

evidence to support his finding. Their Lordships think there was ample evidence to support the finding of the learned Judge and that his conclusion from that finding is correct. That finding and that conclusion are thus stated:—"The defendants two and three (the mortgagees) by themselves or their agents so conducted themselves with reference to this sale that would-be bidders at it were induced to leave. The plaintiff (the purchaser) had notice of those circumstances, using the word notice as it is defined in the Transfer of Property Act. He therefore bought at his peril, and as the sale was not a *bond fide* auction sale it must be set aside."

For the foregoing reasons their Lordships will humbly advise His Majesty that the appeal should be dismissed. The appellant will pay the costs of the first respondent, and the mortgagees will bear their own costs.

Appeal dismissed.

Solicitors for the appellant: *T. L. Wilson & Co.*

Solicitors for the respondent Dayal Mowji: *Payne & Lattey.*

Solicitors for the mortgagees respondents: *Ashurst, Morris, Crisp & Co.*

J. V. W.

ORIGINAL CIVIL.

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

TRIKUMDAS DAMODHAR AND OTHERS (PLAINTIFFS) v. HARIDAS
MORARJI AND OTHERS (DEFENDANTS)*

1907.
March 5.

*Construction of will—Uncertainty—Bequest for purposes of popular usefulness
or for purposes of charity.*

By her will N. after making various bequests bequeathed the residue of her estate as follows:—

"As to whatever immoveable (and) moveable (property) and property in cash belonging to me may be in excess or may remain over as surplus after a disposition shall have been made in accordance with what is stated in the clauses

* Original Suit No. 113 of 1906: Appeal No. 1461.

1907.

TRIKUMDAS
DAMODHAR
v.
HARIDAS.

above written, my abovementioned six executors are to make use of the same in such manner as they may unanimously think proper for purposes of popular usefulness or for purposes of "charity." And I give to them (*i. e.*) my abovementioned trustees full authority to use the same in that manner."

Held, that the gift of the residue was bad for uncertainty.

Runchordas v. Parvatibai⁽¹⁾ relied on.

THE plaintiffs filed this suit for the construction of the will of one Bai Nanabai and for the administration of her estate. The said Bai Nanabai was at her death entitled to a half share in three immoveable properties.

The 5th clause of the said will by which the testatrix purported to dispose of the residue of her estate was as follows:—

As to whatever immoveable (and) moveable (property) and property in cash belonging to me may be in excess or may remain over as surplus after a disposition shall have been made in accordance with what is stated in the clauses above written, my above mentioned six executors are to make use of the same in such manner as they may unanimously think proper for purposes of popular usefulness as for purposes of "charity." And I give to them (*i. e.*) my abovementioned trustees full authority to use (the same) in that manner.

The plaintiffs contended that the said clause was void and inoperative for uncertainty, and if so, they, as her heirs, were entitled to a moiety of her residuary estate.

The defendants 1 and 2 were the surviving executors of Bai Nanabai. The defendants 3 to 6 were the heirs of Morarji Callianji, who was a brother of Nanabai and the managing executor during his life-time. They were made parties for the purpose of making full discovery of the assets and properties of her estate. Defendant No. 7 was an heir of Nanabai in case of intestacy and entitled to the other moiety. The 8th defendant was the Advocate General.

Chandavarkar, J., held that the residuary bequest contained in the said clause was void for vagueness, and that the surplus contemplated by the said clause went to the heirs of Nanabai, and found that both the plaintiffs were entitled, as heirs, to a half of the said residue, and that the plaintiff and the 7th defendant were the heirs of the said Nanabai.

(1) (1899) 23 Bom. 725.

The Judgment of Chandavarkar, J., was as follows:—

CHANDAVARKAR, J.—The fifth clause which I have to construe in the will before me runs as follows:—

“As to whatever immoveable (and) moveable (property) in cash belonging to me may be in excess or may remain over as surplus after a disposition shall have been made in accordance with what is stated in the clauses above written, my above-mentioned six executors are to make use of the same in such manner as they may unanimously think proper for purposes of popular usefulness or for purposes of ‘charity’. And I give to them (*i. e.*) my abovementioned trustees full authority to use (the same) in that manner.”

There can be no doubt upon the authorities that the bequest “for purposes of popular usefulness or for purposes of charity” is void for uncertainty. As was pointed out by Lord Davey in *Hunter v. Attorney-General*⁽¹⁾, “there is a long series of cases extending from *Morice v. Bishop of Durham*⁽²⁾, decided by Sir William Grant and Lord Eldon, to *In re Macduff*⁽³⁾, decided by the Court of Appeal in 1896, and including two decisions of Lord Cottenham. In these cases it has been held that where charitable purposes are mixed up with other purposes of such a shadowy and indefinite nature that the Court cannot execute them (such as ‘charitable or benevolent,’ or ‘charitable or philanthropic,’ or ‘charitable or pious’ purposes), or where the description includes purposes which may or may not be charitable (such as ‘undertakings of public utility’), and a discretion is vested in the trustees, the whole gift fails for uncertainty.” In *Blair v. Duncan*⁽⁴⁾, a testatrix by her codicil directed that one-half of the residue of her estate should be applied for “such charitable or public purposes as my trustee thinks proper”. It was held that these words must be read disjunctively, and, whether according to the law of England or the law of Scotland “the disposition here given to A. B., to determine what particular public purposes should be the objects of the trust, is too vague and uncertain for any Court either in England or Scotland to administer.”

(1) [1899] A. C. 309 at p. 323.

(2) [1896] 2 Ch. 451.

(3) (1804) 9 Ves. 399; 10 Ves. 522.

(4) [1902] A. C. 37 at p. 42.

1907.

TRIKUMDAS
DAMODHAR
HARIDAS.

1907.

TRIKUMDAS
DAMODHAR
v.
HARIDAS.

But it is contended by the executors before me that the words "for purposes of popular usefulness or for purposes of charity" in the fifth clause should not be read disjunctively and that the word "or" means "that is", being simply explanatory of "purposes of popular usefulness." According to the contention, those purposes are limited to what is, according to the legal acceptance of the term, charity. The word "or" may mean "that is"; but whether it was intended to be used in that sense must depend upon the context. In this will that word has been frequently used by the testatrix, more often as a disjunctive than in the other sense. And I find that she has in some places used the word *ette*, which is the ordinary Gujaráti expression for "that is." If she had intended "purposes of charity" to be synonymous with "purposes of popular usefulness," she would not have used the disjunctive *athava* (*i. e.*, or) instead of the word *ette* ("that is"), of the signification of which she was, as the will shows, well aware. It must be borne in mind that "purposes of popular usefulness" are not necessarily the same as "purposes of charity." The latter may embrace purposes which can in no way be classed among the former. That being so, had the lady intended to use "or" in the sense of "that is" and limit purposes of popular usefulness to charity she would have, I think, used the expression, *lokopayogi athava charitina kamama* (*i. e.*, for purposes of popular usefulness or charity), instead of repeating the word "purposes" in the case of "charity" after she had made use of the same word in the case of "popular usefulness." The repetition of that word appears to me to have been deliberate to mark the difference between the two purposes and to treat them as two distinct entities. If the English word "charity" had been used by the testatrix merely because she wanted to make quite clear what she meant by the Gujaráti words, that word would have come immediately after the word "*lokopayogi*" according to the natural way of expression in the Gujaráti language. Had the lady made up her mind to make a bequest in favour of charity only and not in favour of any other purpose of public utility or popular usefulness, it is inconceivable that she would have deemed it necessary to use two expressions to bring out her intention where

one would have amply sufficed. I have struggled hard to see if I can reasonably put a construction upon the clause which will validate the bequest; but I find that I cannot do so without violence to the language deliberately used by the testatrix in her Gujarati will. I must, therefore, hold that the bequest is void for vagueness and that the surplus contemplated in the fifth clause should go to her heirs.

The plaintiffs and defendant No. 7 claim to be her heirs. The other parties neither admit nor dispute that claim. It is conceded by all the parties, however, that the right of heirship put forward by the plaintiffs and defendant No. 7 depends upon the question whether the testatrix had been married according to the approved or unapproved form. She was a Bhatia lady of a well-to-do and respectable family. That is admitted before me. And it is now established law that in the case of Hindus of respectable families of whatever caste, the presumption, in the absence of evidence to the contrary, is that their marriages were according to the approved form (Mayne's Hindu Law, section 83, p. 97, 6th Ed., and *Jagannath Prasad Gupta v. Runjit Singh*⁽¹⁾). Accordingly, giving effect to that presumption, I find that the plaintiffs and defendant No. 7 are the heirs of the testatrix Nanabai *alias* Kuvarvahu.

I find in the affirmative on the first issue. On the second I find that all the plaintiffs are entitled as heirs to the residue.

On the third I find that the plaintiffs and defendant No. 7 are the heirs.

Costs of the hearing before me to come out of the estate of the testatrix as between attorney and client except the costs of defendants Nos. 3 to 6 who must bear their own.

Against this decision the defendants 3 to 6 preferred an appeal for the following among other reasons:—(1) that the learned Judge erred in holding that the residuary bequest "for purposes of popular usefulness or for purposes of charity" contained in clause 5 of the will was void for uncertainty; (2) that the word अथवा (*athva* = or) was used in the said clause in an

(1) (1897) 25 Cal. 354 at p. 363.

1907.

TRIKUMDAS
DAMODHAR
2.
HARIDAS.

1907.

TRIKUMDAS
DAMODHAR
v.
HARIDAS.

explanatory sense only; (3) that the learned Judge was wrong in considering that the repetition of the same word કામ (Kam = works) marked the difference between the two expressions of public usefulness and charity as distinct 'entities' and that the two different expressions for the two purposes were made use of, where one would otherwise have sufficed; (4) that the learned Judge having expressed his view that if અથવા (*athva* = or) had been used immediately after લોકપયોગી (*lokopyogi* = of public usefulness) the use of the English word "charity" in the Gujarati context would have made quite clear what the testatrix meant by their use of the said preceding Gujarati word લોકપયોગી (*lokopyogi*), ought to have decided that અથવા (*athva* = or) was not used disjunctively and that the expression કામમાં વાપરે (*Kamama vapre*) referred to the employment of the surplus or residue of the testatrix's estate in one class of works which were of public usefulness and at the same time 'charitable' in the English law sense of that term.

Branson for the appellants.

Lowndes for the respondents.

JENKINS, C. J. :—This appeal arises out of a suit brought for the administration of the estate of Bai Nana, deceased, and, in the memorandum, the appeal is expressed to be from a Judge's order dated the 1st September 1906. This order was made on the hearing of certain preliminary issues framed for the purpose of determining the question of construction arising under the will of Nana.

We have for the present purposes assumed that an appeal would lie, but I desire not to be taken as deciding that in the affirmative. There are, however, other grounds on which, I think, we must determine this case adversely to the appellants.

The result of the hearing on the preliminary issues was that the learned Judge held the gift contained in the fifth clause of the will was invalid. That clause runs in these terms as translated :—“As to whatever immoveable (and) moveable (property) and property in cash belonging to me may be in excess or may remain over as surplus after a disposition shall have been made in accordance with what is stated in the clauses

above written, my above mentioned six executors are to make use of the same in such manner as they may unanimously think proper for purposes of popular usefulness or for purposes of 'charity'."

1907.

TRIKUMDAS
DAMODHAR
v.
HARIDAS.

Mr. Justice Chandavarkar was of opinion that the property therein given would be applicable by the executors as they thought proper not only for "purposes of charity" but also for "purposes of popular usefulness." Taking that view, he considered that the gift was bad for uncertainty. He accordingly passed an order to that effect and directed that the present appellants should bear their own costs. The only grievance of the present appellants is that this order as to costs was made, and they seek to establish their right to appeal on the ground that the plaintiffs had no right to sue because the plaintiffs admittedly claimed as persons entitled by reason of the gift in the fifth clause of the will being invalid.

The first point, therefore, to determine is whether this gift is bad.

I entirely agree with Mr. Justice Chandavarkar "that purposes of popular usefulness" are distinct from "purposes of charity," and that the word "or" which intervenes between the two is disjunctive.

Mr. Branson has pointed out passages in the will where the word "or" has not been used in a disjunctive sense, and on this he bases an argument in favour of its use in this phrase in an expository sense, but the answer to this is that it may be that it is so used where it connects synonymous terms, but here it is in my opinion clear that "purposes of popular usefulness" is different from "purposes of charity," and that the "or" is disjunctive. Then, Mr. Branson has argued that, even if that be so, still the gift is good, because, he says, the gift for "purposes of usefulness" would not be bad for uncertainty. It seems to me that the answer to that is to be found in the English decisions, some of which are practically on all fours with the present case. Thus, it has been determined that a gift for such charitable or public purposes as trustees should think proper is bad. That appears to me to be undistinguishable from the present case. It

1907.

TRIKUMDAS
DAMODHAR
v.
HARIDAS.

was there held that a gift for public purposes was too uncertain; for the same reason the gift for "purposes of popular usefulness" is bad. That we are entitled to be guided on this subject by the English rulings is apparent from the decision in *Runchordas v. Parvatibai*.⁽¹⁾

The conclusion, therefore, to which I come is that the learned Judge was perfectly right in his opinion that the gift in clause 5 was bad for uncertainty.

We must accordingly confirm the decree, and the appellants must bear the costs of this appeal.

Respondents 4 and 5 will get the difference between party and party and attorney and client costs out of the estate, but in no case shall costs of more than one counsel be allowed.

Attorneys for appellants:—*Messrs. Crawford, Brown & Co.*

Attorneys for respondent:—*Messrs. Madhavji, Kamdar & Chhotubhai; Tyabji, Dayabhai & Co.; Crawford, Brown & Co., and Little & Co.*

B. N. L.

ORIGINAL CIVIL.

Before Mr. Justice Davar.

NAGARDAS VACHRAJ, PLAINTIFF, v. ANANDRAO BHAI, DEFENDANT.*
Guardians and Wards Act (VIII of 1890), sections 47, 48—Indian Majority Act (IX of 1875), section 3—Power of Chamber Judge to alter, vary, modify or set aside orders made by his predecessor in Chamber under the Guardians and Wards Act—Period of minority on vacating of such orders does not extend to 20 years.

Section 48 of the Guardians and Wards Act immediately following as it does the section which provides for appeals is intended to give finality to contested orders and to enact that, when once an order is made, except as provided in section 47 and saving the provisions of section 622 of the Civil Procedure Code, the order shall be final and shall not be contested by a substantive suit or by any other form of litigation.

(1) (1869) 23 Bom. 725.

* Original Suit No. 60 of 1907.

1907.

April 2.