PRIVY COUNCIL.*

BHAIDAS SHIVDAS (PLAINTIFF), APPELLANT *v.* BAI GULAB AND ANOTHER (DEFENDANTS), RESPONDENTS.

P. C.*
1921.
October 25.

~~46 I. A.~~ 49 I. A.

[On Appeal from the High Court at Bombay.]

Hindu will—Gift to widow—Construction—"Malik"—Trust—"All that may remain"—Uncertainty of subject matter—Invalidity.

If a Hindu testator in making a disposition in favour of his widow uses words conferring absolute ownership, she enjoys all the rights of an owner, including that of alienation, although those rights are not conferred by express and additional words, unless the circumstances or the context are sufficient to show that absolute ownership was not intended.

A Hindu by clause 2 of his will appointed his wife his executrix, by clause 3, he constituted her owner ("malik") of his property, and provided that she should leave whatever property might remain after her death to two named daughters "as she liked". By clause 18 the widow after defraying the expenses of a religious object out of the rents from certain property, was authorised to apply the surplus to the maintenance of herself and the two daughters. Clause 20 gave the wife express power to mortgage or sell the testator's property. By clause 23 the daughters were to be executrixes upon the death of the widow, with power to deal with and manage the entire property.

Held, that the widow took an absolute estate; the terms of clause 18 and clause 23 not being sufficient to displace the effect of clause 3 fortified by clause 20, and the second part of clause 3 not constituting a trust in favour of the daughters as the subject matter, namely, what might remain, was uncertain.

Surajmani v. *Rabi Nath*[1], followed; and (as to the alleged trust) *Horwood* v. *West*[2], applied.

APPEAL (No. 123 of 1919) from a judgment and decree of the High Court in its Appellate Jurisdiction, affirming a decree of the High Court in its Original Civil Jurisdiction.

The suit related to the will of Nathoo Moolji, a Gujarati Hindu, who died on December 8, 1894, and to

*Present:—Lord Buckmaster, Lord Atkinson, Lord Carson and Sir John Edge.

(1) (1903) 25 All. 351; L. R. 35 I. A. 17. (2) (1823) 1 Sim. & Stu. 387.

1921.

BHAIDAS SHIVDAS v. BAI GULAB.

the respective estates and interests taken by the testator's widow and his two daughters. The material terms of the will appear from the judgment of the Judicial Committee.

The suit was brought by the appellant as heir of the testator's daughter, Diwali, who died in 1906. The daughter Jamnabai took possession of the estate upon the death of the testator's widow, and remained in possession until her death in 1911, whereupon the respondents came into possession and took out letters of administration to her estate.

The appeal came before the Board originally in February, 1921, and was then allowed upon a question of procedure (see 45 Bom. 718 and L. R. 48 I. A. 181). Subsequently the appeal was restored to the list by consent for trial upon the merits.

The views of the learned Judges before whom the suit and appeals were heard in India were shortly as follows. The trial Judge (Macleod J.) held that the widow took only a Hindu widow's estate and that upon her death there was an intestacy. He was of opinion that the English law as to powers of appointment should not be extended to Hindu wills further than was warranted by the decision of the Privy Council in *Bai Motivahu* v. *Bai Mamubai*[1], and that consequently there did not arise a trust in favour of the daughters equally in default of the exercise of a power to appoint between them. He dismissed the suit. Upon appeal Scott C. J. held that the widow took only a life estate, and that the will imposed an imperative direction upon her to appoint in favour of the daughters, with the result that there was in their favour a trust in remainder as tenants in common in equal shares. Heaton J. differed from the Chief Justice, holding that no obligation was

[1] (1897) 21 Bom. 709; L. R. 24 I. A. 93.

imposed upon the widow to make any disposition in favour of the daughters. Upon the appeal being erroneously referred to another Bench (see 45 Bom. 718; L. R. 48 I. A. 181), Batchelor J. expressed no view as to the estate taken by the widow; he was of opinion that there was no precatory trust in favour of the daughters and that upon the widow's death the whole estate passed to the daughter Jamnabai. Shah J. held that there was an absolute gift to the widow and no trust. In the result the decree of Macleod J., dismissing the suit, was affirmed.

1921, October 24, 25:—*De Gruyther, K. C.* and *Parikh*, for the appellant.

On the true construction of the will the testator's widow took a Hindu widow's estate, with a special power to appoint between the two daughters. The use of the word "malik" in clause 3 does not show conclusively that an absolute estate was intended. The terms of the will as a whole, especially clause 18 and clause 23 show a contrary intention. Had the testator, who was governed by the Mayukha, died intestate the family of either daughter who died before the widow would have got nothing: Mayne, paras. 614, 615. The object of the testator was to provide for that eventuality to the exclusion of collaterals. That object could best be effected by giving his widow a life interest, with a gift over to the daughters. The validity of powers of appointment in Hindu wills is established by *Bai Motivahu* v. *Bai Mamubai*[1]. In default of appointment the daughters take equally. It is true that, as pointed out by Macleod J., section 79 of the Indian Succession Act (X of 1865) which so provides was not one of the sections applied to Hindu wills by Act XXI of 1870, section 2. It was not so applied because in 1870 it was not thought

[1] (1897) 21 Bom. 709; L. R. 24 I. A. 93.

1921.

BHAIDAS SHIVDAS v. BAI GULAB.

that a Hindu will could give a power to appoint. The rule embodied in section 79 is, however, a rule of construction and should receive effect as a rule of justice, equity and good conscience, since its application is not excluded by any legislation. The appellate Court in holding that clause 3 did not create a trust, translated the words in a manner differing from the official translation which had always been accepted by the parties. Of two possible constructions effect should be given to that which excludes an intestacy.

Sir George Lowndes, K. C. and *E. B. Raikes,* for the respondents.

The widow took an absolute estate under the will. The Board held in *Surajmani* v. *Rabi Nath*[1] which does not appear to have been referred to in India, that the word "malik" imports full proprietory rights, unless there is something in the context to qualify it, and that the fact that the donee is a Hindu widow is not sufficient for that purpose. The rest of the will does not qualify the effect of the use of the word "malik". The word is used in clause 3 in conjunction with the word "heir" and in other clauses it is used of the widow clearly in the sense of full ownership. Powers to mortgage and sell are added because at the date of the will the effect of the word "malik" was only recently established. There being a gift of beneficial ownership, the alleged trust is excluded. The words relied on by the appellant are insufficient to create a trust; they are merely an indication that the widow might properly transmit the estate to the daughters. The appellant's construction would exclude a son who might have been adopted to the testator. The Judges in the appellate Court with a knowledge of the Gujarati language, held that the words used did

[1] (1903) 25 All. 351; L. R. 35 I. A. 17.

not create a trust. The appellate Court was entitled to give effect to the true translation of the Gujarati words: *Ramanadan Chettiar* v. *Vava Levvai Marakayar*[1]. Further, the subject-matter of the alleged trust was too uncertain for a trust to arise.

[LORD BUCKMASTER referred to *Horwood* v. *West*[2] and *Parnall* v. *Parnall*[3].]

De Gruyther K. C., in reply referred to *Le Marchant* v. *Le Marchant*[4].

October 25:—The judgment of their Lordships was delivered by

LORD BUCKMASTER:—This is an appeal against a decree, dated the 23rd March 1917, of the High Court of Judicature at Bombay (Appellate Civil Jurisdiction), affirming a decree, dated the 8th September 1916, of the High Court in its Ordinary Original Civil Jurisdiction.

The question raised for determination arises on the construction of the will, dated the 6th August 1894, of one Nathoo Moolji who died on the 8th December 1894.

The appellant is the husband of one of the two daughters of the testator, who predeceased her mother, the testator's widow. The respondents claim under the other daughter who survived her mother.

At the date of the will there were living the testator's widow, his two daughters, and the widow of a predeceased son. The two daughters were named Jamnabai and Diwali. Diwali died on the 13th May 1906 and the testator's widow on the 15th August 1911.

[1] (1916) 40 Mad. 116, 122; L. R. 44 I. A. 21, 27.

[2] (1823) 1 Sim. & Stu. 387. [3] (1878) 9 Ch. D. 96.

[4] (1874) L. R. 18 Eq. 414.

1921.

BHAIDAS SHIVDAS v. BAI GULAB.

In these circumstances the appellant claims as the husband of Diwali that according to the true construction of the will the two daughters took a vested interest in the testator's residuary estate, which was not divested by reason of the death of one of the daughters before the death of the widow. The history of the suit has been fully dealt with by their Lordships when this appeal was formerly before them, and need not be repeated.

The will was made in the Gujarati language, and in the translation is divided into clauses. By clause 2 the testator appoints his wife as his sole executrix. In the next clause, after stating that as he has no son he appoints his wife to be his heir; and the clause continues in these words :—

"And I constitute her the owner. And as to whatever property there may remain after her death my wife shall leave the said property to my two daughters in such manner as she may like *(either) by making a* 'will' or by making (some) other instrument. Of my two daughters one named Bai Jamnabai was married to Shah Haridas Hemchand, but as he subsequently died she has now become a widow. To her and to (my) other daughter Bai Diwali who has been married to Shah Bhaidas Shivdas (i.e.,) to both of them my wife shall give (my) property in such manner as (she) *may* like."

By later clauses of the will the testator referred to powers that he desired his wife to enjoy: for example, by clause 6 he expressly states that he gives his wife authority to do what she thinks right with the profits and the ready moneys of a shop where he carried on business, and further to continue in partnership with the partners if she so desired. By clause 18 he provides that after there have been defrayed out of the rents of certain specified immoveable property, the expenses in connection with a religious object, for which he had made provision, the wife should apply the surplus for her maintenance and use and for the maintenance and use of her daughters if they were living with her, and

if the surplus were insufficient she should deal with the moveable and immoveable properties in such manner as she thought fit. By clause 20, again, he gave express power to his wife to mortgage, lease, sell and use the properties. Finally by clause 23 he provided that after the death of his wife his daughters should be named executrixes, and he gave them authority to deal with or manage the whole of his property and effects. There is no dispute that the word that was used in clause 3 as the original word of gift was the word "malik" which could be appropriately used to constitute the wife absolute owner. It is not that the word is a "term of art," it does not necessarily define the quality of the estate taken but the ownership of whatever that estate may be, and in the context of the present will their Lordships think the estate was absolute. At the time when the will was executed it may well have been that whoever drew the will was aware that at that time words of absolute gift in favour of a Hindu widow might not be supposed capable of conferring upon her a power of alienation, for in the case of *Surajmani* v. *Rabi Nath*[1] which ultimately came before this Board we find that the High Court had ruled: "that under the Hindu law, as interpreted up to the present in the case of immoveable property given or devised by a husband to his wife, the wife has no power to alienate, unless the power of alienation is conferred upon her in express terms."

That decision of the Board showed that that provision was no longer sound and that if words were used conferring absolute ownership upon the wife, the wife enjoyed the rights of ownership without their being conferred by express and additional terms, unless the circumstances or the context were sufficient to show

(1) (1903) 25 All. 351; L. R. 35 I. A. 17.

1921.

BHAIDAS SHIVDAS v. BAI GULAB.

that such absolute ownership was not intended. If clause 3 stood by itself it would, their Lordships think, be difficult to dispute that whatever the testator desired with regard to the disposition of his property after the death of his wife he had not expressed his wishes in such a manner that they bound the property. The words under which the appellant claims are words which only attach to whatever property there may remain after the death of the wife. Without for the moment considering whether the desire expressed by the testator is expressed in a form that makes her disposition of it mandatory or no, it is sufficient to say that if that clause stood alone the principle stated in the case of *Horwood* v. *West*[1] would be applicable to this will as it would to a will in England. The Vice-Chancellor says at page 389 :—"It is essential to the execution of a trust that the subject should be certain; and if this testator intended that his wife should, at her pleasure, during her life, dispose of the property which he left to her, and that his recommendation should extend only to what, if anything, happened to remain of his property at her death undisposed of by her, then there is no trust to be administered by this Court."

But the appellant points out with considerable force that clause 3 does not stand by itself; but that the clauses referred to, and most notably clauses 18 and 23, are in their terms inconsistent with the view that the provisions of clause 3 constituted the wife the absolute owner. Their Lordships are very far from saying that there is not force in this argument; but so far as clause 18 is concerned it should be remembered that even there there is a provision that the surplus, after the property has been used for maintenance in the

(1) (1823) 1 Sim. & Stu. 387.

manner suggested, is to remain with the wife for her maintenance and use, and power is given to her to deal with the immoveable or moveable property as she may think fit. Again, with regard to clause 23, the appointment of the daughters as executrixes of the property, if in fact there had been a gift to them after the widow's death, would be quite unnecessary. The only purpose for creating them executrixes would on either hypothesis be to see that the religious purpose to which part of the property had been devoted and a certain beneficial trust given to the widow of the son should be carried out. If and so far as they were absolute owners it had little value.

Their Lordships therefore think that these subsequent clauses in the will are not sufficient to displace the language of clause 3, fortified by the powers given in clause 20, and by that language there is no trust created in favour of the two daughters of the testator. In forming this conclusion their Lordships have not considered the serious difficulty that is placed in the way of the appellant by the judgments of the Court from which this appeal has proceeded. In the appellate Court one at least of the Judges was thoroughly acquainted with the language in which this will is drawn, and he took the view that the actual words used in clause 3 suggesting how the property should be left after the death of the testator's widow were in themselves inadequate to do anything more than to express a wish and did not create an obligation. Their Lordships have not dealt with that part of the case, because in their opinion the matter is better decided upon the principle to which reference has already been made, viz., even assuming it was intended to create a trust and the words were sufficient for that purpose the subject matter on which the trust is to operate is by the

1921.

BHAIDAS SHIVDAS v. BAI GULAB.

terms of this will too uncertain to enable the Court to give it administration.

For these reasons their Lordships are of opinion that this appeal must fail and ought to be dismissed with costs; the costs incurred in the Court below from the 13th March 1917, and of the appeal on the preliminary point that was argued before this hearing on the merits was reached, which were reserved, in their Lordships' opinion, should be costs in the appeal; and they will humbly advise His Majesty accordingly.

Solicitor for appellant: Mr. *E. Dalgado.*

Solicitors for respondents: Messrs. *Hughes & Sons.*

Appeal dismissed.

A. M. T.

ORIGINAL CIVIL.

Before Mr. Justice Kanga.

1921. *February* 18.

MITHIBAI (PLAINTIFF) *v.* MEHERBAI AND OTHERS (DEFENDANTS)*.

Hindu Law—Will—Construction of—"Malik", meaning of—Will declaring widow "malik" of residuary property and directing that "during her life-time she shall apply the same and spend in a good way"—Widow takes life-estate with uncontrolled power of disposition by act inter vivos*—Sale by a Hindu widow appointed as executrix—Construction of conveyance—Probate and Administration Act (V of 1881), section 90.*

A Hindu testator appointed his widow (his only heir) the sole executrix of his will and devised the residue of his property to her in the following terms:—"As to whatever surplus of my property may remain over after my decease the (Malik) owner thereof is (shall be) my wife Diwali. She shall during her life-time apply and spend the same in a good way. As to the surplus that may remain over after the performance of her, that is to say, my wife's Karaj Avasar (funeral and subsequent ceremonies) all that shall be used for good purpose. Except my executrix no one else nor my heirs or representatives whatever shall have any right to or interest in my property.

* O. C. J. Suit No. 1962 of 1919.