APPELLATE CIVIL.

Before Mr. Justice Heald and Mr. Justice Maung Ba.

D. R. SAKLAT AND OTHERS, A. B. MEHTA } *v.* J. HORMASJEE.* 1929 *June* 4, 12.

Parsi Temple Trust—Appointment of trustees—Scheme providing for wishes of the community—Discretion of the Court, how to be exercised—not taking into consideration community's wishes as expressed in affidavits not an exercise of sound discretion—Appellate Court's power to interfere—Appeal under Clause 13, *Letters Patent.*

The Scheme for the management of the Trust relating to the Parsee Fire Temple at Rangoon as settled by the late Chief Court of Lower Burma provided for the appointment of three trustees. On the death of any of them the surviving trustees or either of them were to apply to the Court to fill up the vacancy. Such applications may be supported by affidavits of the Parsi inhabitants of Rangoon.

After the death of the life trustee, appellants applied to the Court for appointment of the appellant in the second of the above appeals as trustee. A number of affidavits were filed supporting this candidate and averring that a majority of the community supported his candidature. One of the trustees nominated the respondent as a trustee, but no affidavits were filed in support of him. The learned Judge on the Original Side appointed the respondent trustee on the ground that he was not related to the trustees, whilst the appellant and the remaining trustees were all related to one another. No reference was made by the learned Judge to the affidavits supporting the appellant.

Held, that the order was appealable as a "judgment" within the meaning of Clause 13 of the Letters Patent.

Ba Pe v. *Po Sein*, 6 Ran. 97; *P.K.P.V.E.* v. *N. A. Cheltyar*, 6 Ran. 703—*referred to.*

Minakshi v. *Subramanya*, 11 Mad. 26 (P.C.)—*distinguished.*

Held, also, that the Scheme gave the Judge a discretion to appoint a trustee. But discretion must be exercised according to the rules of reason and justice, not according to private opinion. The intention of the Scheme was that the information conveyed by affidavits should be part of the material to be used by the Court in deciding which candidate it may appoint. The wishes of the community as expressed in the affidavits ought to have been considered unless there were cogent reasons to the contrary and as those were ignored, the appellate Court had to interfere with the order and appoint the appellant trustee.

Sharp v. *Wakefield*, [1891] A.C. 173—*referred to.*

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* Civil First Appeals Nos. 95 and 96 of 1929 from the order of the Original Side in Civil Miscellaneous No. 186 of 1919.

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Leach and *Doctor* for the appellants.

Vakharia for the respondent.

HEALD, J.—In Miscellaneous Case No. 186 of 1919 on the Original Side of the Chief Court the Scheme for the management of the Trust relating to the Parsee Fire Temple at Rangoon, which was settled by the Recorder of Rangoon in Suit No. 36 of 1889, was amended so as to provide for the appointment of three trustees.

The relevant clauses of the Scheme as amended are as follows :—

25. The first board of Trustees under this Scheme shall consist of Mr. B. Cowasjee, as life member or until he resigns, and Mr. N. M. Cowasjee and Mr. N. N. Burjorjee, who have been duly elected at a meeting of the members of the Parsee Community of Rangoon.

26. In the event of any vacancy occurring in the office of Trustee a new Trustee or Trustees shall be appointed in his or their stead in the manner following, that is to say, the remaining Trustee or Trustees or either of them shall within one month of the vacancy apply to the Principal Court of Original Jurisdiction in Rangoon to appoint a person or persons to fill the vacancy. The application shall set out the name or names of the persons considered suitable and may be accompanied by the affidavits of any number of the Parsee inhabitants of Rangoon who desire to support the recommendation.

27. On receipt of such application the Court shall fix a day for the hearing thereof and shall give notice, by advertisement in the public press in such newspapers as it may deem fit, of the said date and calling upon persons interested to appear and to submit any other names supported in like manner by affidavit. The Court shall thereupon, after hearing such parties as desire to be heard, appoint such person or persons as it deems fit.

The Trustee Mr. B. Cowasjee died in February last and each of the remaining trustees filed an application to the Court to appoint a person to fill

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the vacancy each naming a different person. The learned Judge on the Original Side of this Court appointed the present respondent Dr. Hormasjee to fill the vacancy.

Mr. A. B. Mehta, who is the other person named as being a person considered suitable for appointment, appeals and a number of members of the Parsee community, who support his claim to the appointment, have also filed a separate appeal.

Respondent's learned advocate has raised a preliminary objection that no appeal lies, and in support of that objection he relies on the decision of their Lordships of the Privy Council in the case of *Minakshi Naidu* v. *Subramanya Sastri* (1).

A similar question was raised in this Court in the case of *Ba Pe* v. *Po Sein* (2), where a Bench, of which I was a member, considered *Minakshi's* case and pointed out that their Lordships' decision rested on the fact that the appointment in that case was made under the provisions of a special Act (XX of 1863) which did not give a right of appeal. The Bench of this Court said that it had been judicially recognised that in certain classes of suits the power of the Court which passed the decree to make orders in the suit does not come to an end when the decree in the suit is passed and that in suits under section 92 of the Code of Civil Procedure where the Court, in the Scheme which it settles, reserves to itself certain powers, it acts in the exercise of those powers not as a *persona designata* but as a Court passing orders in the suit. The Bench said further that where, as in the particular case then under consideration, the Court had reserved to itself power to confirm or to refuse to confirm

(1) (1887) 11 Mad. 26. (2) (1928) 6 Ran. 97.

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elections held under the Scheme embodied in its decree, and where application for confirmation of an election under the Scheme had been made by parties on one side and had been opposed by parties on the other side, the order which the Court made was a decree in the suit itself and was therefore appealable as a decree under the Code.

In the present case the power which the Court reserved to itself was not the power to confirm elections of trustees but the power to appoint trustees, and it is suggested that that difference between the two cases renders the reasoning on which the judgment in *Ba Pe's* case was based inapplicable to the present case. I fail to see that the difference affects the reasoning in any way. In each case the Court in its decree reserved to itself the power to make further orders in the suit and I see no reason why such further orders should amount to decrees in the one case and should not amount to decree in the other.

I would hold therefore that such an order as that passed in this case would be appealable if the appeals were appeals under the Code.

But the present appeals lie, if they lie at all, under Clause 13 of the Letters Patent of this Court, and therefore it is necessary to consider whether or not the order against which it is desired to appeal is a "judgment" within the meaning of that clause. According to the decision of Full Bench of this Court in *P.K.P.V.E.* v. *N. A. Chettyar* (1), the decisive factor in determining whether or not an order is a "judgment" within the meaning of Clause 13 of the Letters Patent is the answer to the question whether the order does or does not finally decide

(1) (1928) 6 Ran. 703.

questions in issue between the parties in so far as the Court deciding them is concerned. The "key-note" is said to be "finality in relation to the Court passing the order". If that test be applied to the order in this case there can be no doubt that that order is a "judgment" within the meaning of Clause 13 of the Letters Patent and that therefore it is appealable under that clause.

I would accordingly find that the present appeals lie.

MAUNG BA, J.—I concur.

HEALD and MAUNG BA, JJ.—Mr. B. Cowasjee, who was a life trustee of the Parsee Fire Temple at Rangoon under a Scheme framed by the Chief Court of Lower Burma in Civil Miscellaneous Case No. 186 of 1919, died about the 2nd of February last, and under clause 26 of the Scheme it was the duty of the remaining trustees or either of them within one month to apply to this Court on its Original Side to appoint a person or persons to fill the vacancy. Neither of the trustees applied to the Court within the month, possibly because they did not agree as to whom they should nominate, but on the 11th of March a number of members of the Parsee community, who are the appellants in one of the two appeals with which this order deals, namely Civil First Appeal No. 95 of 1929, filed an application to the Court, submitting the name of Mr. A. B. Mehta, who is the appellant in the other appeal with which this order deals, as the name of a person considered suitable to fill the vacancy.

Next day Mr. N. M. Cowasjee, one of the two remaining trustees, filed an application setting out the name of Dr. J. Hormasjee, the respondent in these appeals, as that of a person considered suitable to fill the vacancy.

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On the 15th of March Mr. N. N. Burjorjee, the other trustee, filed an application again setting out the name of Mr. A. B. Mehta.

The Court fixed the 8th of April for hearing the applications and gave public notice of the date so fixed.

On the 6th of April Dr. N. N. Parekh, one of the present appellants filed an affidavit supporting the recommendations of Mr. A. B. Mehta as suitable for the vacancy, and stating that Mr. Mehta had the support of 92 out of the 117 male adult members of the Parsee community in Rangoon.

On the 8th of April, that is the day fixed for hearing the application, affidavits supporting the recommendation of Mr. A. B. Mehta were filed by Messrs B. N. Burjorjee, J. C. Batlivala, D. R. Saklat, Manchershah Manekjee, Lieutenant-Colonel Tarapore, Messrs. Manek Manekjee, D. J. Contractor, S. B. Nariman, N. B. Behramferam, P. H. Judge, K. M. Setna, A. Hirjee, M. Burjorjee, D. Hormusjee, B. N. Burjorjee, and D. J. Kolapore. A number of other applications, supporting Mr. Mehta's candidature and containing the signatures of about 100 members of the Parsee community verified by affidavit, were also filed.

No affidavits accompanied or were filed in support of Mr. Cowasjee's nomination of Dr. Hormasjee.

When the matter came before the Court on the 8th of April the supporters of Mr. Mehta applied for an adjournment, but the learned advocate who appeared on the other side opposed it and it was refused.

After hearing the parties the learned Judge made the order which is now under appeal. He said that Mr. Cowasjee had nominated Dr. Hormasjee and Mr. Burjorjee had nominated Mr. Mehta, that the original three trustees were related to each other, Mr. N. M. Cowasjee being a nephew of Mr. B. Cowasjee and a cousin of Mr. Burjorjee, that Mr. Mehta was a

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brother-in-law of Mr. Burjorjee, that he did not think it desirable that trustees should be related to each other, that it was necessary in the interests of the community that the new trustee should be a stranger to the families of the present trustees, and that for that reason he appointed Dr. Hormasjee to be the third trustee in the place of Mr. B. Cowasjee.

Mr. Mehta and his supporters appeal against that decision on grounds that the learned Judge's exercise of the discretion given by the Scheme was arbitrary and not judicial, that there was no good reason for disregarding the wishes of a majority of the community, and that there was nothing on the record to support the learned Judge's opinion—that it was necessary in the interests of the Parsee community that the new trustee should not be related to either of the present trustees.

An appellate Court is always reluctant to interfere with the decision in a matter of discretion, but it is difficult to see how we can refuse to interfere in this case.

It was said by Lord Halsbury, L.C., in the case of *Sharp* v. *Wakefield* (1), to which we have been referred, that " discretion means, when it is said that something is to be done within the discretion of the authorities that that something is to be done according to the rules of reason and justice, not according to private opinion ; according to law and not humour. It is to be not arbitrary, vague, and fanciful, but legal and regular."

In this case the learned Judge undoubtedly had a discretion, since under the Scheme he was entitled to appoint such person as he deemed fit. But the Scheme itself provides for the filing of affidavits of the Parsee inhabitants of Rangoon who desire to support a particular

(1) L.R. [1891] A.C. 173.

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candidate for appointment, and it was obviously the intention of the Scheme that the information conveyed by those affidavits should be part of the material used by the Court in deciding which candidate to appoint.

In his judgment in this case the learned Judge made no reference to the fact that the recommendation of one candidate was supported by a large number of affidavits and that of the other by none, and he made no reference to the contents of the affidavits. The sole reason which the learned Judge gave for his decision was his personal opinion that all the trustees ought not to be related to each other and that it was necessary in the interests of the community that a stranger should be appointed trustee. There is no affidavit suggesting or supporting that view, and although it was doubtless pressed at the hearing and the learned Judge was entitled to consider it, it seems to us to be an insufficient reason for rejecting what was clearly the opinion of a considerable majority of the members of the community, and for appointing a candidate whose a candidature was not supported by any affidavits rather than a candidate whose recommendation was supported by a large number.

Respondent's learned advocate asked us to admit at the hearing of the appeal affidavits in support of his candidature, but we are of opinion that such affidavits should have been filed before the date fixed for hearing on the Original Side of the Court, and that in view of the fact that respondent opposed the adjournment which would have given him and his friends a further opportunity for the filing of such affidavits, sufficient reason for the admission of such further evidence at the hearing of the appeal has not been shown. We have accordingly refused to admit any further affidavits.

It is not seriously suggested that respondent is personally otherwise than suitable to fill the vacancy, and

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we dispose of the matter on the assumption that personally both candidates are entirely suitable. We are of opinion that in the case of such an appointment the wishes of the community ought to be considered and that unless there is some cogent reason to the contrary the person who has the support of the majority of the community ought to be appointed. We do not consider that the learned Judge's opinion that the trustees ought not to be related to each other was sufficient in the circumstances of this case to warrant his disregarding the wishes of the community for the expression of which the Scheme itself provided.

We are therefore constrained to set aside the order of the learned Judge appointing respondent to be trustee, and we appoint Mr. A. B. Mehta to be trustee in the vacancy caused by the death of Mr. B. Cowasjee.

We see no reason why either the Trust or the respondent should be made liable for the costs of these proceedings and accordingly we direct that the parties do bear their own costs.

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Before Sir Guy Rutledge, Kt., K.C., Chief Justice, and Mr. Justice Brown.

MA AYE YIN AND OTHERS

v.

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June 13.

Buddhist Law—Orasa—*Eldest child dying in infancy—Second child whether entitled to the status—Joint living and active assistance in parent's business not essential.*

Held, that if the first born child dies before attaining the age of majority, the eldest child who attains the age at which he or she would be able to take the place of the father or the mother in case of their death is the *orasa*.

Held, also, that for an *orasa* to qualify for his special rights, joint living with the surviving parent and active assistance in his or her duties is not necessary.

* Civil First Appeal 249 of 1928, from the judgment of the District Court of Amherst in Civil Regular No. 11 of 1928.