APPELLATE CIVIL.

Before Mr. Justice Russell and Mr. Justice Aston.

HARILAL BAPUJI AND OTHERS (ORIGINAL DEFENDANTS), APPELLANTS, *v.* BAI MANI (ORIGINAL PLAINTIFF), RESPONDENT.* 1905. *February* 6.

Hindu Law—Ancestral property—Trust by the father—Trusts Act (II of 1882), section 6—Will—Executors—Legatees.

A Hindu, who had a son living jointly with him, made a will whereby he appointed his son as heir to his whole property, which was ancestral, and also appointed trustees in order to administer the property until his son should attain 21 years. The trustees were empowered to take the whole of the property into their possession:

Held, that the appointment of trustees was void since at the moment of the testator's death the whole of the property became the property of the son.

Held, further, that no trust was created by the will because the property in question was not one transferrable to the beneficiary.

Certain legacies were devised by the will to relatives of the testator and others.

Held, that as the Court had held that the appellants were not validly appointed executors, the legatees were not represented by them and no declaration could be made as to the validity or otherwise of the legacies.

SECOND APPEAL from the decision of C. E. Palmer, Assistant Judge at Ahmedabad, reversing the decree passed by Vadilal T. Parekh, Joint Subordinate Judge at Ahmedabad.

Suit for declaration that a will was null and void.

One Chamanlal Varajbhukhan died on the 6th November 1902, having before his death made a will on the 3rd November 1902. He left him surviving his widow (the next friend of the plaintiff) and a son Ranchhod (the plaintiff) by her. Chamanlal and Ranchhod were living united, and the property of the family was ancestral.

By his will Chamanlal purported to leave the whole property to his son Ranchhod. The defendants were appointed trustees to manage the property during the minority of the son; and for this purpose they were authorized to take the property into their possession.

* Second appeal No. 536 of 1904.

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The material provisions of the will were as follows:—

"I appoint as my sole heir my son Ranchhod, who is two years old, and, therefore, I appoint three trustees (executors).....to administer my property until my son attains the age of majority. The trustees have full right to obtain possession of my property and to manage it as hereinafter mentioned. They should perform ceremonies after me according to my respect and should spend money in charity as mentioned in the list made. They should annually give maintenance at Rs. 175 to my two wives Narbada and Chanchal, who should agreeably live in my house. If they do not agreeably live together, Narbada should get Rs. 75 per year and a *meda* to live in. My new wife Chanchal should live in my house and should get Rs. 100 annually for her maintenance and for that of my son. My father has given ornaments worth Rs. 800 to my sister Mani, who should get Rs. 25 annually for her clothing. Rs. 1,000 should also be paid to her. But if she dies childless, my son is to inherit the ornaments and money. Rs. 25 should be paid to Fakira and Rs. 50 to Shoma Ranchhod. Expenses for the marriage of my son should be made according to my respect. It is better if Chanchal does not contract a *nâtrâ* (remarriage). But if she contracts a *nâtrâ* according to the custom of the caste, the trustees should take care of my son and spend necessary money. The trustees should spend money in educating my son and are empowered to give an additional sum, should the maintenance allowed for my son and his mother be found to be insufficient. The trustees have a right to sell any portion of my property and to purchase new property if necessary..... They should make over all my property to my son on his attaining the age of twenty-one years, and he has a right to dispose it off according to his wishes. If, however, my son dies childless, my sister Mani should inherit all the property in possession of the trustees and my son. If my sister Mani has no issue, the trustees should give adequate sums to her and my wives for the expenses of pilgrimages, and should spend the balance in giving scholarships to poor boys for their education."

Bai Mani (*alias* Chanchal) filed this suit on behalf of her minor son Ranchhod, to obtain a declaration that the will was null and void and also a perpetual injunction against the defendants restraining them from administering the property of the deceased.

The Subordinate Judge held that the deceased had authority, according to law, to make the will and that the will was not void. He, therefore, dismissed the plaintiff's suit with costs.

On appeal the Assistant Judge reversed the decree passed by the Subordinate Judge, and held that although the will of Chimanlal was duly proved, it was wholly void in law. He granted the declaration and injunction prayed for. The reasons for his decision were as follows:—

"The parties admit that, following I. L. R. 10 Bom. 528, if property be ancestral property and it passes to the next heir under a will, that person takes it as ancestral and not as self-acquired property. The deceased Chimanlal got his father Varajbhukan's property under the will (Exhibit 54) which is proved by the writer Keshavlal (Exhibit 58) and an attesting witness Dolatram (Exhibit 59). The latter states that Varajbhukan's property had descended to him from his father Vandravandas. This fact is not seriously questioned in this Court. The necessary conclusion, therefore, is that the property obtained by the deceased Chimanlal under the will was ancestral property and its character was unaffected by the fact that Varajbhukan made a will. Following I. L. R. 12 Bom. 105, 621, Chimanlal's will is inoperative as regards this ancestral property. This ancestral property with the balance of the property, if any, acquired by Chimanlal was undivided family property in which the minor Ranchhod was a co-parcener with his father Chimanlal. Therefore Chimanlal had no right to dispose of any of it by will (*vide* 3 Bom. H. C. A. C. J. pp. 6—9). There is nothing on the record to show that any of Chimanlal's property was wholly acquired by his own exertions, so I can only hold that the will, in so far as it purports to dispose of the property, is void.

The pleader for the respondents contends that though certain provisions of the will may be void, the whole will should not necessarily be set aside as void. The only clauses that are void are the gift to Mani, which might, however, following 6 Bom. L. R. 269, be allowed, as it is a reasonable gift to a near relative and the reversion of the property to Mani. Before the gift to Mani is set aside she ought to be made a party. The guardians appointed by the will are proper, and plaintiff being the next heir, though she is minor's mother, and is still in charge of him, is unfit to be his guardian.

I cannot hold that these are satisfactory reasons for declaring a portion of the will void."

Inverarity (with him *L. A. Shah*), for the appellants (defendants) :—We submit that though the will purports to deal with the ancestral property of the testator, it is not wholly void. It may be that the plaintiff does not take under the will, but by survivorship. But the provision appointing the defendants as trustees to administer the property during the minority of the plaintiff (testator's son) is valid. The will in effect appoints the defendants to be guardians of the property of the minor. A Hindu father has a perfect right to appoint guardians of his son by a will. Section 6 of the Guardians and Wards' Act (VIII of 1890) clearly contemplates the testamentary appointment of a guardian. See also *Soobah Pirthee Lal Jha* v. *Soobah Doorgah Lal Jha* [1]. The provisions relating to legacies to the testator's

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sister and other relations are valid, as being gifts to near relatives out of affection (*Bachoo* v. *Mankorbai*[1]). The legatees are not parties to this suit and the Court cannot make any declaration regarding their rights in their absence. The declaration as to the whole will being void is, therefore, wrong. In *Hanmant* v. *Bhimacharya*[2], the declaration was confined to the provision of the will so far as it affected the devolution of the property. No injunction should have been granted by the lower Appellate Court.

C. H. Setalvad (with him *K. M. Jhaveri*), for the respondent (plaintiff):—The property being ancestral, the testator had no right to make any will. The will appoints the defendants trustees of the testator's property and not guardians of the minor's property. The case of *Soobah Pirthee Lal Jha* v. *Soobah Doorgah Lal Jha*[3] has no application. All the legacies are void and the declaration that the whole will is null and void ought to stand.

Mr. *Inverarity* was heard in reply.

RUSSELL, J.—The plaintiff herein sued for a declaration that the will said to have been made by deceased Chimanlal Varajbhukhan on the 3rd November 1902 is null and void. The three defendants were appointed trustees of the will. The lower Appellate Court declared that the said will was null and void.

It was argued before us for the appellants-trustees that there was a valid appointment of themselves as guardians of the minor son of the deceased and that certain legacies were validly bequeathed. The will, so far as it is material, begins by saying that in order that the property acquired from the testator's father, which was belonging to him (the testator), might not be wasted after his death, and in order to make a disposition of the same after his death, he made his testamentary writing. After giving particulars of his moveable and immoveable property, the will goes on to appoint in the event of the testator's death, his son Ranchhod to be the heir of his whole property; and it

(1) (1904) 6 Bom. L. R. 268. (2) (1887) 12 Bom. 105.
(3) (1867) 7 W. R. 73.

appoints the three appellants trustees in order to administer his property until his son Ranchhod reaches the age of majority. It goes on to say, "my Trustees shall take the whole of the property in their possession and administer the same, as if with full power, and get my son Ranchhod married; and as to any outlay that may be required for the education and training of my son Ranchhod, my trustees shall make the same and increase the same, if necessary, in addition to what he has mentioned for the expenses of my son and his mother." Then it continues that when his son Ranchhod shall reach the age of 21 years, his trustees may hand over to him whatever property there may be belonging to the testator, and that his son is to do whatever he likes with the property that there may be belonging to him (testator). From these extracts from the will it is apparent that the testator did not appoint the appellants the guardians of his son *eo nomine* but appointed them trustees of his property till his son should come of age. The property was clearly ancestral and the question arises, whether the testator could appoint trustees in the way he has done.

In the first place, it must be remembered, that by section 8, Indian Trusts Act (II of 1882), the subject-matter of the trust must be property transferable to the beneficiary. It is impossible to say that the property comprised in this will comes within such category.

As said by Mr. Mayne, at page 537 (6th edition), "a member of an undivided family cannot bequeath even his own share of the joint property because, at the moment of death, the right by survivorship is at conflict with the right by devise. Then the title by survivorship, being the prior title, takes precedence to the exclusion of that by devise." Accordingly, therefore, at the moment of the testator's death, the whole of his property was and became the property of his son, and was not property transferable to the son. As Mr. Mayne further says, the same result is arrived at by legislation. Section 3 of Act XXI of 1870, Hindu Wills Act, provides that "nothing herein contained shall authorize a testator to bequeath property which he could not have alienated *inter vivos*, or to deprive any persons of any right of maintenance of which but for section 2 (the extending

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section) of this Act, he could not deprive them by will.....and that nothing herein contained shall affect any law of adoption or intestate succession."

The Probate and Administration Act (V of 1881), which also applies to Hindus, provides by section 4 "that nothing herein contained shall vest in an executor or administrator any property of a deceased person which would otherwise have passed by survivorship to some other person."

Of course it may be that if the testator had appointed the appellants guardians, the case of *Soobah Doorgah Lal Jha* v. *Rajah Neelanund Singh* (1) would apply, although in that case, the actual words are not reported. That case referred to joint property; but having regard to the principles we have referred above, and to the fact that the appellants are not appointed guardians, we must declare the will null and void.

With regard to the legacies, the will devised as follows:—

"To my sister Mani my father has given ornaments of the value of Rs. 800, nobody has any claim to the same and Rs. 25 shall be paid to my sister every year for her clothes and Rs. 1,000 shall be paid to my sister Mani. Should she die without issue my son Ranchhod is owner of the ornaments and moneys. After my death 25 rupees shall be paid to my coachman and 50 rupees to one Soma Ranchhod."

These legatees were not represented before us. In accordance with what we have held above, the appellants were not validly appointed trustees and in the will they are not appointed executors. It is, therefore, impossible for us in the present proceedings to decide whether or not these legatees are entitled to their legacies.

Under these circumstances we must vary the decree of the lower appellate Court by excluding from the declaration any decision as to the validity of the legacies to legatees not parties to this suit, namely, Mani and Soma Ranchhod and the coachman; for, we are unable to decide in the present proceedings in the absence of the legatees whether the will is void as regards the legacies.

As to costs, the costs of both parties must come out of the estate, as between attorney and client, except as to this appeal.

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The lower appellate Court was in error in making the appellants pay the costs. They were placed in the position in which they are by the testator's own act and in accordance with the usual rule ought to get their costs as between attorney and clients. As to this appeal, however, they must bear their own costs. The respondent will get her costs of this appeal out of this estate.

R. R.

Decree varied.

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Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Aston.

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DINKAR ANANT DONGRE AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* NARAYAN BHALWAJA LOHAR AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Easements Act (V of 1882), section 7, illustration (J)—Stream—Usufruct—Riparian owner—Right to use and consume water without material injury to other like owners.

With respect to riparian owners the law is that each such owner has a right to the usufruct of the stream which passes through his land. The right is not an absolute and exclusive right to the flow of the water in its natural state, but to the flow of the water and the enjoyment of it subject to the similar rights of all the proprietors of the banks on each side to the reasonable enjoyment of the same gift of Providence.

Embrey v. *Owen* (1) followed.

Section 7, illustration (J), of the Easements Act (V of 1882) shows that a riparian owner has the right to use and consume water for irrigating the land abutting on a natural stream, provided that he does not thereby cause material injury to other like owners.

SECOND appeal from the decision of H. Page, Acting District Judge of Ratnágiri, reversing the decree of Mahadev Shridhar, First Class Subordinate Judge.

The plaintiffs and defendants were riparian owners and the holding of the defendants was higher up the stream than the plaintiffs'. In the year 1901 the plaintiffs brought the present suit to obtain an injunction restraining the defendants from

* Second appeal No. 703 of 1903.

(1) (1851) 6 Exch. 353.