and in my opinion it is not a matter even of the slightest doubt—I hold that it is perfectly clear—that he never committed the offence of cheating in this matter at all.

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I think our order should be that the conviction is set aside and that the fine, if paid, should be refunded.

SHAH, J. :—I entirely agree.

Order set aside.

R. R.

ORIGINAL CIVIL.

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

SHIRINBAI (DEFENDANT-APPELLANT) *v.* RATANBAI AND OTHERS (PLAINTIFFS AND RESPONDENTS).*

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Will, construction of—"Malek Mukhtyar" for life—Existence indicated in will of special oral directions—Terms of the trust not ascertained or ascertainable—Power executed in professed compliance with authority given—Parol evidence admissible to prove the trust so as to prevent a fraud—Onus of proof—Undistributed share of the property of an intestate—Indian Limitation Act (IX of 1908), Article 123.

A Parsee testator by his will made his wife "Malek Mukhtyar" as to all his property during her life, just as the testator was the owner, free from question by any of his other heirs, representatives, relatives and kinsmen with directions that she should protect the children, as he had protected them, according to their means, declaring that if any of his children should not act according to her orders, then during her life-time the child should not have any claim to any of the testator's property. Clause 7 of the will provided that "agreeably to what was written above, the wife was, during her life-time, to carry on 'Vahivat' (management) in respect of every kind of property and make expenses on auspicious and inauspicious occasions, as the testator had been doing." The clause further provided : "and in her life-time, keeping God and Meher Davar (the Dispenser of Justice) before her mind, my wife shall duly as I have directed her orally and according to the times (i.e., as

* O. C. J. Suit No. 703 of 1916 : Appeal No. 49 of 1917.

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circumstances demand) make her will, and all my heirs and the heirs of my heirs, shall duly act agreeably to the same." Clauses 8 and 10 of the will provided for interests contingent upon the testator's widow and executrix dying without making a will as mentioned in clause 7.

The testator died in 1872 and thereafter his widow as executrix administered the estate until her death in 1906. By her will she purported to dispose of all property, both her own and what she had received from her husband, and appointed her surviving son her executor. The latter died in 1915 leaving a will whereby he appointed his daughter, the 1st defendant, his executrix. The plaintiff, a daughter of the original testator's son (who predeceased his mother), filed the suit on the 18th of May 1916, praying *inter alia* that the estate of the testator might be administered by the Court and that it might be declared that the testator's widow had no power to make a will disposing of any part of the testator's estate. The 1st defendant contended that the will of the testator's widow was valid and that the plaintiff's claim was barred by limitation.

Held (1) that the testator's widow took only a life estate under the will;

(2) that the words "shall duly as I have directed her orally and according to the times (i. e.. as circumstances demand)" were not consistent with a general testamentary power but indicated the existence of special directions as to the objects in whose favour the power was to be exercised;

(3) that there being no direct evidence as to the testator's directions the will made by the widow should not be given effect to and that on her death there was an intestacy as regards all the property of the testator;

(4) that, Article 123 of the Indian Limitation Act applying to every suit where the plaintiff seeks to recover an undistributed share in the estate of an intestate, the suit was not barred by limitation.

PER SCOTT, C. J.:—The Court will not try to compel the execution of a trust where the terms of the trust are not ascertained or ascertainable, but, where a power in the nature of a trust has been executed in professed compliance with the authority given, the onus, as it seems to me, of proving that the execution was a fraud on the power should lie on those who seek by challenging the execution to get possession of property in the hands of those benefiting by the act of the donee of the power.

Hetley v. *Hetley*[1], referred to;

Maung Tun Tha v. *Ma Thit*[2], followed.

[1] [1902] 2 Ch. 866. [2] (1916) L. R. 44 I. A. 42.

SUIT for administration of property.

One Bomanji Kaikhushru Mody died in March 1872, leaving him surviving his widow, Kuverbai, two sons, Nusservanji and Sorabji, and two daughters, Nawazbai and Banubai. He left a will, in the Gujerati language, dated 9th January 1872, whereby he appointed Kuverbai his executrix.

The following are the material clauses of the will :—

4. As to all kinds of my immoveable property that is to say all sorts of land and vadi, and vajifa (lands) and shops and godowns and houses, &c., and as to all sorts of moveable property and effects, that is to say all kinds of goods and effects, furniture and household articles and things, and claims, &c., debts and all kinds of decrees, darkhasts, and all sorts of rights, and the rights which I may acquire or which may accrue due to me hereafter from my ancestors I duly appoint my wife the said Kuverbai to be the owner (and) Mukhtiar of the whole of the same during her life-time just as I am the owner. And as long as she lives none of my other heirs, legal representatives or relatives, can question her in regard to any matter whatsoever.

5. I direct my wife and executrix that, just as I have been protecting my children during my life-time, so shall she protect my children with forethought and having regard to the times and our means and wisely and thoughtfully. Likewise I direct my children to remain under the control of their respected mother and to behave respectfully, obeying her direction that is order and biddings, so that the reputation of you (them) all (i. e.) mother (and) children and my family may be preserved. That will reflect credit on me and you all in this world as well as the next.

6. If any of my children should not behave respectfully towards and act according to the orders of his (or her) mother, as written (directed) in the above fifth paragraph, then during the life-time of my wife, he (or she) shall not have any kind of title, interest, (or) share in and right (or) claim to any property and effects whatever belonging to me ; and should any one (of them) prefer (a claim) the same shall duly be null and void.

7. Agreeably to what is written above, my wife shall during her life-time, duly carry on Vahivat (management) in respect of every kind of my property and effects and make expenses on good (or) bad occasions just as I (have been doing). And she shall during her life-time, keeping God and Meher Davar (the Dispenser of Justice) before her mind ('s) eye make her will agreeably

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to the oral instructions given by me to (her) my said wife (and) according to the times, and all my heirs and the heirs of my heirs shall duly act agreeably to the same.

8. Should my wife that is to say executrix die without making her will, that is to say, testamentary writing, as mentioned in the above paragraph seven then both my sons (namely) Nusservanji and Sorabji shall duly become owners in equal shares of all kinds of my property and effects; and both of them shall duly take certificate (i. e., obtain probate) from the Court. And out of my property and effects which they may take, they shall duly pay to their sister Nawazbai Rs. 5000, in words, five thousand, thirteen months after the demise of their respected mother. And to the said moneys neither Nawazbai's husband nor any of her creditors whatsoever shall duly have any claim or right (or) title. And if, when the time for payment of the abovementioned moneys to my daughter Nawazbai, agreeably to what is written above, arrives, the said Nawazbai be not alive then my (said) sons shall duly pay her children who may be (living) in equal shares, the moneys in respect of their mother's shares, and if the said children be of young age, then the moneys in respect of their shares shall be set apart and interest thereon shall be realized by (depositing the same in) Savings Bank or (investing the same in) Government (loan) notes or in any good security, and (the moneys) shall be duly paid to them on their attaining the age of twenty-one years. But Nawazbai's husband has no manner of right or claim whatever to the said moneys and if he should prefer any claim, the same shall duly be null and void.

Nusservanji died in 1899 leaving him surviving his widow, one son, Ardeshir, and three daughters, Ratanbai (the plaintiff), Bachubai, and Aimai. Ardeshir died unmarried and intestate in 1901. Bachubai died in 1904 leaving her surviving her husband and three sons.

Kuverbai administered the estate until her death in March 1906. By her will she appointed her surviving son, Sorabji, her executor and purported to dispose of all her property, both her own and what she had received from her husband.

By her will she gave a legacy to her daughter Banubai and made certain bequests in favour of the son and three daughters of her predeceased son, Nusservanji.

The residue of the estate she bequeathed absolutely to her surviving son, Sorabji, by the following clauses :—

9. As to my all lands and immoveable properties, houses, vadis, lands together with the building (erected) thereon received by my husband in Surat and Broach and as to my moveable and immoveable properties wherever the same may be and as to the household goods and effects and as to my whatever rights I am to get and as to whatever there may be belonging to me I give the whole thereof to my said son Sorabji as a gift. He may make any use thereof he likes, and with regard to whatever may be realised in respect thereof Sorabji himself shall become the owner thereof and he shall fully receive the same.

11. With regard to my remaining immoveable or moveable property and moneys in cash, &c., whatever there may be and wherever the same may be and whether the same may be mine or whether the same may have been received by me on behalf of (from) my husband or which I myself may have been authorised according to my husband's will to give away I make over the whole thereof (i. e., every thing) to my said son Sorabji Bomanji Mody.

On Kuverbai's death her son Sorabji remained in possession of the whole estate and continued to hold it as owner until his death on 24th October 1915 when he purported to deal with the said estate as if it was his own property. He made a will, dated 16th December 1914, of which his daughter Shirinbai the 1st defendant was the executrix.

The plaintiff alleged that Kuverbai took a life-interest in the estate of Bomanji Kaikhushru Mody; that the direction to Kuverbai to make a will was void; and that on Kuverbai's death the estate of Bomanji Kaikhushru Mody devolved under clause 8 of his will on his two sons in equal shares subject to the legacies to the daughters or that it devolved on the heirs of Bomanji Kaikhushru Mody as on an intestacy.

The plaintiff prayed (*a*) that the estate of Bomanji Kaikhushru Mody may be administered by and under the directions of the Honourable Court and partitioned amongst the parties entitled thereto in accordance with

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their respective interests, (*b*) that it may be declared that the directions to Kuverbai to make a will in accordance with the oral instructions of the testator contained in the will of Bomanji Kaikhushru Mody were void and of no effect, (*c*) that it may be declared that Kuverbai had no power to make a will disposing of any part of the estate of Bomanji Kaikhushru Mody, (*d*) that it may be declared that the estate taken possession of by the 1st defendant as being the estate of Sorabji was really the estate of Bomanji Kaikhushru Mody and that Sorabji had no power to dispose by his will of the said estate save his own share therein, and (*e*) that all necessary directions may be given, enquiries made and accounts taken.

Beaman J., who heard the case, held that Kuverbai took a life interest with power of disposition *inter vivos*; that the direction in the will to Kuverbai to make a will was void; and that on Kuverbai's death there was an intestacy as regards the testator's property remaining in her hands undisposed of at her death.

The 1st defendant appealed and the plaintiff filed cross-objections.

Setalvad with *Taraporevalla*, for the appellant.

Strangman, Advocate-General, with *Desai*, for respondents Nos. 1 and 4.

Desai with him *Kanga*, for respondents Nos. 6, 7, 8 and 9.

F. S. Taleyarkhan, for respondent No. 5.

Respondents Nos. 2, 3, 10, 11, 12 and 13 did not appear.

SCOTT, C. J.:—This is an appeal from the judgment of Beaman J. We have to construe the will of Bomanji

Kaikhushru Mody who, by clause 4 of his will as to all his property, made his wife Kuverbai "Malek Mukhtyar" during her life, just as the testator was the owner, free from question by any of his other heirs, representatives, relatives and kinsmen, with directions (clause 5) that she should protect the children, as he had protected them, according to their means, declaring (clause 6) that if any of his children should not behave respectfully towards, and act according to the order of, the mother, then during her life-time the child should not have any claim to any of the testator's property.

Clause 7 provided that "agreeably to what was written above, the wife was, during her life-time, to carry on 'Vahivat' (management), in respect of every kind of property and make expenses on auspicious and inauspicious occasions, as the testator had been doing." The clause proceeds "and in her life-time, keeping God and Meher Davar (the Dispenser of Justice) before her mind, my wife shall duly as I have directed her orally and according to the times (i.e., as circumstances demand) make her will, and all my heirs and the heirs of my heirs shall duly act agreeably to the same."

The learned Judge held that clause 4 conferred no more than a life-estate upon Kuverbai. In this construction I concur, for although "Malek Mukhtyar" would, standing by itself, imply absolute ownership, that term is limited by the words "during her life" in clause 4, as well as by the implication in clause 5, that the maintenance of the children should be proportioned to the means of the testator which he confided to his widow and the directions in clause 7 that the widow during her life-time should carry on "Vahivat" and make expenses on auspicious and inauspicious occasions (such as marriages and deaths).

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The learned Judge, however, states that in the cases of *In re Thomson's Estate*[1] and *In re Pounder*[2], the Courts were very clear that although an estate for life was given the life tenant had absolute power to dispose of the property *inter vivos* though he had no power to dispose of it by will and he was of opinion that these cases were in all material points identical with this case. Kuverbai had a life-estate with uncontrolled power of disposition *inter vivos*.

The learned Judge is under a misapprehension as to *In re Thomson's Estate*[1]. There the testator gave all his property to his widow "for the term of her natural life to be disposed of as she may think proper for her own use and benefit according to the nature and quality thereof and in the event of her decease, should there be anything remaining of the said property or any part thereof" he gave the "part or parts thereof" to certain persons. The Judges of the Court of appeal expressed the opinion *obiter* that the widow took no more than a life-estate with a right to enjoy the property *in specie*. In *In re Pounder*[2] the testator gave his residue to his wife absolutely, and by a codicil revoked this gift and after making a specific gift gave his residue to his wife, for her own absolute use and benefit and disposal, but, without prejudice to the absolute power of disposal by his wife of all the residue, in case at her decease any part thereof should remain undisposed of by her, he gave the same to two other persons generally. It was held that the widow took a life interest with power of disposition by act *inter vivos* but not by will.

The expression "power of disposal" in *In re Pounder*[2], in my opinion, differentiates it entirely from the present case. Moreover the testator Bomanji provided

(1) (1880) 14 Ch. D. 263. (2) (1886) 56 L. J. Ch.

by clause 8 that if his wife, that is to say, "administratrix" should die without making her will as mentioned in the above paragraph 7, then both his sons Nusservanji and Sorabji should duly become "Malek in equal shares of all kinds of my property and effects" and pay certain legacies as provided. The testator treats the property not covered by a will of Kuverbai as all his property, thereby indicating that, except by her testamentary disposition, he expected his property to remain intact.

Kuverbai made a will on the 16th May 1905 appointing Sorabji executor and died in March 1906. Sorabji proved the will. His executrix Shirinbai is the first defendant. The plaintiff is the daughter of Nusservanji, the other son of the testator who predeceased the mother Kuverbai. It is in connection with clause 7 of Bomanji's will and the will of Kuverbai that the principal contest and the most difficult question arises.

The plaintiff contends in paragraph 10 of the plaint:—

10. The plaintiff says that the said Kuverbai had no power to make a will dealing with the estate of the said Bomanji Kaikhushru Mody and that the whole of the estate alleged by the 1st defendant to belong to the said Sorabji really belonged to the estate of the said Bomanji Kaikhushru Mody and is divisible either under clause 8 of the said will of the said Bomanji Kaikhushru Mody or is divisible amongst the heirs of the said Bomanji Kaikhushru Mody or the legal representatives of such as have died on an intestacy of the said Bomanji Kaikhushru Mody as to his property after the life-interest therein of the said Kuverbai.

Clause 8 of the will of Bomanji referred to in paragraph 10 of the plaint is as follows:—

8. Should my wife, that is to say, executrix die without making her will that is to say testamentary writing as mentioned in paragraph seven above, then both my sons Nusservanji and Sorabji shall duly become Malek (i. e., owner) in equal shares of all kinds of my property and effects and both of

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them shall duly take certificate (that is, obtain probate) from the Court; and out of my property and effects which they may take, they shall duly pay to their sister Nawazbai Rs 5,000, in words five thousand, thirteen months after the demise of their respected mother, and to the said moneys neither Nawazbai's husband nor any of her creditors whatsoever shall duly have any manner of claim or right or title. And if, when the time for payment of the above-mentioned moneys to my daughter Nawazbai, agreeably to what is written above, arrives, the said Nawazbai be not alive, then my sons shall duly pay her children that there may be in equal shares the moneys appertaining to their mother's shares. And if the said children be minors, then the moneys in respect of their shares shall be set apart and interest thereon shall be realised by depositing the same in Savings Bank or (investing the same in) Government (Loan) Notes or in any good security and (the moneys) shall be duly paid to them on their attaining the age of twenty-one years. But Nawazbai's husband shall have no manner of right or claim whatever to the said moneys, and if he should prefer any claim, the same shall duly be null and void.

Clause 9 contains a conditional legacy in favour of Banubai, the other daughter of the testator, similar in terms to that in favour of Nawazbai but smaller in amount. Clause 10 is as follows :—

10. If my wife and executrix should die without making a will and if any of my sons should die before my wife and should there be son or sons of him, then he or they shall duly receive his or their father's share, and should there be a daughter or daughters of him then my other son or his son shall get her or them married and shall duly pay to each of the daughters Rs. 1,000, in words, one thousand, when she attains the proper age ; and should there be a wife (widow) of the (deceased) son and if she should not remarry then my other son or his son shall duly pay Rs. 2000, in words, two thousand, to her. If, after receiving the said amount, she re-marries, then my son or his heirs are duly Mukhtyars (i. e., at liberty) to recover the said amount together with interest thereon from her.

It is impossible to hold that the sons under clause 8 got anything but interests contingent on their mother not making her will as mentioned in clause 7.

The learned Judge has held that the testamentary power given by clause 7 was void for uncertainty on

the authority of *Hetley* v. *Hetley*[1] but that, notwithstanding, as Kuverbai did execute a will, it cannot be said that she did not make a will as mentioned in paragraph 7 and therefore the condition has not been shown to have been fulfilled, upon which clause 8 would come into operation.

The words "shall duly as I have directed her orally and according to the times (or as circumstances demand)" do not seem to me consistent with a general testamentary power; the reference to previous oral directions indicates the existence of special directions as to the objects in whose favour the power was to be exercised. I, therefore, agree with the lower Court that the power was limited as in the case of *Hetley* v. *Hetley*[1]. I do not, however, feel satisfied that this Court should in the circumstances declare the power or trust in the form of a power to be void for uncertainty. The Court is not called on to declare whether or not an unexecuted power should be executed in a particular manner. It will not try to compel the execution of a trust where the terms of the trust are not ascertained or ascertainable, but, where a power in the nature of a trust has been executed in professed compliance with the authority given, the onus, as it seems to me, of proving that the execution was a fraud on the power should lie on those who seek by challenging the execution to get possession of property in the hands of those benefiting by the act of the donee of the power. In many cases one can imagine very little evidence would be required to shift the onus of proof of title upon the parties in possession.

In the present case I doubt whether the Court would not best give effect to the intentions of the testator by assuming that Kuverbai, who did make a will and

[1] [1902] 2 Ch. 866.

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whom he trusted, has carried out the testator's directions, for she refers to the testamentary power conferred upon her by her husband's will and makes dispositions among the members of the family on lines similar to those indicated by Bomanji in clause 10 of his will to take effect in default of appointment by Kuverbai and in the event of the death of one of his sons.

I have had doubt whether the provisions of Kuverbai's will should not be taken as evidence of the testator's directions, following the course taken in *Podmore* v. *Gunning*[1]. There the plaintiffs, the natural children of the testator, represented that previously to, and at the time of making, his will the testator communicated to his wife his desire and determination to give the whole of his property, real and personal, to the plaintiffs after her death and that she undertook that if he made a will in her favour she would carry into effect his determination in favour of the plaintiffs and that upon such undertaking and promise he made his will giving his real and personal estate to his wife absolutely "having a perfect confidence she will act up to those views which I have communicated to her in the ultimate disposal of my property after her decease."

The testator's widow made two wills, one almost entirely in favour of the plaintiffs and the other giving them greatly reduced legacies—both wills were subsequently destroyed and the widow who married again died intestate.

The plaintiffs joined as defendants the second husband of the widow (who claimed as administrator of the personalty and as tenant by the courtesy of the real estate) and the heir-at-law and next-of-kin of the testator.

(1) (1836) 7 Sim. 644.

The Vice-Chancellor held that the words of the will were consistent with the testator having given to his wife either some absolute direction or some general recommendation leaving it to her discretion to act upon it or not and in such manner as she might think fit.

For the next-of-kin and heir-at-law it was contended that on the face of the will the wife was not to take the property beneficially for a longer period than her own life. This also was the plaintiff's contention. There were therefore three alternatives before the Court—a secret trust for the plaintiffs, a resulting trust for the next-of-kin and heir-at-law, or an absolute estate for the widow.

On the evidence it was held that no secret trust was made out but a discretion was left in the widow, the Vice-Chancellor holding that the two first wills of the widow were extremely strong evidence of what passed between her and the testator. In the result, therefore, both the plaintiffs and the next-of-kin and heir-at-law failed.

In consequence of my doubts the question has been argued at a further hearing of this appeal. I still doubt if a trust for the next-of-kin is more likely than the directions contained in Kuverbai's will to carry out the intentions of the testator. There is, however, no direct but only inferential evidence as to the testator's directions and under all the circumstances of the case I am not prepared to set aside the decision of the lower Court or to hold that there is sufficient evidence of the terms of the power conferred on Kuverbai.

The only remaining question is whether the plaintiffs' claim is barred by limitation. It is not barred if Article 123 applies. In my opinion that Article does apply for the plaintiffs are suing for a distributive share of the property of an intestate. The recent decision of

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the Privy Council in *Maung Tun Tha* v. *Ma Thit*[1] displaces the line of Indian cases upon which reliance has been placed for the defendants.

The decree of the Court below must be varied by declaring that Kuverbai took only a life-estate under the will of Bomanji and directing the Commissioner to take an account of the estate of Bomanji which came into the hands of Sorabji both before and after the death of Kuverbai.

The respondents other than Ratanbai must be treated as formal parties throughout the hearing in the lower Court under rule 503. Therefore only one counsel would be allowed to them in taxation of costs between party and party. After letters of administration were granted to Ratanbai there was no reason for their appearing in the appeal at all as they claimed through Nusservanji, and, therefore, no costs can be allowed to them on the appeal. The order as to costs will be that the costs of all parties from the date of the filing of the suit to the decretal order of reference will come out of the estate, and the costs of the respondent Ratanbai in the Court of appeal will come out of the estate. The costs of the appellants in the appeal must be borne by themselves.

MACLEOD, J. :—One Bomanji Kaikhushru Mody died in March 1872, leaving him surviving his widow, Kuverbai, two sons, Nusservanji and Sorabji and two daughters, Nawazbai and Banubai. He left a will whereby he appointed Kuverbai executrix and she proved the will in April 1872. Thereafter she administered the estate until her death in 1906. By her will she appointed her surviving son Sorabji (Nusservanji having died in 1899) her executor and she purported to dispose of all her property, both her own and what she had received from

(1) (1916) L. R. 44 I. A. 42.

her husband. After reciting that her daughter Nawazbai was dead and had in her life-time passed a release whereby she had given up all her claim against the estate of Bomanji the testatrix proceeds to make bequests in favour of Banubai and the children of Nusservanji. By clauses 9 and 11 she bequeathed absolutely the residue to Sorabji. Clause 11 is important:—

"With regard to any remaining immoveable or moveable property and moneys in cash whatever there may be and wherever the same may be and whether the same may be mine or whether the same may have been received by me on behalf of (from) my husband or which I may myself have been authorised according to my husband's will to give away I make over the whole thereof (i.e., everything) to my said son, Sorabji Bomanji Mody."

From this clause it may be gathered that Kuverbai thought she had, under her husband's will, a general power to appoint. Sorabji took possession of the estate and continued to hold it as owner until he died in October 1915, leaving a will whereby he appointed his daughter Shirinbai executrix. The will was proved on the 19th January 1916.

The plaintiff who is a daughter of Nusservanji then filed this suit praying *inter alia* that the estate of Bomanji might be administered by the Court, and that it might be declared that Kuverbai had no power to make a will disposing of any part of the estate of Bomanji.

The chief points for consideration were:

(1) Whether the plaintiff's claim was barred by limitation?

(2) On a proper construction of Bomanji's will did Kuverbai take (*a*) as absolute owner or (*b*) as life tenant with a general power of appointment by will? or (*c*) as life tenant with a special power of appointment by will according to the oral directions of the testator?

(3) If Kuverbai took only a life-estate and the power to make a will was void for uncertainty, was there an intestacy?

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The learned Judge in the Court below has held that the suit was not barred by limitation; that Kuverbai took a life interest with power of disposition *inter vivos*; that the direction in the will to Kuverbai to make a will was void; and that on Kuverbai's death there was an intestacy as regards the property of Bomanji remaining in her hands undisposed of at her death. Accordingly it was referred to the commissioner to take an account of the estate of Bomanji which was in the hands of Sorabji at the death of Kuverbai with a direction that he should ascertain whether the investments standing in the name of Sorabji formed part of the estate of Bomanji.

From that decree Shirinbai filed an appeal, while Ratanbai filed cross-objections on the ground that it should have been held that Kuverbai took a life interest only in her husband's estate.

On the question of limitation it has been argued that Article 123 can only apply in cases where the claim for a distributive share in the estate of an intestate is made against a legal representative of the deceased or some one legally bound to distribute the estate. I agree with the learned Judge that the decision of the Privy Council in the case of *Maung Tun Tha* v. *Ma Thit* [1] lays it down that Article 123 applies to every suit in which the plaintiff seeks to recover an undistributed share in the estate of an intestate. It is true that the Indian decisions to the contrary were not referred to, but with all respect those decisions appear to have resulted from a misreading of what was said by White J. in *Issur Chunder Doss* v. *Juggut Chunder Shaha* [2]. That was a suit for a legacy and it is obvious that such a suit can only lie against a person bound to pay the legacy under

[1] (1916) L. R. 44 I. A. 42.

[2] (1882) 9 Cal. 79 at p. 81.

the testator's will. In *Keshav Jagannath* v. *Narayan Sakharam*[1], Sargent C. J. said :

"We concur in the opinion expressed by White and Macpherson, JJ. in *Issur Chunder Doss* v. *Juggut Chunder Shaha*[2], that the article only applies to a case in which it is sought to obtain the share from a person who is the executor of the will or otherwise represents the estate with a legal obligation to 'distribute the estate'".

With all respect it will appear from the report in *Issur Chunder's case*[2] at p. 81 that the learned Judges said :

"Article 123 only applies to cases in which the property sought to be recovered is not only a legacy, but is also sought to be recovered as such from a person who is bound by law to pay such legacy, either because he is the executor of the will or otherwise represents the estate of the testator."

But a suit for a distributive share is of an entirely different nature and may lie against any one in possession of the estate.

The next question is, what is the proper construction to place upon clause 4 of Bomanji's will? It is true that the testator makes Kuverbai "Malek Mukhtyar" of all his property, but only "during her life". Clauses 5, 6 and 7 clearly show that the testator intended that Kuverbai should carry on the management only of the estate in the same way as he had been doing, and the gift over to the sons in equal shares of all funds of his property, if Kuverbai died without making a will in accordance with his intentions, seems to me conclusive that the testator did not give and did not intend to give to his wife a power of disposition *inter vivos*.

Then in clause 7 there are the following words :—

"And in her life-time, keeping God and Meher Davar before her mind, my wife shall duly as I have directed her orally and according to the times make her will and all my heirs and the heirs of my heirs shall duly act agreeably to the same."

(1) (1889) 14 Bom. 236 at p. 240. (2) (1882) 9 Cal. 79 at p. 81.

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SHIRINBAI v. RATANBAI.

It has been contended that these words constitute a general power of appointment. But in my opinion they cannot be read in that way. They point obviously to the fact that the testator gave certain oral directions to his wife and gave her power only to make a will in accordance with those directions. Stress has been laid upon the words "and according to the times" but it has been shown to us that the proper translation of the actual Gujarati words is "according to the circumstances", i.e., at the time Kuverbai made her will, so that Kuverbai might make the testator's instructions conform to the circumstances as existing when she made her will.

There can be no evidence now as to what these instructions were, but even if there were evidence, on the authority of *Hetley* v. *Hetley* [1], which appears directly in point, that evidence could not be admitted. The power then is void for uncertainty. It has been suggested that the case might fall within the principle laid down in *In re Fleetwood* [2] but that principle is only applicable where, on the face of the will, there has been an absolute gift with an indication that the gift is subject to a secret trust, so that it is clear there was no intention on the part of the testator that the donee should take a beneficial interest. Then parol evidence is admissible to prove the trust so as to prevent a fraud, but if the particular trust cannot be proved there is a resulting trust in favour of the next-of-kin.

The last question is, whether, since we cannot give effect to the will of Kuverbai, there was an intestacy on her death, or whether the gift over in clauses 8 and 10 comes into operation.

The plaintiff contends that it is for the defendant to show that Kuverbai died without making a will as

(1) [1902] 2 Ch. 866. (2) (1880) 15 Ch. D. 594.

mentioned in paragraph 7 before the gift over comes into operation, and as she cannot do so, there is an intestacy. The first defendant on the other hand argues that it makes no difference whether Kuverbai died without making a will or whether she made a will which is found to be a nullity.

No direct authority on the point has been cited. But it seems to me that the testator only intended that the gift over should take effect in the case of his wife dying intestate. He made no provision for what should happen if his wife died leaving an invalid will. Therefore there was an intestacy.

The decree of the Court below must be varied by declaring that Kuverbai took only a life-estate under the will of Bomanji and directing the commissioner to take an account of the estate of Bomanji which came into the hands of Sorabji both before and after the death of Kuverbai.

Solicitors for the appellant: Messrs. *Merwanji, Kola & Co.*

Solicitors for the respondent: Messrs. *Payne & Co.*

Decree varied.

G. G. N.