that the trustees or the trustee or the survivor of them, their heirs or executors, shall, in the event of my death without leaving male issue, or from the time that such failure of issue shall take place, pay to or for the benefit of the said Lilbai and her children the monthly sum of rupees one thousand out of the interest or income of my residuary estate, and that the provisions contained in the foregoing will, so far as they direct the mode of distribution of the sum payable to Lilbai in her life-time and among her children, male and female, after her death, are applicable to the said sum of rupees one thousand herein mentioned."

Lilbai survived the testator and the three plaintiffs are her sons. Of them, Karmali was unquestionably born in the testator's life-time. Merali was born after the testator's death; but it is one of the questions in the suit, whether at the testator's death Ibrahim had been conceived or not. There were other children of Lilbai, but with them in the circumstances of the case we have no concern. These facts have given rise to the discussion before us whether or not the bequest in favour of Lilbai's children is wholly void under the rule in *Leake v. Robinson*⁽¹⁾.

But before we come to the question of construction, it is necessary first to consider briefly the testamentary capacity of the testator. He was, as I have said, a Khoja of Bombay, and although the community, of which he is a member, may popularly be reckoned Mahomedan, in some respects the civil rights of a Khoja are determined by the law governing Hindus in this Presidency; thus it is well established that on an intestacy the devolution of a Khoja's property is governed by the Hindu law. But here we have not an intestacy, but a disposition by will, and so we must determine the measure of a Khoja's testamentary capacity. In a recent case before this Court it was held on evidence there adduced that the law applicable to Hindus governed, and in this case it is agreed on all sides that this conclusion is sanctioned by the custom that prevails in Bombay. It is common knowledge in legal circles that Khojas continually make their wills, as though they had the testamentary capacity of a Hindu; and counsel in this case, whose experience is of the widest, have informed the Court that they do not desire any issue to be raised on the point, for all parties are at one that

(1) (1817) 2 Mer. 208.

this will must be construed on the basis of the testator having the testamentary powers of a Hindu resident of Bombay.

Let us then first consider how far the rule in *Leake v. Robinson*⁽¹⁾ has anything to do with the determination of the true construction of the will in this case. Those who rely on that case as an authority in their favour maintain that as a result of it the gift to the children of Lilbai is bad, as it is a gift to a class which includes those not born in the life-time of the testator. On the other side it is argued that *Leake v. Robinson*⁽¹⁾ has no force in India. It is necessary therefore in the first place to see what precisely is the gift in this case. Now if this depended on the words of the will alone, it might have been contended (though not necessarily with success) that the gift to children was substitutionary, and was in favour only of those children whose parents had died in the life-time of the testator, and that as a consequence it took effect immediately on the death of the testator. But the codicil shows that this was not the testator's meaning, and that he contemplated that Lilbai, and, after her death, her children should take. Starting then with this we have to see whether the gift to children included only those who were alive at the testator's death, or extended also to those who were alive at Lilbai's death. The former view would apparently be opposed to the English cases, but there would seem to be some warrant for it in the decision of Sir Barnes Peacock, C. J., and Macpherson, J., in *Krishnaramani Dasi v. Ananda Krishna Bose*⁽²⁾. But for the sake of argument I will accept the Advocate General's contention that the class of children was to be determined at the death of Lilbai. This hypothesis invites a consideration of the rule in *Leake v. Robinson*⁽¹⁾ and its operation.

It was there decided that where in a gift to a class all the shares cannot be ascertained within the period allowed by the law of remoteness the whole gift fails, and the ground would appear to be that it is a gift to the class, not merely to the individuals of which it is composed, and so, from inability to ascertain earlier the object of the gift the vesting of that given is

(1) (1817) 2 Mer. 363.

(2) (1869) 4 Ben. L. R. 231 (O. J.)

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delayed beyond the limits prescribed by law. The first question therefore is not whether the rule in *Leake v. Robinson*⁽¹⁾ holds good in India, but whether it applies to the circumstances of this case.

The gift here does not offend the rule against perpetuities: there is no delay in vesting; the vice is that the class includes those not in existence at the date of the testator's death. But that (in my opinion) is a defect essentially distinct from an infringement of the law of remoteness; indeed a passage in Sir William Grant's judgment appears to indicate as much; for he points out that there all included in the description were equally capable of taking. But that is just where the gift now under consideration differs: all those included in the description in this will are not equally capable of taking; for to those not in existence at the testator's death no gift could be made: they labour under a personal incapacity. So we have to determine the effect of a gift to a class some of whom are personally incapable of taking. Now if we have recourse to the English authorities it seems clear that to such a case the rule of *Leake v. Robinson*⁽¹⁾ has no application. Thus if a gift to several jointly, be void as to one, the others take the whole. This is aptly illustrated by *Dowset v. Sweet*⁽²⁾ and *Young v. Davies*⁽³⁾. If it be objected that this result in these two cases is founded upon the principle of survivorship which is an incident of joint tenancy, while here under the rule laid down in *Bai Diwali v. Patel Becharadas*⁽⁴⁾ and the cases there cited survivorship has no place, the answer is that though here there may not be the incidents of joint tenancy, still the children, take as a class and the members of that class capable of taking at the time of distribution are entitled to the whole of the gift whatever may be their number: *Shaw v. M'Mahon*⁽⁵⁾ and *Fell v. Biddolph*⁽⁶⁾. This appears to me to be necessarily involved in the conception of a gift to class where the testator looks to the body as a whole, rather than to the members constituting the body as individuals (see Per Lord

(1) (1817) 2 Mer. 363.

(2) (1753) 1 Amb. 175.

(3) (1863) 2 Dr. & Sm. 167.

(4) (1902) 26 Bom. 445; 4 Bom. L. R. 102.

(5) (1843) 4 Dr. & War. 431.

(6) (1875) L. R. 10 C. P. 701.

Macnaghten in *Kingsbury v. Walter*⁽¹⁾. So far therefore I am against the Advocate General's claim, but this does not exhaust his contentions for he has addressed us an argument on the basis of the Succession Act, not suggesting that the Act directly governs the present will, but that sections 100 and 102 embody a rule of law, which, independently of the Act, applies to a Khoja testator's testamentary dispositions. But even making this assumption I still think that it would not invalidate the gift to Lilbai's children.

Now it is to be noticed that the benefits in favour of Lilbai and her children are by way of annuity, not without limit as to time, but terminable, and that the gift is of an annuity or annuities not before existing. Lord Cottenham in *Blewitt v. Roberts*⁽²⁾ thus defines such an annuity, "in the ordinary acceptation of the terms," he says, "if the gift amount to a gift of a positive annuity of £100 a year, no doubt the gift being an annuity to the donee for life, it is a gift of as many hundred pounds as the donee should live years."

Applying those remarks here can it be said that the gift to Lilbai's children is a bequest that does not comprise the whole of the remaining interest of the testator in the thing bequeathed? I think not: we have not here the carving out of successive interests in an existing subject matter, but in Lord Cottenham's view successive gifts of sums of money whose number is determined by the period of time over which they may extend: successive pecuniary legacies payable out of a demonstrated fund, which as to each sum comprises the whole of the interest of the testator in it.

My conclusion therefore on the meaning and effect of the will and codicil is that there is a gift to a class, and that if (as the Advocate General contends and I think is the true view) the class is to be determined at Lilbai's death, those members of the class at that time, who were capable of being donees, take the whole, that is to say, in the circumstances of this case, as against the Advocate General's clients, such of Lilbai's children as were in existence at the testator's death are entitled to the annuity.

(1) (1901) A. C. 187 at p. 191.

(2) (1841) 10 L. J. Ch. 342 at p. 343.

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This brings me to the question which of the children answer that description? Here the only doubt is as to Ibrahim, and for him it is contended that though not born, he was conceived at the testator's death. The onus of establishing this lies on him and in my opinion he has failed in discharging it. What are the proofs adduced? First there is the statement in para. 11 of the plaint in suit 370 of 1870 filed on the 3rd of May, 1870, in which it is said:

"The ages of the infant defendants are as follows: the defendant Karmali is eight years of age, the defendant Ibrahim, six years, the defendant Meharali, ix months old, and the defendant Rahimatbhai, three years of age."

Then in para. 13 of the affidavit of Rahimbhai Dharamsi, the present plaintiff's father, in that suit, affirmed on the 23rd of June, 1870, it is said:

That the ages of the plaintiffs Karmali, Ibrahim, Meharali and Rahimatbhai are as follows:—The plaintiff Karmali is eight years of age, the plaintiff Ibrahim, six years, the plaintiff Meharali, six months old, and the plaintiff Rahimatbhai, three years of age.

Then in para. 6 of the affidavit of Kazbai, affirmed in the same suit on the 18th of February, 1876, it is said:

That from the date last aforesaid the said infant defendants have been living with me and under my protection. They are still minors, the said Karmali Rahimbhai being 14 years of age, the said Ibrahim Rahimbhai being 12 years of age, the said Meharali Rahimbhai being 6 years of age, and Rahimat being 9 years of age.

In para. 7 of Kazbai's affidavit, affirmed in that suit on the 8th of May, 1876, it is said:

That from the date last aforesaid the infant plaintiffs have been living with me and under my protection. They are still minors, the said Karmali Rahimbhai being fourteen years of age, the said Ibrahim Rahimbhai being twelve years of age, the said Meharali Rahimbhai being six years of age, and the said Rahimatbhai being nine years of age.

And in para. 8 of the affidavit of Kazbai, affirmed in that suit on the 12th of January, 1883, it is said:

That Ibrahim, one of the plaintiffs, is 18 years of age, and he has requested me this deponent to get him married, as according to the custom of the Khoja caste, boys of his age and very often under that age are married, I did not think it proper to displease him by refusing to accede to his request, and in order to

accomplish such his wish on the subject I have entered into a marriage contract on his behalf as his guardian with one Dossabhoy Mowji for the marriage of the said Ibrahim with his niece Rahimatbai who is the daughter of one Hassain Mowji, deceased. The said Rahimatbai is about 14 years of age and the marriage is fixed to take place in the month of February next.

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Statements of this class have been treated as admissible by the Courts in India and relevant to the question of age, and the Advocate General has conceded that in this Court—whatever may be the case elsewhere—we are bound by this course of decision.

Mr. Lowndes also has relied on the inferences suggested by an entry in an account book which states that Rahimatbai, the father, started for Hongkong on the 15th of June, 1864.

The Advocate General, on the other hand, relies, 1st on three entries in the account books relating to the birth of children. It thus appears that on the 10th October, 1862, Rs. 125 were paid on account of the Chhathi ceremony of Lilbai's child: this according to Wilson's glossary being a ceremony performed a few days, from 6 to 9, after the birth of a child among Mahomedans. The child in question was Karmali. Then we find from an entry of the 4th February, 1864, that Rs. 100 were paid on the 6th day after Lilbai gave birth to a son. This was Peer Mahomed, who has died. On the 4th of March, 1866, there is an entry in these terms:

(1)

Peace! Prosperity! The 9th of Fagan Vad of Samvat and 1922 the day of the week Sunday the English date the 11th of March in the year 1866.

(2)

Debited to the profit and loss account Rs. 125, namely, Rupees one hundred and twenty-five, on account as follows:—Bai Lilbai, the daughter of Bhai Khan Mahomed Habibbhai, a denizen of paradise, got (gave birth to) a son. Bai Kazbai, the wife of Bhai Khan Mahomed, received (the amount) for the purpose of giving (making a present of) it to him by the hands of Bhai Khimji Rowji who paid the same and came away Rs. 125-0-0

It is contended by the Advocate General that this was a payment made on the occasion of Ibrahim's birth, and for this purpose he argues that there was no other son to whom it could have applied, and he points to Ahmedbhoy Habibbhoy's evidence.

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On the other side it is contended that even if it refers to Ibrahim there is nothing to show that the payment was made in connection with the Chhathi ceremony, and it is pointed out that no payment of that kind is recorded as made in connection with the birth of any younger children of the family.

This then is the evidence on which we are asked to hold that Ibrahim had been conceived on the 4th of October, 1864.

It seems to me impossible to treat the statement of Ibrahim's age in the documents on which reliance has been placed as establishing this when it is borne in mind that Peer Mahomed was born 1 year and 4 months after Karmali, *i. e.*, in February, 1864, and that the father left Bombay in June, 1864, and more especially when regard is had to the payment of Rs. 125 on the 11th March, 1866, which appears to me to point to a payment in connection with Ibrahim's birth.

Hence I hold Ibrahim has not established that he was in legal existence at the testator's death.

RUSSELL, J.:—Upon the question of fact in this case which has been placed before us, *viz.*, whether Ibrahim was *en ventre sa mere* at the time of the testator's death, I am of opinion that he has failed to prove that he was.

The following then are the material dates to be borne in mind:—

About the 10th October, 1862, Karmali born.

4th February, 1864, Pir Mahomed born but died.

4th September, 1864, Testator's will.

9th September, 1864, Codicil thereto.

24th October, 1864, Testator died.

1866, Ibrahim probably born.

1867, Rahimatbai born.

1869, Meharali born.

16th January, 1881, Rahimatbai married.

Judgment in the Tagore case was delivered by the Privy Council on the 5th July, 1872.

[His Lordship, after referring to the material clauses of the will and the codicil, went on—]

The codicil being the last of the two documents is the chief thing to be considered. From that it is clear that what the

testator intended to create was a trust for the benefit of Lilbai and her children. He then goes on: "I direct that the provision contained in the foregoing will, as far as they direct the mode of distribution of the sum payable to Lilbai in her lifetime and among her children, male and female, after her death, are applicable to the said sum of Rs. 1,000." Now one of the provisions of the will is as follows:

"Provided also, and I further declare, that if any person entitled to the said monthly sum or sums of Rs. 150 respectively, or any part thereof, shall for the time being be under the age of twenty-one years, the said Trustees of this my will may either themselves or himself pay or apply for the benefit of such person the amount becoming payable to him or her or applicable to his or her benefit, or may pay the same to his or her parent or guardian (if any) without seeing to the application thereof."

The testator here contemplates one person being entitled. Assume that Karmali has now reached the age of 21 years and was applying for the Rs. 1,000 to be paid to his guardian for his benefit. Could it be said, looking at the words in the will, that as he had brothers and sisters born after the testator's death he was entitled to nothing?

I would refer to the words of Rolfe B. in *Dungannon v. Smith*⁽¹⁾ where he says: "The reason why a gift to a class, as children or the like, is void when it may embrace some objects too remote is this:—there is no intention to give to any number short of the whole class: and, therefore, if the prescribed limit *may* be transgressed before the class is filled up, the whole gift fails, because it does not necessarily take effect within the prescribed period." And in *In re Bevan's Trusts*⁽²⁾, Kay, J., held that the general rule of *Leake v. Robinson*⁽³⁾ has been made to give way, if there are particular indications of a contrary intention.

In the present case in my opinion the testator expressed his intention to charge the residue in favour of one or more, less than the whole class.

The words of the present will are very like those used in *In re Morgan*⁽⁴⁾ where it was held that the gift was "a gift to charity subject to provisions for nephews and nieces." Here the testator

(1) (1846) 12 Cl. and F. 546 at p. 575.

(3) (1817) 2 Mer. 361.

(2) (1887) 34 Ch. D. 716 at pp. 718, 719.

(4) (1893) 3 Ch. 222 at p. 227.

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has made provision in certain events for one person entitled as I have pointed out above.

As I have mentioned, the *Tagore* case was not decided till July, 1872, and it was conceded in this, as in a previous case before this Court, that the will of a Khoja in Bombay must be construed according to Hindu law. The word "entitled" in the will therefore must be read as "entitled according to Hindu Law" as existing in 1864 though not perhaps formulated expressly on this point till July, 1872.

If this be so the cases cited by the learned Chief Justice, viz., *Young v. Davies*⁽¹⁾ and *Fell v. Biddolph*⁽²⁾ are directly applicable. I need not refer to them at length.

This being so, the true meaning of this will is that the Rs. 1,000 per month is a charge upon the residue in favour of Lilbai during her life for the benefit of her and her children or child and after her death for such of her children or child as are entitled thereto according to Hindu Law, i. e., the children in existence at the testator's death, provided there are such children or a child then in existence. See *In re Powell*⁽³⁾ and the cases there cited.

In cases like the present I think it is desirable to bear in mind the words of Lord Brougham in *Langston v. Langston*⁽⁴⁾ :

"There are two modes of reading an instrument: where the one destroys and the other preserves, it is the rule of law, and of equity, following the law in this respect . . . that you should rather lean towards that construction which preserves, than towards that which destroys."

I therefore concur in the judgment just pronounced.

Attorneys for the appellant (defendant)—*Messrs. Craigie, Lynch and Owen.*

Attorneys for the respondents (plaintiffs)—*Messrs. Wadia, Gandhi & Co. and Messrs. Thakurdas & Co.*

A. H. S. A.

(1) (1863) 2 Dr. & Sm. 167.

(2) (1875) L. R. 10 C. P. 701.

(3) (1898) 1 Ch. 227.

(4) (1834) 2 Cl. & F. 194 at p. 243.