

who objected to the sale of certain properties alleged to belong to the judgment-debtor. To that dispute the judgment-debtor himself was not made a party, in any sense of the word whatever. He had no notice of this dispute and he never intervened in it. The dispute was heard, in that summary manner, which is adopted in such proceedings. It was not tried with the thoroughness and with that care to secure that all persons interested are parties with which such a suit, for instance as a mortgage suit, is tried; the decision arrived at by the Court is a decision which not only binds the parties to the dispute, but, unless a suit to set it aside is brought within one year, it is final. But it seems to me, that it would be wrong on principle to hold that the decision arrived at binds anyone whatever who is not a party to the dispute or one who derives interest from a party. Now the judgment-debtor was not a party to that dispute and he is not a person who has derived interest from either of the parties. It seems to me therefore to be contrary to first principles to say that the decision arrived at in that dispute has any legal effect whatever as regards the judgment-debtor, in the nature of *res judicata*, or for the purpose of preventing him or the auction-purchaser, if indeed the auction-purchaser can be supposed to be his representative, from reopening that matter which was decided.

*Decree reversed.*

R. R.

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### ORIGINAL CIVIL.

*Before Mr. Justice Robertson.*

MOTILAL MITHALAL AND ANOTHER, PLAINTIFFS, v. THE ADVOCATE GENERAL OF BOMBAY AND OTHERS, DEFENDANTS.\*

1910.

August 5.

*Hindu Law—Will—Use of expression “malik”—Widow’s estate—Construction.*

A Hindu died, leaving a Will by which (*inter alia*) he appointed his wife as residuary legatee in the following words:—“As regards whatever may

\* Suit No. 236 of 1910, Originating Summons.

1911.  
 NARAYAN  
 SADOBA  
 HALWAI  
 v.  
 UMBAR  
 ADAM  
 MEMON

1910.

MOTILAL  
MITHALAL  
v.  
THE  
ADVOCATE  
GENERAL  
OF BOMBAY.

remain over I appoint my wife Dhancore as the owner (*malik*) of the whole thereof." The management of the property comprising the said residue was provided for by the appointment of two persons named in the Will and certain other restrictions were placed on the management of the property by the wife. Finally provision was made for the further distribution of the property after the wife's death.

*Held*, that the widow took a widow's estate and not an absolute estate.

The use of the expression '*malik*' by itself would be sufficient to give the widow an absolute estate, but the knowledge of the testator as to the incidents of a widow's estate and the ordinary notions or customs of Hindustan is to be considered in construing a Will.

THIS matter came before the Court on an originating summons taken out by the executors under the Will of one Jethalal Nathalal who died on 9th October 1907 leaving him surviving his widow Dhancore (second defendant) and three daughters by a pre-deceased wife (the third, fourth and fifth defendants). The sixth defendant was first cousin to the deceased and the Advocate General was made a party as representing certain charities.

The clauses of the Will and the questions in dispute are sufficiently set out in the judgment of the learned Judge.

*Nadkarni* for the plaintiffs.

*Jardine*, Acting Advocate General, for the first defendant.

*Jinnah* for the second defendant.

*Kanga* for the third defendant.

*Dastur* for the fourth, fifth and sixth defendants.

ROBERTSON, J.:—This is an originating summons taken out for the purpose of obtaining the Court's opinion upon the construction of the Will of one Jethalal Nathalal, who died on the 9th October 1907 leaving a Will dated the 15th of July 1907. The summons is taken out by the executors according to the tenor of the Will, and the principal point that arises is the determination of the question: What, if any, interest is taken by the second defendant Bai Dhancore under the Will of the testator? Bai Dhancore is the widow of the testator.

The Will, which is in Gujarati, sets out that the testator had certain properties which he desired to dispose of and he commences his Will by saying:

"I in full consciousness make this my Will agreeably to what is written below. The particulars thereof are as follows:—

'1. There are my three daughters by name Mani and Kasi and Somi born of the womb of my first married wife Jadav and no son whatever is alive. My said wife Jadav is dead.'

'2. I have got my eldest daughter Mani married to Shah Hargovandas Vachhraj in Bombay and my two other daughters Kasi and Somi have remained to be betrothed and married.'

'3. After the decease of my wife Jadav I have married again with Dhancore the daughter of Shah Chunilal Jethalal in the city of Broach. No child whatever has yet been born of her womb.'

He then recites that he had a piece-goods business carried on in two shops, and proceeds: "An agreement has been made with them (my partners) on stamped paper of the value of Rs. 10 (namely) ten. And both of these partners have not got any capital whatever credited in their names in the two shops carried on in my name. We three partners have equal shares." Then he proceeds: "And the whole capital in the shops belongs to me personally. The same amounts to about Rs. 15,000, namely Rupees fifteen thousand. All those moneys belong to me personally. Therefore Shah Bhogilal Jugaldas of Cambay, who is my maternal uncle-in-law, and Shah Motilal Mithalal together shall on my behalf after my life-time (decease) deal with these moneys after my life-time (decease) agreeably to what is written below, because my wife has not as yet attained her full age. In like manner my daughters are young. Therefore they shall deal with (or dispose of the said moneys) agreeably to (what is written) below:—The particulars thereof are (as follows):" Thereafter he makes certain provisions with regard to his daughters setting aside the sum of Rs. 3,000 for the benefit of the daughters, and finally he directs: "My daughters shall not sell the same." That refers to the Rs. 3,000 to be invested in Government Promissory Notes. After reciting the existence of his charity account in his piece-goods shops and giving certain legacies, he says: "An arrangement

1910.

MOTILAL  
MITHALAL  
r.  
THE  
ADVOCATE  
GENERAL  
OF BOMBAY.

1910.

MOTILAL  
NITHALALv.  
THE  
ADVOCATE  
GENERAL  
OF BOMBAY.

agreeably to the above particulars shall be made out of the moneys appertaining to my capital in my above shops. On the above moneys being deducted, as regards whatever may remain over, I appoint my wife Dhancore as the owner of the whole thereof." I understand that the word used for owner is "*malik*". He then enumerates his immoveable property and other properties such as goods and chattels, vessels and utensils, clothes and wearing apparel, etc., and all claims and outstanding appertaining to his piece-goods shops, and finally to all these he says: "I appoint my wife Dhancore as the owner of the whole of the said property." Here, again, I understand the expression used is "*malik*". He then proceeds: "She shall with the advice of the above written two persons carry on the '*vahivat*' (management) thereof. And for doing that business a good (competent) Mehta or man should be employed. Such person as these two persons (that refers to the two persons Bhogilal and Motilal) may desire to keep shall be employed and (the said management) shall be carried on. And on the death or decease of any of these two (persons) another good (and) proper person shall again be admitted who shall live (act) consistently with his respectability and reputation. And as regards the memorandum of ornaments (and) jewellery which I have made (written out) in my handwriting and kept in my box, when the above written two persons may desire to see the same, the same shall be shown to them." It is a little difficult to understand exactly what the testator meant by this provision but I have very little doubt that when he says that the list of the jewellery is in his box and that the list is to be shown whenever they wish it to the persons whom he practically appoints executors, he means it to be shown for the purpose of comparing the list with the ornaments to see that they are all there. Then the Will proceeds: "After my life-time (decease) a '*lahann*' (distribution) of vessels shall after me be made within (my) '*varsi*' (first anniversary) amongst the (members of my) caste in Surat. My wife shall act according to the wishes of the two persons written above. Should she however act contrary to what they may say, (these) two persons shall make such arrangement as they may think proper. And on my wife's

decease the Caste "*Mahatam*" outlays having been made in a good manner, as regards what may remain over, moneys shall be given out of the same into the "*Nirashrit*" fund and to my three daughters and to my maternal uncle's son Lakhmidas Kanji on such arrangement having been made as the above written two persons may deem proper. According to the above particulars (my property) shall after me be administered."

It is argued on the one hand that Bai Dhancore under these provisions merely took the income during her life. On the other, it was argued that she took either an absolute estate or at the very least a widow's estate.

If I was at liberty to speculate as to what the testator meant, I should have very little hesitation in coming to the conclusion that his intention was that his wife should have the full benefit of the estate during her life but that he intended that she should be guided throughout by the advice of his executors and that he intended to make a gift over after her death to his three daughters and his maternal uncle's son. But the authorities are perfectly clear that what the Court has to do is not to speculate upon what the testator intended to say but has to construe the intention as it is actually expressed in the Will. It is, therefore, necessary to consider what the authorities say in regard to Wills of this character made by Hindus. It is not necessary to refer to more than a few of the cases that have been cited before me; and I think it best to base my decision upon the authorities which are reported in the Bombay Law Reports and on the Privy Council cases to which I will refer. In *Harilal v. Bai Rewa*<sup>(1)</sup> a somewhat similar point came before Chief Justice Farran and Mr. Justice Strachey. The headnote says: "A Hindu by his Will directed that after his death his wife was to take possession of and enjoy his property, and in another passage declared that 'just as he was the owner so she was to be the owner', but there were no words of inheritance used, nor did he directly give his wife any power of disposition over the property: *Held*, that she took only a life interest in the property." And at page 380 Sir Charles Farran says: "The Courts have

1910.

MOTILAL  
DITHALAL  
v.  
THE  
ADVOCATE  
GENERAL  
OF BOMBAY.

(1) (1895) 21 Bom. 376.

1910.

MOTILAL  
MITHALAL  
v.  
THE  
ADVOCATE  
GENERAL  
OF BOMBAY.

always leaned against such a construction of the Will of a Hindu testator as would give to his widow unqualified control over his property. By the use of such expression as 'my wife is the owner after me' or 'my wife is the heir' it is usually understood that the testator is providing for the succession during the life-time of the widow and not altering the line of inheritance after her death."

In *Chunital v. Bai Muli*<sup>(1)</sup> very much the same point came before a Court composed of Messrs. Justices Parsons and Ranade. There the words of the Will were: "After my death, my wife, if she be alive, is the rightful heir, and if she be not alive, and after the death of my wife, my daughter Bai Nathi is my rightful heir (*lakdar waras*)" . . . . "As to my daughter Nathi, whom I have, after the life-time of myself and of my wife, appointed heir to my property, and as to the surplus the heir to the same is my daughter Nathi." The testator died in 1894; Nathi in 1895; and the wife in 1897. Thereupon the testator's step-mother claimed the property as his reversionary heir. *Held*, that under the Will Nathi took an estate vested in interest from the testator's death, which would pass to *her* heirs on her death, and the step-mother would have no title. And in the judgment Mr. Justice Parsons says at page 423: "The facts, therefore, are almost exactly the same as those in the case of *Lallu v. Jagmohan*<sup>(2)</sup>, and, if that ruling is followed, the result would be that Nathi would take an estate vested in interest from the testator's death which would pass to her heirs on her death, and the plaintiff would have no title." He then says: "There is no real difference in the meaning of the words *malik* (assuming that that was the vernacular word translated owner) and *waras* when they are used in the Wills. The intention of the testator in each case to give his whole property to his wife for life and on her death to his daughter absolutely is clear."

I consider that those two cases show that so far as the Bombay decisions are concerned, there would be no doubt that on the true construction of this Will the widow did not take an absolute estate. But there are two Privy Council decisions

(1) (1899) 24 Bom. 420.

(2) (1866) 22 Bcm. 409.

upon the point to which it is important to refer. The first is that of *Moulvie Mahomed Shumsool Hooda v. Shewukram*<sup>(1)</sup>. There, a Hindu inhabitant of Behar, by a document of testamentary character, after reciting that the property of which he was about to dispose was ancestral property, and reciting the deaths of his only son, of his brother without leaving issue, his brother's wife and his own wife, declared "only D. K., widow of my son, who too excepting her two daughters, born of her womb, S. and D., has no other heirs, is my heir. Except D. K., none other is, nor shall be my heir and *malik*." At page 14 of the judgment which was delivered by Sir Robert P. Collier it is said: "He (that is the testator) then uses expressions which, if they stood alone, would, in their Lordships' opinion, shew that he intended to make an absolute gift to Raneë Dhun Kowur. The expressions are these:" (I have just read them.) "It has been contended that these latter expressions qualify the generality of the former expressions, and that the Will, taken as a whole, must be construed as intimating the intention of the testator that Mussumât Raneë Dhun Kowur should not take an absolute estate, but that she should be succeeded in her estate by her two daughters. In other words, that she should take an estate very much like the ordinary estate of a Hindu widow. In construing the Will of a Hindu it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindus with respect to the devolution of property. It may be assumed that a Hindu generally desires that an estate, especially an ancestral estate, shall be retained in his family; and it may be assumed that a Hindu knows that, as a general rule, at all events, women do not take absolute estates of inheritance which they are enabled to alienate. Having reference to these considerations, together with the whole of the Will, all the expressions of which must be taken together without any one being insisted upon to the exclusion of others, their Lordships are of opinion that the two Courts in India, who both substantially agree upon this point, are right in construing the intention of the testator to have been that the widow of his son should

1910.

MOTILAL  
MITHALAL  
&  
THE  
ADVOCATE  
GENERAL  
OF BOMBAY.

(1) (1874) L. R. 2 I. A. 7.

1910.

MOTILAL  
MITHALAL  
v.  
THE  
ADVOCATE  
GENERAL  
OF BOMBAY.

not take an absolute estate which she should have power to dispose of absolutely, but that she took an estate subject to her daughters succeeding her in that estate; whether succeeding her as heirs of herself or succeeding her as heirs of the original testator is immaterial."

But it remains to be considered whether the case of *Musammatt Surajmani v. Rabi Nath Ojah*<sup>(1)</sup> has so modified the force and effect to be given to the decisions I have just cited as to affect my judgment in this case. The headnote in that case says: "Where a Hindu husband gave certain property by deed of gift or testamentary instrument to his first and second wives and daughter-in-law respectively, reserving to himself a life interest, but directing that after his death they shall be '*malik wa khud ikhtiyar, i. e., owners with proprietary powers*': Held, in a suit by the husband's reversionary heirs for a declaration after the death of the said second wife that she was incompetent to alienate the property so given, that she took an absolute estate. The word '*malik*' imports full proprietary rights, unless there is something in the context to qualify it. The fact that the donee is a Hindu widow is not sufficient for that purpose." And at page 19 their Lordships say: "The words translated, 'as owners with proprietary powers,' are in the original (I read them). The appellants contend that these words are amply sufficient to confer an alienable estate. The respondents, on the other hand, contended, and Courts below have held, that under these words the lady took no more than the ordinary estate of a Hindu widow, which is inalienable except in special conditions which are not alleged to exist in this case." Then they proceed to set out the facts and to deal with various previous decisions, and they say at page 21 "This case seems to adopt and apply the same view of the word '*malik*' as was taken in the Calcutta case in 24 W. R. above cited, with the result that in order to cut down the full proprietary rights that the word imports something must be found in the context to qualify it. Nothing has been found in the context here or the surrounding circumstances, or is relied upon by the respondents, but the fact that the donee is a woman and a widow, which

(1) (1907) L. R. 35 I. A. 17.

was expressly decided in the last mentioned case (that is the case of *Lalit Mohun Roy v. Chukkan Lal Roy*<sup>(1)</sup>) not to suffice. But, while there is nothing in the context or surrounding facts to displace the presumption of absolute ownership implied in the word '*malik*,' the context does seem to strengthen the presumption that the intention was that '*malik*' should bear its proper technical meaning."

It appears, therefore, from that decision that the use of the expression '*malik*' by itself would be sufficient to give the widow an absolute estate. But it seems in no way to affect the remaining part of the decisions in Bombay and in *Moulyie Mahomed Shumsool Hooda v. Shewukram*<sup>(2)</sup> that the knowledge of the testator as to the incidents of a widow's estate and the ordinary notions or customs of Hindus is to be considered in construing a Will. Applying those decisions to the present case, it seems to me, though I come to the conclusion not without doubt that it was the intention, and that such intention has been expressed by the testator, to restrict the estate to be taken by his widow, and that the effect of these decisions is that she took a widow's estate and not an absolute estate.

It follows, therefore, that the first question: "What, if any; interest is taken by the second defendant Bai Dhancore under the Will of the testator Jethalal Nathalal in the residue of his estate," must be answered by saying that she took a widow's estate therein.

As to the second question: "Whether the executors will be justified in handing over the said residue to the second defendant or any and what part thereof," it follows that as she is entitled to a widow's estate, she must be entitled to the possession of the estate. Therefore, they must be justified and indeed bound to hand over the possession of the estate to her.

As to the third question: "If not, what arrangement should be made for the custody, preservation and management of the said residue during the life-time of the second defendant," it follows that no answer is necessary.

(1) (1897) L. R. 24 I. A. 76.

(2) (1874) L. R. 2 I. A. 7.

1910.

MOTILAL  
MITHALAL  
v.  
THE  
ADVOCATE  
GENERAL  
OF BOMBAY.

As to the fourth question: "Whether the gift over in the said Will contained on the death of the second defendant is valid or invalid, and if valid, who are the persons entitled to the said residue on her death and in what proportions, and for what interests," in my opinion the time has not arrived for answering that question.

The plaintiff's and the Advocate General's costs to be paid out of the estate as between attorney and client. The second defendant to have her costs out of the estate. Defendants 4 and 5 to have their costs out of the estate as between party and party. Defendants 3 and 6 to have one set of costs between them as between party and party.

Attorneys for plaintiff:—Messrs. *C. P. D. Cunha & Co.*

Attorneys for defendant 1:—Messrs. *Little & Co.*

Attorneys for defendant 2:—Messrs. *Mehta and Dalpatram.*

Attorneys for defendant 3:—Messrs. *Dadachanji and Pocha.*

Attorneys for defendants 4 and 5:—Messrs. *Jehangir, Gulabhai and Billimoria.*

Attorneys for defendant 6:—Messrs. *Jehangir, Mehta and Somji.*

K. McI. K.

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## APPELLATE CIVIL.

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*Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.*

1911.  
*February 14.*

MANILAL RANCHOD AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS,  
v. MOTIBHAI HEMABHAI AND OTHERS (ORIGINAL DEFENDANTS),  
RESPONDENTS.\*

*Civil Procedure Code (Act XIV of 1882), sections 268, 274—Usufructuary mortgage—Debt—Immovable property—Execution of money decree—Attachment.*

Where a deed of mortgage with possession provided that the mortgagee was to enjoy the profits in lieu of interest for ten years and was to be redeemed on the expiration of the term by payment of the mortgage money,

\* Second Appeal No. 707 of 1909.