PRIVY COUNCIL.

DINBAI (PLAINTIFF)

v.

NUSSERWANJI RUSTOMJI AND OTHERS (DEFENDANTS).

P. C.* 1922

May 25.

[ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER OF SIND.]

Will—Parsi Testator—Construction—English rules of construction not applicable—"Heirs."

Cases depending upon rules adopted by English Courts for the construction of wills made in England are not of assistance in construing the will of a Parsi made in India.

A Parsi merchant by his will made at Karachi in the English language provided (by clause 7) that after the death of his widow his reversionary estate should be held in trust to pay the income to his son J. for life, and upon J.s' death to J.'s widow and children; and (by clause 8) that in the event of J. dying without issue, the executors should pay Rs. 10,000 to J.'s widow, and should divide a moiety of the residue "amongst my heirs according to the law of intestate succession among Parsis, but excluding the widow of J. from getting any share in such distribution." J., after enjoying the life interest bequeathed to him by clause 7, died without issue; his widow thereupon claimed as J.'s administratrix a share of the residuary estate under the last provision of clause 8 of the will:—

Held, that the words of that provision excluded a claim by the widow as representing her husband, not only a claim in her own right; further, that according to the intention of the testator, as appearing from the terms of the will but apart from English rules of construction, J. was not included among the "heirs" as that word was used in clause 8.

Observations in *Bhagabati Barmanya* v. *Kali Charan Singh* (1), and *Norendra Nath Sircar* v. *Kamalbasini Dasi* (2) followed.

Judgment of the Court of the Judicial Commissioner affirmed.

* *Present*: LORD ATKINSON, LORD PARMOOR, LORD CARSON, SIR JOHN EDGE and MR. AMEER ALI.

(1) (1911) I. L. R. 38 Calc. 468; L. R. 38 I. A. 54.

(2) (1896) I. L. R. 23 Calc. 563; L. R. 23 I. A. 18.

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APPEAL (No. 47 of 1921) from a judgment and decree of the Court of the Judicial Commissioner in its High Court jurisdiction (November 20, 1918) reversing a decree of that Court in its District Court jurisdiction.

The suit was brought by the appellant, the widow of one Jamsedji, who was the son of Pochaji, against the executors of the will of Pochaji. The testator was a Parsi merchant who died at Karachi in 1908. The appellant by her plaint claimed a declaration that as representative of Jamsedji she was entitled under the will of Pochaji to a share of his residuary estate. The facts of the case and the material terms of the will appear from the judgment of the Judicial Committee.

Both Courts in India had rejected the appellant's claim.

Upjohn K.C. and *E.B. Raikes*, for the appellant. Jamsedji, as one of the heirs of the testator according to the law of intestate succession among Parsis, was entitled to four-sevenths of the moiety, and his rights are now vested in the appellant as his administratrix. [Reference was made to the Parsi Intestate Succession Act (XXI. of 1865), s. 5, and the Indian Succession Act (X of 1865), s. 98.] The words in clause 8 excluding Jamsedji's widow do not apply to her claim as his administratrix; they were inserted to exclude a claim by her under s. 5 of the Parsi Intestate Succession Act, 1865, in case Jamsedji died in the testator's lifetime. The word "heirs" in clause 8 is to be construed as the heirs of the testator at his death: *Wharton* v. *Barker* (1), *Bulloch* v. *Downes* (2). *Hood* v. *Murray* (3).

De Gruyther K.C. and *Kenworthy Brown*, for the respondent. Upon the true construction of the will the

(1) (1858) 4 K. & J. 483, 488. (2) (1860) 9 H. L. C. 1, 18.
(3) (1889) 14 App. Cas. 124, 137.

appellant's claim was rightly rejected. The intention of the testator as appearing from the will was that in the events which have happened the appellant should take Rs. 10,000 and no more. The words in clause 8 excluding the widow apply to her present claim. Further, the word "heirs" in that clause do not include Jamsedji. Clause 8 is directed entirely to the situation upon the death of Jamsedji, and the "heirs" referred to are the heirs of the testator upon that event occurring. The whole provisions of clauses 7 and 8 support that view. Decisions in England based on rules of construction applicable to English wills should not be applied in this case: *Bhagabati Barmanya* v. *Kali Charan Singh* (1).

Upjohn K.C., in reply. The practice of Courts of Equity in England is applicable as representing justice, equity and good conscience: *Mancharsa Ashpandiarji* v. *Kamrunisa* (2).

May 25. The judgment of their Lordships was delivered by

LORD PARMOOR. The question for decision in the appeal is the construction of the will of N. N. Pochaji, a Parsi inhabitant of Karachi, who died there in August, 1908. The testator left a will dated June 21, 1907, of which probate has been granted to the respondents 1 and 2. The appellant is the widow of a son of Pochaji, named Jamsedji, and has obtained letters of administration to his estate. She asks for a declaration that as representative of Jamsedji she is entitled to a half of Jamsedji's four-sevenths share of the residuary estate of Pochaji under ss. 3 and 6 of the Parsi Intestate Succession Act, 1865.

The action was tried by Mr. C. Fawcett, Additional Judicial Commissioner, who held that Pochaji, by the

(1) (1911) I. L. R. 38 Calc. 468; L. R. 38 I. A. 54, 64.

(2) (1868) 5 Bom. L. R. (A. C. J.) 109, 114.

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terms of his will, intended that the appellant should be entirely excluded from any share in the distribution, whether as heir of Jamsedji or otherwise. It is clear that the learned Judge appreciated the case put forward on behalf of the appellant before their Lordships. He states her claim to be that, though the will may exclude her from sharing as an heir of the testator it does not exclude her as an heir of Jamsedji. This decision was confirmed in the Appellate Court, the Court holding that whatever might be the construction of the will in other respects, the appellant was excluded from claiming any share in the residuary estate of Pochaji by the clause "excluding the widow of Jamsedji from getting any share in such distribution." The general principle to be applied in the decision of the appeal is not in dispute. The rule of law is to ascertain the intention of the testator as declared by him, and apparent in the words of his will, and to give effect to this intention so far as, and, as nearly as may be, consistent with law. In the present instance no issue of inconsistency with law arises, so that the only question is one of construction.

Pochaji, a Parsi merchant at Karachi, made his will in the English language. It is not necessary to set out the whole will, but clauses 7 and 8 are as follows: "7. From and after the death of my wife my executors shall stand possessed of the residuary trust estate upon trust to spend from and out of the same a sum of rupees two thousand for the funeral expenses of my wife and for other ceremonies for one year after her death, and shall hold the residue upon trust to pay the net income thereof to my son Jamsedji, for and during his lifetime and from and after his death upon trust for the widow and children of my son Jamsedji absolutely as tenants-in-common in such proportions that each male child shall get double the share of each

female child, and the widow shall get the same share as a female child Provided, however, that if any child of my son Jamsedji shall have died in his lifetime leaving a child or children him surviving, then such child or children shall take the share which his or her, parent would have taken of the residuary trust estate. if such parent had survived my son Jamsedji, and if more than one the males always taking twice the share of the females. 8. In the event, however, of the said son Jamsedji dying without leaving any issue how low soever, but only leaving a widow, then my executors shall pay out of such residuary trust funds a sum of rupees ten thousand absolutely to such widow, and in such case and also in the event of the said Jamsedji dying without leaving any widow or issue how low soever, my executors shall stand possessed of the balance of said residuary trust estate in trust to spend rupees two thousand for the funeral expenses of the said son Jamsedji and to appropriate a moiety of the balance to such charitable objects for the purpose of promoting liberal and religious education amongst the Parsi Zoroastrians of Karachi as my executors may in their discretion think fit, and divide the other moiety amongst my heirs according to the law of intestate succession among Parsis, but excluding the widow of Jamsedji from getting any share in such distribution."

In the event of her surviving him, Pochaji appointed his wife, Khursedbai, sole executrix and trustee of his will; but she predeceased her husband. At the death of Pochaji in 1905 he left surviving him his son Jamsedji, Dinbai, Jamsedji's wife (who is the appellant), two daughters, and four grandsons (who are respondents). Jamsedji died childless in May, 1913, leaving his widow Dinbai surviving him. It is contended on behalf of the appellant that Jamsedji is one

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of the heirs named in the will of the testator, being thereby entitled according to the law of intestate succession among Parsis to four-sevenths of the moiety of the estate, and that his rights are now vested in the appellant as his administratrix, and that her rights as administratrix of the estate of Jamsedji are not affected by clause 8 of the will.

It will be convenient to consider, in the first place, the meaning of the words "excluding the widow of Jamsedji from getting any share in such distribution." In substance the counsel for the appellant suggested two limitations on these words. It was argued that the distribution was completed by the allocation of the residuary estate amongst the heirs of Pochaji, and that the words did not apply to any subsequent devolution of the property. Their Lordships are unable to accept this interpretation, and see no reason for dissenting from the opinion of the Appellate Court that they would apply to funds coming to the appellant as representative of Jamsedji, in the event of Jamsedji being included in the class of heirs to the testator. It was further argued on behalf of the appellant that these words were directed to exclude claims of the appellant which might have arisen under s. 5 of Act XXII of 1865 if Jamsedji had died in the lifetime of the testator, leaving his widow surviving him. In the first place the words construed in their natural meaning contain no such limitation, and, secondly, clause 8 appears to contemplate conditions which will arise after the death of the testator, and when the provision of s. 5, Act XXII, 1865, would have ceased to be operative. In any case there is no reason why the words "excluding the widow of Jamsedji from getting any share in such distribution" should not have their natural general meaning, and to limit them to the event of Jamsedji predeceasing

Pochaji is to introduce a limitation not to be found in the terms of the will. It may be true that Jamsedji might have defeated the intention of the testator by making a will, or in some other form alienating his interest in the residuary estate. The answer to this objection is that Jamsedji did not, in fact, either make a will or alienate his interest, and the testator may well have thought that this was an improbable contingency, and that he had sufficiently safeguarded the interests of the other members of his family.

It is pointed out in the judgment of the Appellate Court that on this construction of the words "excluding the widow of Jamsedji from getting any share in such distribution," it is not necessary to decide whether the words "my heirs" in para. 8 of the will include Jamsedji among the class. This issue, however, was argued at some length before their Lordships. The will was written in English, and there is no doubt that in a will so written the word "heirs" would naturally include heirs as at the date of the testator's death, subject always to a contrary intention being declared in a particular will. It is hardly necessary to restate so clear a principle, but reference may be made to the case of *Hood* v. *Murray* (1). This was a Scotch will, and Lord Watson states the rule as follows: "The rule, as I understand it, is simply this, that in cases where a testator or settlor, in order to define the persons to whom he is making a gift, employs language commonly descriptive of a class ascertainable at the time of his own death, he must *primâ facie*, and in the absence of expressions indicating a different intention, be understood to refer to that period for the selection of the persons whom he means to favour. In my opinion, the rule has no other effect than to attribute to the words used their

(1) (1889) 14 App. Cas. 124.

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natural and primary meaning, unless that meaning is displaced by the context."

Accepting this principle in its fullest sense, the question in the present appeal is whether the natural primary meaning has been displaced by the context. Various cases were referred to in the argument which depend on rules of construction, adopted in the construction of wills made in this country, and applicable to documents framed with the knowledge of the rules of construction which are afterwards applied to them. These cases are not of assistance in the construction of a Parsi will made at Karachi. In *Bhagabati Barmanya* v. *Kali Charan Singh* (1), Lord Macnaghten. delivering the judgment, said: "It is no new doctrine that rules established in English Courts for construing English documents are not as such applicable to transactions between natives of this country. Rules of construction are rules designed to assist in ascertaining intention, and the applicability of many such rules depends upon the habits of thought and modes of expression prevalent among those to whose language they are applied. English rules of construction have grown up side by side with a very special law of property and a very artificial system of conveyancing, and the success of those rules in giving effect to the real intention of those whose language they are used to interpret, depends not more upon their original fitness for that purpose than upon the fact that English documents of a formal kind are ordinarily framed with a knowledge of the very rules of construction which are afterwards applied to them. It is a very serious thing to use such rules in interpreting the instruments of Hindus, who view most transactions from a different point of view, think

(1) (1911) I. L. R. 38 Calc. 468, 474; L. R. 38 I. A. 54, 64.

differently and speak differently from Englishmen, and who have never heard of the rules in question."

A similar opinion is expressed in *Norendra Nath Sircar* v. *Kamalbasini Dasi* (1): "To construe one will by reference to expressions of more or less doubtful import to be found in other wills is, for the most part, an unprofitable exercise. Happily that method of interpretation has gone out of fashion in this country. To extend it to India would hardly be desirable. To search and sift the heaps of cases on wills which cumber our English Law Reports in order to understand and interpret wills of people speaking a different tongue, trained in different habits of thought and brought up under different conditions of life, seems almost absurd."

It is therefore not necessary to examine the present will in the light of rules of construction which have been applied in English decisions. On the construction of the will of Pochaji their Lordships agree with the Appellate Court. In their opinion the testator did not intend that his son Jamsedji should take any interest under his will as an heir. The testator intended that the only interest in his property which Jamsedji should take or have was a right of maintenance under para. 6 during the lifetime of the testator's wife if she survived the testator, and a life interest under para. 7 in the testator's property undisposed of under the earlier paragraphs of the will, and that he did not intend to include Jamsedji as one of his "heirs" as that term is used in para. 8. If the contention of the appellant could be maintained, she would be entitled not only to Rs. 10,000 specifically bequeathed to her for her absolute use, but also to one-half of the four-sevenths of the moiety of the

(1) (1896) I. L. R. 23 Calc. 563, 572; L. R. 23 I. A. 18, 26.

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testator's residuary trust estate mentioned in the fifth paragraph of the will.

In their Lordships' opinion this would not be in accord with the intention of the testator as declared in the terms of his will.

Their Lordships will humbly advise His Majesty that the appeal shall be dismissed with costs to be paid out of the estate.

Solicitors for the appellant: *Watkins & Hunter.*

Solicitors for the respondents: *Wontner & Sons.*

A. M. T.

APPELLATE CRIMINAL.

Before Sanderson C. J. and Panton J.

1921

June 7.

LEGAL REMEMBRANCER

v.

TRAILOKYA NATH CHATTERJEE.*

Kiln—Panja not a kiln—Bengal Municipal Act (Beng. III of 1884), ss. 261, 273(2).

The process of burning bricks, called a *panja*, by laying alternative layers of fuel and unfired bricks with fire vents in which fires are kindled and allowed to burn till the fuel is consumed, is not a "kiln" within the meaning of ss. 261 and 273(*2*) of the Bengal Municipal Act.

THE accused, Trailokya Nath Chatterjee, was charged under s. 273 (*2*) of the Bengal Municipal Act, 1884, with having used a place as a kiln for making bricks at Konnagar without a license. It appeared that the accused burnt bricks by the process known as *panja*, which is described in the judgment of the

* Government Appeal No. 2 of 1922, against the order of Nirmal Kumar Sen, Sub-Deputy Magistrate of Ghatal, dated Jan. 3, 1922.