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ORIGINAL CIVIL.

Before Mr. Justice Macleod.

BAYABAI SAKALKAR (PLAINTIFF) *v.* HARIDAS RANCHHORDAS AND OTHERS (DEFENDANTS).*

1914.

August 27.

Will—Bequest to a person not named in the will—Private directions given by the testator to one of his executors—Evidence as to who was intended to have the benefit of the bequest, admissibility of—The Indian Succession Act (X of 1865), sections 62, 67, 68, 69.

A testator provided by his will as follows :—

"In accordance with directions that I am going to give in private to trustee No. 1 out of the trustees appointed by me my trustees should entrust to Haridas Rs. 5,000 that may be received from my life-policy and the shares of Tata and Co. also should be transferred to the person whose name will be disclosed by Haridas."

In a suit filed by B praying *inter alia* that Haridas should be ordered to disclose the private directions given by the testator and for declaration that she, B, was the person intended by the testator to have the benefit of the bequest,

Held : (1) that Haridas was bound to disclose the private directions given him by the testator and that evidence thereof was admissible ;

(2) that the second part of the above clause should be read with the first part and that the shares must be transferred to a person whose name was given by the testator to Haridas, and that the power conferred on Haridas was therefore not a general but a special one.

* O. C. J. Suit No. 1045 of 1912.

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THE facts of this case are sufficiently set forth in the judgment of the learned Judge.

Gadgil with *Munsif* for the plaintiff.

Desai with *Dadachanji* for defendants Nos. 3 and 4.

Kanga with *Dastur* for defendant No. 5.

Kanga with *Taraporewala* for defendant No. 6.

Defendants Nos. 1 and 2 and 7 to 11 did not appear.

MACLEOD, J.:—One Gokuldas Kanji, a Bhatia, died in Bombay about the 18th December 1910 leaving a widow Gangabai and a daughter Kashibai, a concubine Bayabai, plaintiff in the suit, and several illegitimate children said to be by her. By his will he appointed defendants 1 to 5 in this suit executors and executrix. Clause 7 of the will runs as follows :—

"In accordance with the directions I am going to give in private to trustee No. 1 out of the trustees appointed by me my trustees should entrust to Haridas Rs. 5,000 that may be received from my life-policy and the shares of Tata & Co. also should be transferred to the person whose name will be disclosed by Haridas."

The said Gangabai filed Suit No. 24 of 1911 against the said executors and executrix, praying, *inter alia*, (*a*) that the estate of Gokuldas might be administered on the footing that he had died intestate, or in the alternative on the footing of the will, if proved to be genuine and valid; (*b*) that, so far as might be necessary, the will, if proved to be genuine, might be construed by the Court.

In paragraph 9 of the plaint the plaintiff contended that several clauses of the will were void and inoperative.

The defendants did not admit this in their written statement but were willing that the will should be construed. In paragraph 9 they said that certain persons should be added as parties.

It is admitted now that Bayabai, the present plaintiff, was the person in whose favour directions were given

to Haridas but her name was not mentioned in paragraph 9.

The suit came on for hearing before Beaman J. on the 20th June 1912.

The learned Judge's notes, to which I have referred, contain merely the appearances for the parties. No issues were raised from which it seems that the parties, in a friendly spirit, without argument, asked the learned Judge to construe the will.

The judgment on cl. 7 is as follows :—" Clause 7. Here the testator intends to create a secret trust ; but having regard to the provisions of the Hindu Wills Act read with the Indian Trusts Act, it is clear that no effect can be given to it, and as no beneficial interest is given to executor No. 1 the whole of that gift fails and falls into the residue."

Bayabai making her five children as the children of Gokuldas party-plaintiffs filed this suit against the five executors and executrix on the 27th September 1912, praying, *inter alia*, that the defendant Haridas might be ordered to disclose the secret trust under cl. 7 ; that the bequest in cl. 7 might be declared to be for the benefit of the plaintiff ; and that the defendants should be ordered to pay such maintenance including arrears to the first plaintiff for herself and her children as the Court might think fit.

Defendants 3 and 4 filed their written statement. In cl. 4 they refer to the judgment in Suit No. 24 of 1911 and contend that the question of cl. 7 being effective was *res judicata*. They admit that they had been informed by defendants that the person for whose benefit provision in cl. 7 was intended was the first plaintiff.

Thereafter Gangabai was made a party-defendant as well as various other parties who took benefits under the will. Gangabai filed a written statement in which

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she contended that the decree in Suit No. 24 of 1911 was binding on the first plaintiff and that in any event the first plaintiff was not entitled to be paid more than Rs. 15 a month as maintenance which had been offered to her.

The other defendants did not appear at the hearing. After the pleadings had been read, plaintiffs' counsel asked that plaintiffs 5 and 6 might be struck off, since they had no claim being daughters. As it was obvious there was a misjoinder of causes of action and of parties he also asked for leave to withdraw the suit on behalf of plaintiffs 2 to 4 with liberty to file a fresh suit for maintenance, and for leave to withdraw such part of the first plaintiff's suit as referred to in the claim for maintenance with liberty to file a fresh suit. I ordered that plaintiffs 5 and 6 should be struck off, and also plaintiffs 2 to 4 with liberty to file a fresh suit, while first plaintiff should be allowed to continue the suit in respect of prayers (*a*) and (*b*) of the plaint with liberty to file a fresh suit for her maintenance. The first plaintiff was directed to pay the costs of defendants 3 and 4 and defendant 6 incurred by them in preparing to resist the claim for maintenance, unless a suit was filed in respect of that claim within three months from that date (the 6th August) in which case the same materials would be available.

If necessary, the consequential amendments in the plaint could be made.

The following issues were then raised :—

1. Whether the claim made by the plaintiff in paras 3 and 4 of the plaint with reference to the sum of Rs. 5,000 and the shares in Tata Steel Co., is not *res judicata* by reason of the decision in Suit No. 24 of 1911.

2. Whether in any event the plaintiff is entitled to the said claim.

3. Whether these defendants are not entitled to the decree on their counter-claim.

As regards issue 3 plaintiffs' counsel admitted he could not retain the share certificate referred to in the counter-claim.

As regards the first issue as the plaintiff was not a party to Suit No. 24 of 1911, the decision would only be binding on her if she were claiming under the executors. It was urged that executors represent the beneficiaries, but the defendants certainly did not represent Bayabai as no mention whatever was made of her name. Nor does she claim under them as her case is founded on a contract made by Haridas with the testator. Moreover, the question I have now to decide was not raised in the suit, namely, whether if there was a trust in favour of Bayabai she could come in and prove it. I, therefore, find that she is not bound by the decision in Suit No. 24 of 1911.

The evidence of Haridas now makes it clear that the testator was desirous of making a bequest in favour of Bayabai but was not willing for her name to appear in the will. He, therefore, dictated cl. 7 as it stands and told Haridas in private that the bequest was for the benefit of the lady at Kandewady.

Haridas knew to whom the testator referred although he did not know her name until afterwards. On one occasion he had gone with the testator to the house in which Bayabai lived and the testator pointed her out to him. In answer to my questions Haridas said that the testator understood that witness was willing to abide by his wishes, and he was quite willing to pay the plaintiff if the legacy was paid to him.

The bequests in cl. 7 are two :—

1. Rs. 5,000 to be recovered from the life-policy were to be given to Haridas to whom the testator was going to give directions in private.

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The shares in Tata & Co. were to be transferred to the name of such person as Haridas might name.

The question arises whether the evidence of Haridas as to the private instructions given to him by the testator is admissible.

It was argued that section 68 of the Indian Succession Act which is incorporated in the Hindu Wills Act by section 2 of that Act applied, but this is not a case of ambiguity or deficiency on the face of the will.

If the testator had made no mention of his private instructions, and had merely made bequest of the Rs. 5,000 to Haridas I do not think it can be doubted that the terms of the trust which he had undertaken could be proved.

The question was very fully gone into in *Manuel Louis Kunha* v. *Jnana Coelho* [1], where it was held that the rule of equity that a legatee who undertakes to carry out the wishes of the testator will be treated as a trustee and compelled to carry out the instructions of the testator was made applicable to India by section 5 of the Indian Trusts Act.

But it was argued that the case is different if it appears on the face of the will that the legatee is not intended to take any beneficial interest, because there is an ambiguity or deficiency on the face of the will and therefore extrinsic evidence of the testator's intention is not admissible.

The cases of *In re Fleetwood* [2] and *In re Huxtable* [3] show that where there is a bequest to A to be dealt with by him in accordance with directions given to him by the testator, the Courts have not considered that there is an ambiguity or deficiency on the face of the will so as to exclude oral evidence of the instructions

[1] (1908) 31 Mad. 187. [2] (1880) 15 Ch. D. 594.
[3] [1902] 2 Ch. 793.

given. All that is required is that the instructions were communicated to the legatee by the testator and that the legatee agreed to accept the bequest on the terms of the trust. The consent of the legatee is implied if by his silence he leads the testator to believe that he will abide by the instructions communicated to him.

In *In re Fleetwood*[1] Hall V. C. said (p. 607): "The same principle which led this Court, whether wisely or not, to hold that the *Statute of Frauds* and the *Statute of Wills* were not to be used as instruments of fraud, appears to me to apply to cases where the will shews some trust was intended, as well as to those where this does not appear upon it."

In *In re Huxtable*[2] A bequeathed 4000*l.* to C "for the charitable purposes agreed upon between us" and it was held by the Court of Appeal that there was a gift for limited charitable purposes, and that evidence was admissible to shew what the purposes agreed upon were. It was admitted for proving matters which were not defined by the will.

In *Riordan* v. *Banon*[3] the facts were practically on all fours with the present case. The will directed a pecuniary legacy to be disposed of by the legatee in a manner of which he alone should be cognizant. It was proved by parol evidence that before execution of the will the testator had verbally informed the legatee that he intended to bequeath the legacy in trust for a person he then named and that the legatee had consented to accept the legacy for that purpose. The residuary legatee having claimed the benefit of the legacy it was held that a valid trust for the person named had attached to the bequest and the Court would allow such trust to be proved by parol evidence.

(1) (1880) 15 Ch. D. 594. (2) [1902] 2 Ch. 793.
(3) (1876) 10 Ir. R. Eq. 469.

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I can see no reason why this rule of equity should not be applied in India both when it appears on the face of the will that instructions have been given to the legatee and when it does not so appear. In the latter case equity interferes to prevent a fraud by the legatee, in the former, to prevent a fraud by the residuary legatee. The objection is the same in each case, viz., that the testator's intentions have not been expressed in accordance with the provisions of the law applicable to wills.

The bequest of the shares in Tata & Co. stands on a different footing. The testator directed that his executor should transfer them to such person as Haridas might name. But for the context those words would give Haridas a general power to name any one he pleased as the transferee. Read with the first part of cl. 7 it is evident that the testator intended that the shares should be transferred to the same person in whose favour a trust had been created as regards Rs. 5,000.

It has been argued that Haridas cannot be permitted to disclose the name of the person to whom the testator told him the shares should be transferred and that, therefore, the shares fall into the residue, on the ground that there is an ambiguity or deficiency on the face of the will.

Sections 67 and 68 of the Indian Succession Act embody the canon referred to by Jarman on Wills, 6th edition, at p. 516: "The admission or rejection of parol evidence is commonly said to depend in all cases on the canon, which rejects it in the case of *patent* ambiguities, or those which appear upon the face of the will, and admits it in the case of *latent* ambiguities, or those which seem certain, for anything that appears upon the face of the will, but there is some collateral matter, out of the will, that breeds the ambiguity. And this ambiguity being raised by parol evidence, may, it is said, be fairly

removed by the same means. But upon examination the maxim proves not to be an universal guide; for on the one hand, there are many recognized authorities for the admission of parol evidence to explain ambiguities appearing on the face of the will, while, on the other hand, the existence of a latent ambiguity will certainly not, as appears sometimes to have been supposed, warrant the admission in all cases indiscriminately of parol evidence to show what the testator meant to have written as distinguished from what is the meaning of the words he has used...We come, therefore, to the conclusion either that the distinction taken by the canon between latent and patent ambiguities is an unsubstantial one, or that the proposition does, in its second branch, assert the admissibility of evidence to shew the testator's intention (as distinguished from the meaning of his written words); and that, consequently, if true, its application must be confined to a special class of cases."

In *Colpoys* v. *Colpoys*[1], still accepted as an authority, the Master of the Rolls said at p. 464 *et seq*: "The books are full of instances sanctioned by the highest authorities both in law and equity. When the person or the thing is designated on the face of the instrument, by terms imperfect and equivocal, admitting either of no meaning at all by themselves, or of a variety of different meanings, referring tacitly or expressly for the ascertainment and completion of the meaning to extrinsic circumstances, it has never been considered an objection to the reception of the evidence of those circumstances, that the ambiguity was patent."

But the question does not arise in this case whether under similar circumstances those authorities will be followed by the Courts in India, for it seems to me that the evidence now under consideration has been adduced

(1) (1822) Jac. 451.

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for the purpose of proving material facts, and not for proving what the testator meant to have written.

In *Higgins* v. *Dawson*[1] Lord Davey refers with approval to the following passage in the judgment of Rigby L. J. in the Court below: "The first point which I think it convenient to notice is the fundamental distinction between evidence simply explanatory of the words (of the will) themselves, and evidence sought to be applied to prove intention itself as an independent fact (Wigram, 3rd Edn., pl. 10). This distinction must never be lost sight of. The great majority of the cases of explanatory evidence consisted of the ascertainment of persons and things insufficiently explained by the will itself:" see also Wigram, p. 51; and Jarman at p. 511 says: "Upon the same principle, of course, it is not essential to the validity of the gift, either of real or personal estate, that the person who is the intended object of the testator's bounty should be actually pointed out on the face of the will; it is enough that the testator has provided the means of ascertaining it, according to the maxim, *id certum est quod certum reddi potest*. Nor is it material that the description makes the objects of gift to depend upon circumstances or acts of persons which are future and contingent."

That a power can be created by a Hindu will was recognized by this Court in *Javerbai* v. *Kablibai* [2]. If the words of the second part of clause 7 are read by themselves Haridas has a general power to nominate the person to whom the shares should be transferred. He could nominate himself or any person in existence at the date of the testator's death. But read with the words in the first part of the clause it is clear that the shares must be transferred to a person whose name was given by the testator to Haridas, and that the power is not a general one but a special one.

(1) [1902] A. C. 1 at p. 10. (2) (1890) 15 Bom. 326.

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I think that Haridas was bound to disclose the plaintiff's name and that the evidence is admissible either under section 62 or in accordance with the authorities above cited.

Attorneys for the plaintiff: Messrs: *Jehangir, Seervai, Minocheher and Hiralal.*

Attorneys for the defendants: Messrs.. *Edgelow, Gulabchand, Wadia & Co.*; Messrs. *Dastur & Co.*; Messrs. *Madhavji Kamdar and Chhotubhai.*

Suit decreed.

M. F. N.

ORIGINAL CIVIL.

Before Mr. Justice Macleod.

1915.

February 8.

NISSIM ISAAC BEKHOR (PLAINTIFF) *v.* HAJI SULTANALI SHASTARY & Co. A FIRM (DEFENDANTS).*

Sale of goods—C. I. F. Contract—Insurance of goods against war risk without buyer's instruction—Buyer not obliged to pay for such insurance—Payment against documents—Bill of lading must be tendered—Bill of lading, what is a—War—Government proclamations prohibiting trading with the enemy—Effect of proclamations on contract, goods shipped in enemy Port—Performance of contract becomes illegal.

On the 9th June 1914 the defendants purchased from the plaintiff, 5 tons round copper bottoms c. i. f. Mahomerah, July shipment, and agreed to pay for the said copper in Bombay on being tendered the Bills of lading and other documents in respect thereof. The copper was shipped on board the S. S. Tangistan on or about the 28th July 1914 and the plaintiff obtained relative Bills of lading and insured the goods against ordinary marine risks. On the 5th August in consequence of war having broken out between Great Britain and Germany the plaintiff's agent in England, although not instructed to do so by the defendants, insured the copper against war risks and paid 10 per cent. premium. The documents arrived in Bombay on the 7th September whereupon the plaintiff tendered them to the defendants and demanded payment of the invoice price of the goods including the above mentioned extra premium of 10 per cent. in respect of insurance against war risks. The defendants refused to pay the amount demanded on the ground that they were not liable to pay the aforesaid extra premium.

O. C. J. Suit No. 1309 of 1914.