ORIGINAL CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Davar.

DWARKADAS DAMODAR (APPELLANT) *v.* DWARKADAS SHAMJI AND OTHERS (RESPONDENTS).*

1915. *September* 27.

Settlement by a Hindu woman on trusts—The Indian Trusts Act (II of 1882), section 83—Trusts failing after settlor's death—Resulting trust in favour of settlor's heirs at the time of her death—The Indian Succession Act (X of 1865), section 191, effect of—The Probate and Administration Act (V of 1881), section 4, effect of.

Where by a deed of settlement a Hindu woman conveyed an immoveable property to trustees on certain trusts, some of which failed after her death (as being in favour of persons unborn at the date of the settlement),

Held, (1) that there was a resulting trust in favour of the settlor,

(2) that the persons entitled to the property on the failure of the trusts were the heirs of the settlor to be determined at the time of her death.

Where a person dies intestate and no administration is granted to his estate, the term 'legal representative' in section 83 of the Trusts Act must include the person or persons beneficially entitled who represent the interests of the deceased by virtue of inheritance. The representative by inheritance is to be found according to law at the moment of the death of the deceased, the maxim being "*Solus deus haeredem facere potest, non homo.*"

ORIGINATING Summons:

One Hakoobai a Hindu woman conveyed by a deed of trust, dated 11th December 1873, an immoveable property situated in Bombay to two trustees, Damodar Virji and Morarji Cooverji. The deed of trust *inter alia* provided that the trustees were to hold the said property—

"Upon trust to permit and suffer the said messuage, hereditaments and premises hereinbefore described, and, intended to be hereby assured, to be held, occupied, used and enjoyed, and, the rents, issues and profits thereof to be received by or to pay the same unto the said Hakoobai during her natural life, for her sole and separate use, and from and after the decease of the said Hakoobai, upon trust to permit the same premises to be used, occupied and enjoyed and the rents, issues and profits thereof to be received

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or to pay the same unto Gomtibai and Devkore (the only daughters of the said Hakoobai), for the term of their joint natural lives and for their sole and separate use respectively, and from and after the decease of either of them, the said Gomtibai and Devkore during the life-time of the other of them and leaving issue her surviving upon trust as to one equal undivided moiety of and in the same hereditaments and premises for such issue absolutely, if more than one in equal shares as tenants-in-common and not as joint tenants. And in the event of the death of either of them, the said Gomtibai and Devkore, in the life-time of the other of them and leaving no issue her surviving them upon trust with and out of the rents, issues and profits of the hereditaments and premises hereinbefore described and intended to be hereby conveyed, to lay out and expend a sum not exceeding Rs. 1,500 in the performance of the funeral ceremonies of such one of them, the said Gomtibai and Devkore, as shall die in the life-time of the other of them leaving no issue her surviving, and subject thereto, upon trust to permit and suffer all and singular the said hereditaments and premises to be occupied, used and enjoyed, and the rents, issues and profits thereof, to be received or to pay the same unto the survivor of them, the said Gomtibai and Devkore during her natural life for her sole and separate use. And from and after the termination of the estate lastly hereinbefore limited to the survivor of them the said Gomtibai and Devkore upon trust to convey, assign and assure all and singular the said hereditaments and premises, hereinbefore described and intended to be hereby assured and the rents, issues and profits thereof, unto the heirs of the body of the survivor of them, the said Gomtibai and Devkore, if more than one in equal shares as tenants-in-common and not as joint tenants, and in default of any such issue, upon trust for the heirs according to Hindu law of the survivor of them the said Gomtibai and the said Devkore."

The said trust deed empowered the trustees to sell the trust property under certain circumstances and to invest the sale proceeds in Government Securities and to hold the same upon trusts.

At the date of the trust deed Hakoobai had two daughters, Devkore and Gomtibai, and two granddaughters, Matubai and Gatubai, daughters of Gomtibai.

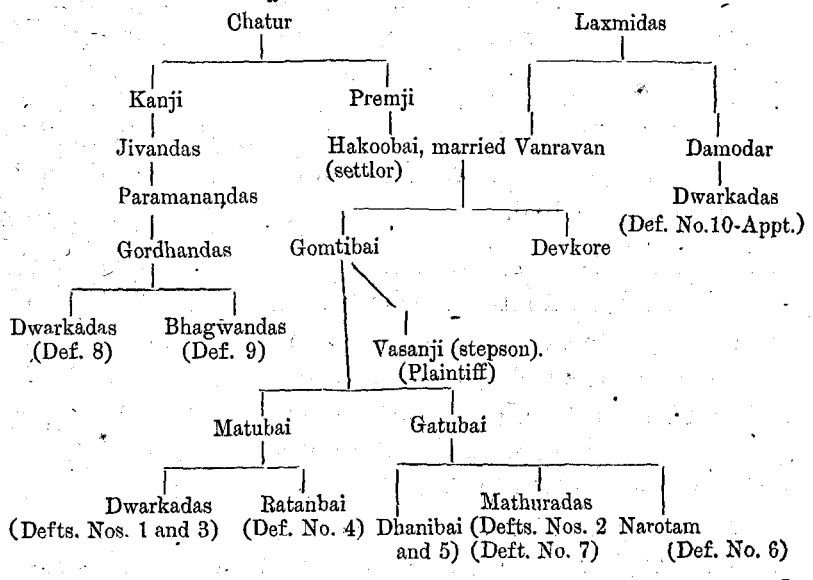
Damodar Virji, who was one of the trustees, died during the life-time of Hakoobai.

The plaintiff, who was a step-son of Gomtibai, was appointed a trustee in Damodar's place on the 5th

October, 1885, by Hakoobai in virtue of the power of appointment reserved under the trust deed. The other trustee Morarji Cooverji died subsequently, and the plaintiff continued to be the sole trustee.

Hakoobai died in 1890. Devkore had predeceased her in 1884 leaving no issue. Matubai died in 1891, leaving her surviving Dwarkadas (defendant No. 3) and Ratanbai (defendant No. 4).

The following pedigree shows the relationship of the various parties :—



In 1908 the plaintiff sold the trust property and invested the sale proceeds in Government Promissory Notes of the nominal value of Rs. 33,000.

On 8th March 1911, Gomtibai appointed her two grandsons Dwarkadas (defendants Nos. 1 and 3) and Mathuradas (defendants Nos. 2 and 5) co-trustees with the plaintiff, in virtue of the power of appointment reserved under the trust deed.

In October 1913, Gatubai died leaving her surviving two sons, Mathuradas (defendant No. 5) and Narotam

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(defendant No. 6) and a daughter, Dhanibai (defendant No. 7).

The trust property was used and enjoyed and the interest on the Government Promissory Notes was paid to Gomtibai till her death on 15th March 1914.

Gomtibai left a will dated 30th September 1908 whereby she purported to bequeath the trust property to her daughter Gatubai and the children of her daughter Matubai.

Dwarkadas (defendant No. 8) and Bhagwandas (defendant No. 9) were the descendants of an uncle of Hakoobai.

Defendant No. 10 was a brother's son of Hakoobai's husband, while defendant No. 11 was a brother of the husband of Gomtibai.

The plaintiff submitted that on a true construction of the trust deed Gomtibai took only a life estate in the trust property and that she had no right to make a testamentary disposition of it, the same being invalid and of no effect; that defendants Nos. 3, 4, 5, 6 and 7, not having been born at the date of the said trust deed could not under Hindu Law take any benefit under it; and that the plaintiff who was born before the date of the trust deed was the nearest heir of Gomtibai capable of taking benefit under the trust deed and was absolutely entitled to the trust property.

The plaintiff took out an originating summons on the presentation of the plaint and the defendants were called upon to attend before the learned Judge sitting in chambers for the determination of the following questions:—

1. What estate did the said Gomtibai take under the said Indenture of trust?

2. Had the said Gomtibai any power to make a testamentary disposition of the said trust property ?

3. Is the will of the said Gomtibai in so far as it purports to dispose of the said trust property valid and operative ?

4. Can defendants Nos. 3, 4, 5, 6 and 7, not having been born at the date of the said Indenture, take any benefit, under the said Indenture as "heirs of the body" of the said Gomtibai ?

5. Can defendants Nos. 3, 4, 5, 6 and 7, not having been born at the date of the said Indenture, take any benefit under the said Indenture as heirs of the said Gomtibai according to Hindu Law ?

6. Is the plaintiff according to Hindu Law, a nearer heir of the said Gomtibai than defendants Nos. 3, 4, 5, 6 and 7 ?

7. Is the plaintiff according to Hindu Law a nearer heir of the said Gomtibai than defendant No. 11 ?

8. In the events that have happened who is the person entitled to the said property ?

Macleod J. decided that Gomtibai took a life interest under the trust deed ; that defendants Nos. 3, 4, 5, 6 and 7 did not take any benefit under the trust deed as "heirs of the body" or as "heirs" of Gomtibai ; that the plaintiff was not entitled to the property ; and that the trust came to an end on the death of Gomtibai without leaving heirs according to Hindu Law in existence at the date of settlement.

Under question 8, the point arose whether the trust property went to the heirs of the settlor in existence when the trusts failed or the heirs of the settlor at the time of her death.

The summons was adjourned into Court to decide whether Gomtibai or defendant No. 10 was to be considered as the heir of Hakoobai.

Macleod J. decided that the trust property on failure of the trusts went to the heirs of the settlor at the date of the settlor's death. The following Judgment was delivered by His Lordship.

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MACLEOD J.:—This was an originating summons in which certain questions were propounded regarding a deed of settlement whereby one Hakoobai settled property upon the trusts therein mentioned.

I held that in the events which had happened the trusts had failed and, therefore, the property reverted to the settlor or her heirs.

As the settlor was dead when the trusts failed the question arose whether the 10th defendant who, at the present time, was the nearest in descent from the settlor was entitled to the property or the heirs or devisees of Gomtibai, who was the heiress of the settlor at the time of her death.

For the latter contention I think it was rightly argued that there can be only one heir or set of heirs to a deceased person, namely, the person or persons who would be entitled at his death to succeed to his estate on intestacy. No authority was cited for the proposition that the person nearest in relation at any particular time after the death is the heir though not the heir at the time of the death.

Therefore I saw no reason why the 10th defendant should get his costs out of the estate; as I am informed that the 10th defendant has filed an appeal on this question alone and I have been asked to write a judgment, I have confined myself to this question.

Defendant No. 10 appealed.

J. Mehta and *Vibhakar* for the appellant.

Jinnah and *Jayakar* for respondents 1 and 3.

Vaidya and *Moos* for respondent 4.

Desai for respondent 5.

SCOTT, C. J.:—This appeal comes before us on a judgment of Mr. Justice Macleod upon an originating summons for the purpose of deciding certain questions with regard to a settlement executed by one Hakoobai on the 11th of December, 1873. The summons was taken out by one of the trustees of the settlement who also claimed to be a beneficiary entitled to the trust property in the events that had happened. The other parties to the summons were the other trustees and all persons who could conceivably be supposed to be interested as the heirs of the settlor or her daughter Gomtibai.

The question concerning the plaintiff's beneficial interest was raised in the plaint in these terms:—

"The plaintiff says that he was born at the date of the said indenture and is the nearest heir of the said Gomtibai according to Hindu Law, capable of taking any benefit under the said indenture, and submits that under the terms of the said indenture and a true construction thereof the plaintiff has become absolutely entitled to the aforesaid trust property."

The plaintiff was represented in chambers upon the summons and had his case fully argued by Mr. Setalvad, but after argument it was decided against him by the learned Judge; and having regard to the fact that the matter has been fully considered and that no appeal has been preferred on behalf of the plaintiff, we must take it that the question of his interest is finally settled against him. That question having been settled by the learned Judge, there remained for decision Question 8: "In the events that have happened, who is the person entitled to the property." It was conceded by all the parties to the summons except the unsuccessful plaintiff that in the events that had happened, there was an intestacy and a resulting trust in favour of the settlor. Then the question arose who were or was the heirs or heir of the settlor entitled to take the property. On the one hand it was contended that the heir of the settlor at the time of her death was Gomtibai, her surviving daughter, and that since Gomtibai was dead at the date of the summons, her children, the respondents, were entitled to the property. On the other hand, the tenth defendant claimed that the heir of the settlor could not be ascertained until the extinction of the beneficial interests which were validly created under the settlement, and that at the date of such extinction he was the nearest heir of the settlor.

Now the law as to what are known in ordinary legal language as "resulting trusts" is stated in section 83 of the Indian Trusts Act:—"Where a trust is

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incapable of being executed, or where the trust is completely executed without exhausting the trust property, the trustee, in the absence of a direction to the contrary, must hold the trust property, or so much thereof as is unexhausted for the benefit of the author of the trust or his legal representative." Section 191 of the Indian Succession Act provides that "Letters of Administration entitle the administrator to all rights belonging to the intestate as effectually as if the administration had been granted at the moment after his death." Similarly, the Probate and Administration Act, section 4, says :—"The executor or administrator, as the case may be, of a deceased person, is his legal representative for all purposes, and all the property of the deceased person vests in him as such." That would include property falling into possession at the time of the testator's death or many years afterwards, for all interests vest in the personal representative. The executor or administrator as the case may be holds all property not validly disposed of for the persons beneficially entitled at the moment of the death of the deceased owner.

In the present case we have to deal with the estate of a deceased intestate for which no administration has been granted. We have only to find the beneficiary. The Succession Certificate Act does not on the facts necessitate a grant of administration. The term 'legal representative' in section 83 of the Trusts Act must in such a case include the person or persons beneficially entitled who represent the interests of the deceased by virtue of inheritance.

The heirs then are the 'legal representatives' and they represent the estate of the deceased for the purpose of interests established by way of a resulting trust just as would the executor or administrator. Their representation dates from the same period and the

reversion under the resulting trust whether foreseen or unforeseen having vested as a transferable interest in the deceased vests on her death in her representative. The representative by inheritance is to be found according to law at the moment of the death of the deceased, the maxim being "*solus deus haeredem facere potest, non homo.*"

On behalf of the appellant it was argued that there could be no vested reversion till the "succession opened." This expression is appropriate where there is a claim on the death of a Hindu widow enjoying her husband's estate but its use in the present case indicates the fallacy underlying the argument for the appellant. To use the words of the Judicial Committee in *Moniram Kolita* v *Keri Kolitani*[1] the widow's "estate is an anomalous one, and has been compared to that of a tenant-in-tail. It would perhaps be more correct to say that she holds an estate of inheritance to herself and the heirs of her husband. But whatever her estate is, it is clear that, until the termination of it, it is impossible to say who are the persons who will be entitled to succeed as heirs to her husband. The succession does not open to the heirs of the husband until the termination of the widow's estate."

Here, the valid life interest of Gomtibai under the settlement was merely a "particular" estate by reason of which the reversionary interest of the settlor remained to fall into possession at some future time although capable of immediate transfer or inheritance.

As Gomtibai was at the death of the settlor both the sole heir and the sole beneficiary capable of taking under the settlement, her life interest under the settlement merged in her reversion on the principle that

(1) (1880) 5 Cal. 776 at p. 789.

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"whenever a greater estate and a less coincide and meet in one and the same person, without any intermediate estate, the less is immediately annihilated; or, in the law phrase, is said to be merged, that is, sunk or drowned, in the greater," 2 Blackstone's Commentaries, 177.

This question of merger was not, however, argued and it is sufficient for the disposal of the appeal to say that Gomtibai and not the appellant was the settlor's heir. If that had been the only question in appeal we should dismiss it with costs. But it is not the only question. There remains a question of costs.

The question which we have dealt with in the foregoing remarks appears to have occasioned considerable difficulty in the lower Court. It was argued on the 21st of November after the decision of the case against the plaintiff and was then adjourned for further argument into Court under the rule which permits a Judge to adjourn a case where he thinks fit for argument into Court.

The tenth defendant had been brought before the Court by one of the trustees who for his own reasons wished to have all possible claims adverse to his claim disposed of in the originating summons, and it was also a matter of much interest and importance to the other trustees because they had to decide whether or not they held for their co-trustee or whether there was a resulting trust for the heirs of the settlor. The case, therefore, falls within the authorities which have been cited to us, *Rivers* v. *Waidanis*[1] and *Buckton* v. *Buckton*[2], both of which appear to us to justify the conclusion that the tenth defendant ought to be allowed his costs upon this summons, and that being so, he is entitled to his costs of this appeal also.

[1] (1907) 97 L. T. 707. [2] [1907] 2 Ch. 406 at p. 414.

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We affirm the decree of the lower Court except in this respect that the tenth defendant is entitled to his costs out of the estate. We dismiss the appeal ordering all parties to the appeal to have their costs out of the estate.

Solicitors for the appellant :—Messrs. *Chitnis, Motilal and Kanga.*

Solicitors for the respondents :—Messrs. *Madhavji, Kamdar and Chhotubhai.*

G. G. N.

APPELLATE CIVIL.

Before Mr. Justice Batchelor and Mr. Justice Hayward.

1915. *October* 18.

SONU VALAD KHUSHAL KHADAKE (ORIGINAL PLAINTIFF), APPELLANT v. BAHINIBAI MURD KRISHNA AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS*

Civil Procedure Code (Act V of 1908), Order II, Rule 2—Cause of action, splitting up of—Bar does not apply where causes of action are different.

On T's death, his widow sold two of his Survey Numbers (403 and 404) to D, and shortly afterwards sold Survey No. 324 to Z, who was a brother of D, joint in estate. After the widow's death, B, a daughter of T, sued D and T (another daughter of T) to recover possession of Survey No. 324 ; but the suit was at her request dismissed. B then having sold the three Survey Numbers to the plaintiff, the present suit was brought against the two daughters, and D and Z, to recover possession of the three Survey Numbers. The lower Courts dismissed the suit on the preliminary ground that since B omitted to sue in respect of Survey Nos. 403 and 404 in the first suit, the plaintiff was debarred from preferring his claim to those numbers in the present suit. The plaintiff having appealed,

Held, that the suit was not barred by the provisions of Order II, Rule 2 of the Civil Procedure Code inasmuch as the two sets of facts which required to be proved in both suits in order to enable the plaintiff to succeed were different sets of facts, and the causes of action accordingly were different.

* Second Appeal No. 628 of 1914.