1891.

DÁDOBÁ ARJUNJI v. DÁMODAR RAGHUNÁTH

the rule of *dam dupat*. It was urged that defendants should not be allowed to redeem without also paying the costs of the plaintiff's mortgage suit, but there is no finding which would justify our holding that they were responsible for the plaintiff's having unnecessarily incurred the costs of that suit. As defendants set up a title as owners of the property, and have failed, they must pay the costs of this suit throughout. The decree must, therefore, be varied by directing that defendants may redeem on payment of Rs. 398, with the costs of this suit throughout, within three months from the date of this decree—and, in default of such payment, the defendants to be foreclosed, and possession of the property to be given to the plaintiff.

Decree varied.

ORIGINAL CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Bayley.

1891.
October 9.

JAVERBA'I, (ORIGINAL PLAINTIFF), APPELLANT, *v.* KABLIBA'I AND ANOTHER, (ORIGINAL DEFENDANTS), RESPONDENTS.*

Hindu law—Will—Construction—Gift to a class not all in existence at testator's death—Rule in Tágore case—Void gift—Gift over, alternative or expectant on void gift—General power of appointment in a Hindu will, how far valid—Operation and effect of such a power—English rules of construction not followed.

Manchhárám Pitámbardás, by his will, dated 14th April, 1873, after appointing his brother, Jamnádás, to be his executor, bequeathed all his estate, &c., to Jamnádás, upon trust to pay debts, &c., and to stand possessed of the residue in trust (1) for his (testator's) wife Jáverbái and Ambávahu, the wife of his brother Jamnádás, during the life of both, or the survivor of them, for their or her sole use; and (2) from and after the decease of the survivor of them, in trust for the male issue of Jamnádás, if any there were; and (3) in default of such male issue, in trust for any person or persons, in any shares or share, and in such manner as his brother Jamnádás should, by any deed or deeds, or writing or writings, appoint, with or without power of revocation or new appointment.

Jamnádás proved the will, and as executor managed the estate until his death on the 17th October, 1888. He had no male issue, but two daughters, who were the defendants in this suit. On the 7th October, 1888, he made a will, by which, in accordance with the authority given to him by the last clause of the will of Manchhárám, he directed that twelve months after the death of Jáverbái (Ambá-

*Suit No. 235 of 1890.

vahu being dead) the estate should be divided equally between his two daughters, Kabli and Moti. Kabli was born in Manchárám's life-time, but Moti not till after his death.

Held, that the devise in Manchárám's will in favour of the male issue of Jamnádás meant in favour of such male issue as should be living at the time of the death of the survivor of the tenants for life, whether born in the life-time of the testator, or after his death; and as, at the death of the testator, Jamnádás had no male issue, it was a gift to a person or persons not in being at that time, and, therefore, void under the rule in the *Tágore case*.

Held, also, that the devise over, in default of such male issue, was an alternative gift, to take effect on an event to be determined at the death of the survivor of the tenants for life, and consequently was not open to objection.

Held, further—as to the bequest to such person or persons as Jamnádás should, by deed or writing, appoint—that there was no clear principle of Hindu law which forbad such a bequest being construed, and effect given to it, according to its plain and literal terms; always subject, however, to the same restrictions as the Hindu testamentary law imposes on the testator himself, *viz.*, that the appointment should be made, so that (i) the appointee might be ascertained when the event arose on which he was to take (in this case, therefore, before the death of the surviving tenant for life), and (ii) the appointee be a person who was alive at the death of the testator.

Held, accordingly, that in making this bequest the testator's intention was clearly to give Jamnádás the ultimate disposal of the property, but not that it should form part of Jamnádás' estate. The circumstance that English Courts, in such cases, treat the property, when the power has been exercised, as part of the estate of the appointor, in the interest of creditors, and some other persons favoured by the Court of Equity, could not affect the question as to what was the intention of Manchárám when he made his will.

Original Court's decree varied accordingly; the share in the residue appointed by Jamnádás to his daughter Moti (born after the testator's death) being declared to be part of Manchárám's estate of which he died intestate, and to belong, therefore, to his (Manchárám's) heir.

APPEAL from Farran, J. (see I. L. R., 15 Bom., 326.)

The plaintiff's husband, Manchárám Pitámbardás, died in 1873, leaving a will whereby he appointed his brother, Jamnádás, his executor. The fourth clause of the will was as follows:—

Clause 4. "I hereby demise and bequeath all my immoveable and moveable estate and effects, not hereinbefore otherwise disposed of, (except estate vested in me as a trustee or mortgagee) unto my brother the said Jamnádás Pitámbardás, his executors, administrators and assigns, upon trust, that he, the said Jamnádás Pitámbardás, his heirs, executors, administrators and assigns shall call in and collect all my outstandings, and pay my funeral and testamentary expenses and debts, and the legacies bequeathed by this my last will as aforesaid, and shall stand possessed of the said residuary trust moneys, and all my immoveable and other

1891.

JAVERBÁI v. KABLIBÁI.

moveable property, in trust for my wife Javervalu and for Ambávalu, wife of my said brother Jamnádás Pitámbardás, during the life of both, or the survivor of them, for their or her sole use, benefit, advantage and comfort; and from and after the decease of the survivor of them in trust for the male issue of my said brother Jamnádás, if any there be; and, in default of any such male issue as aforesaid, in trust for any person or persons, in any shares or share, and in such manner as my said brother Jamnádás shall, by any deed or deeds or writing or writings, appoint, with or without power of revocation and new appointment."

Jamnádás proved his brother's will and managed the estate until his death on the 17th October, 1888. He had no male issue, but left two daughters, Kablibái and Motibái (the respondents). The latter was born in 1876, therefore after the death of Manchárám.

Jamnádás had no estate of his own. He, however, left a will dated the 7th October, 1888, the material parts of which were as follows:—

"Now my health being bad I make this my last will or testament in accordance with the authority given to me in the last clause of the will of my deceased brother Manchárám Pitámbardás, dated 7th July, 1869 (and this) *nemnuk patra*, or deed of appointment, and (this) arrangement for the maintenance of the family."

Then after directing certain outlays the will concluded as follows:—

"After making all the above-named outlays as to whatever immoveable and moveable property and ornaments and jewels and clothes and apparel and furniture, all the household goods and things that there may be, the owners and heirs to the same are my daughters Ben Kabli and Ben Moti. They after the expiration of twelve months after my brother's widow Bái Javer's death shall truly divide and take the same in equal shares. According to these particulars, as written above, this my last will,—that is, testament—is made. The same shall be accepted and agreed to by my heirs and representatives."

The plaintiff (appellant) brought this suit to have Manchárám's will construed. The Court of first instance (Farran, J.) held (1) that the trust in favour of the male issue of Jamnádás was void; (2) that the power of appointment given to Jamnádás was equivalent to a gift, and that such gift was valid; (3) that the bequests by Jamnádás to his daughters (the respondents) were valid bequests. (See I. L. R., 15 Bom., 326.)

The plaintiff now appealed, contending that Manchárám had died intestate in respect of all his property save the life-interest

therein given to his widow, and that all trusts of his property subsequent to the trust in respect of such life-interest were void. She also contended that the power of appointment given to Jamnádás was void; or, if not void, had not been validly exercised; and that she (the appellant) was absolutely entitled to Manchárám's moveable, and to a Hindu widow's estate in his immoveable, property.

Jardine and *Dhairyávan* for the appellant:—The Hindu law does not admit of the creation of powers of appointment such as is given by Manchárám's will. There is no property conferred. In any case, such a power could only be validly exercised in favour of a person alive at the death of the donor of the power, but here there is no restriction whatever. Bequests by Hindu wills are held good as being analogous to gifts, but there is no analogy between a power and a gift. A gift must deal with something tangible. There cannot be a gift of a right to give. They cited Mayne's Hindu Law, (4th Ed.), 388, 354, 356, 458; *Lallubhái* v. *Mánkuvarbái*[1] *Hixon* v. *Oliver*[2]; *Robinson* v. *Dusgate*[3]; *Holmes* v. *Coghill*[4]; *Attorney General* v. *Tonner*[5]; Jarman on Wills, (4th Ed.), Vol. II, p. 526; *Rái Bishen Chand* v. *Mussumat Asmaida Koer*[6]; *Rám Lál Sett* v. *Kanai Lál Sett*[7]; *Manjamma* v. *Padmanabhayya*[8]; *Gangbái* v. *Thávar Mulla*[9]; *Martin* v. *Lee*[10]; *Bái Mámubái* v. *Dossá Morárji*[11]; *Vullubhdás Dámodhar* v. *Thucker Gordhandás Dámodhar*[12]; *Kumar Tarkeshwar Roy* v. *Kumar Shoshi Shikhareshwar*[13]; *Bhoobun Mohini Debya* v. *Huris Chunder*[14]; *Brajanath Dey Sirkár* v. *S. M. Anandamayi Dási*[15].

Latham (Advocate General), *Starling*, *Russell*, and *Macleod*, for the respondents. They cited Sugden on Powers, (8th Ed.), pp. 394, 511; *Raikishori Dási* v. *Debendranath Sirkar*[16]; *Crompe* v. *Barrow*[17]; *Re Thatcher's Trusts*[18]; *Evers* v. *Challis*[19]; *Hixon* v.

(1) I. L. R., 2 Bom., 389.
(2) 13 Ves., 108.
(3) 2 Vernon, 180, at p. 181.
(4) 7 Ves., 499.
(5) 2 Ves., 1.
(6) L. R., 11 I. A., 164.
(7) I. L. R., 12 Calc., 663.
(8) I. L. R., 12 Mad., 393.
(9) 1 Bom. H. C. Rep., 71.
(10) 14 Moore's P. C., 142.
(11) I. L. R., 15 Bom., 443.
(12) I. L. R., 14 Bom., 360.
(13) L. R., 10 I. A., 51.
(14) L. R., 5 I. A., 138.
(15) 8 Beng. L. R., 208.
(16) L. R., 15 I. A., 37.
(17) 4 Ves., 681.
(18) 26 Beav., 365.
(19) 7 H. L. C., 531.

1891.

JAVERBÁI v. KABLIBAI.

Oliver(1); *Visalatchmi Ammal* v. *N. Subbu Pillai*(2); *Okhoymoney Dasi* v. *Nilmoney Mullick*(3); *Mussamut Khoob Conwur* v. *Baboo Moodnúráin Singh*(4).

SARGENT, C. J.:—The questions raised by the several issues in this case arise on the construction of the 4th clause of the will of one Manchárám Pitámbar, dated 7th July, 1869, which is in the following terms:—

"I hereby demise and bequeath all my immoveable and moveable estate and effects not hereinbefore otherwise disposed of (except estate vested in me as a trustee or mortgagee) unto my brother the said Jamnádás Pitámbardás, his executors, administrators and assigns, upon trust, that he, the said Jamnádás Pitámbardás, his heirs, executors, administrators and assigns shall call in and collect all my outstandings and pay my funeral and testamentary expenses and debts and the legacies bequeathed by this my last will as aforesaid, and shall stand possessed of the said residuary trust moneys and all my immoveable and other moveable property in trust for my wife Javervahu and for Ambávahu, wife of my said brother Jamnádás Pitámbardás, during the life of both, or the survivor of them, for their or her sole use, benefit, advantage and comfort, and from and after the decease of the survivor of them in trust for the male issue of my said brother Jamnádás, if any there be, and, in default of such male issue as aforesaid, in trust for any person or persons, in any share or shares, and in such manner as my said brother Jamnádás shall by any deed or deeds, or writing or writings, appoint, with or without power of revocation or new appointment."

Jamnádás made a will, dated 7th October, 1888, by which he directed that, subject to certain special bequests, his daughters Kabli and Moti should divide the residuary estate.

The first point for consideration is as to the construction of the devise, from and after the death of the survivor of his wife Javervahu and Ambávahu, wife of his brother, "in trust for the male issue of my brother Jamnádás, if any there be." We cannot doubt that the Judge of the Divisional Court was right in

(1) 13 Ves., 112.
(2) 6 Mad. H. C. Rep., 270.
(3) I. L. R., 15 Calc., 282.
(4) 9 Moore's I. A., 1.

construing this as meaning that the male issue of Jamnádás living at the time of the death of the survivor of the tenants for life, should take the estate, without distinguishing between those born in the life-time of the testator and those born prior to the former event, but subsequent to the testator's death; and as, at the death of Manchárám, Jamnádás had no male issue, it was a gift to a person or persons not in being at that time, and, therefore, void under the rule in the *Tágore Case*[1].

As to the devise over in default of such male issue, if it be regarded as taking effect after the failure or determination of the previous invalid gift, it would be doubtless itself void under the ruling in the *Tágore Case*. But here the devise over, in default of male issue of Jamnádás, is an alternative gift, to take effect on an event to be determined at the death of the survivor of the tenants for life, which excludes the gift to the male issue of Jamnádás from taking effect. The circumstances are the same as in *Kumár Tarakeshwar Roy* v. *Kumár Shoshi Shikareshwar*[2], with regard to the gift over of the shares of the nephews who died without leaving a male child, the Privy Council having held that the gift to the sons and grandson of this nephew was void, and that each nephew took only a life estate. No objection can, therefore, in our opinion, be taken, on the above ground, to the devise in default of male issue.

But it remains to consider the more difficult question as to the validity and effect of such a devise, supposing the devise had been, (as in the event it has become), to the ladies and the survivor of them, and, after the death of the survivor, to such persons as Jamnádás should by deed or writing appoint. Such a devise has never, we believe, come under the consideration of any of the High Courts, or of their Lordships of the Privy Council.

Mr. Justice Farran considers that it is impossible to find a place for powers of appointment in the Hindu system of law, but that, in furtherance of the general intention of the testator, the will may be construed as conferring on Jamnádás, upon his declaring his readiness to accept it in writing, full power over the estate in the Hindu sense,—to do what he pleased with it—to confer it on

(1) L. R. I. A., Sup. Vol. 47. (2) L. R., 10 I. A., 51.

1891.

JAVERBA'I v. KABLIBA'I.

whom he pleased—or, in other words, that the devise may be construed as giving Jamnádás the absolute ownership, subject only to the condition of his expressing the acceptance of it in writing, but, as we understand the learned Judge, not necessarily in any particular form of words.

The question as to the validity of a testamentary power of appointment, like all questions relating to the testamentary law of India, must doubtless, as laid down in the *Tágore Case*, be considered with reference to the analogous law of gifts *inter vivos;* but it is to be remembered that the testamentary law as administered in the English Courts, although based upon the analogies afforded by the law of gifts, is also, in important respects, a development of this law; as may be seen by its giving effect to remainders and executory devises, subject only to certain restrictions as to the persons to take—both of which estates, as pointed out by the learned authors of West and Bühler, (3rd Ed.), 218, 219, are opposed to the strict notions of a gift, and require that the possession of the tenant for life should be regarded as enuring for the benefit of the remainder man, or executory devisee. The mere circumstance, therefore, that the Hindu law of gifts, as it is found in the Hindu law books, relates only to definite objects accompanied by immediate possession, is not, we apprehend, of itself a reason for deciding against the validity of powers of appointment in a Hindu will.

Now it is clear that the Hindu law recognizes the exercise of "powers" over definite objects, as distinct from the ownership in them—such as powers of management, or *vahivat*, and the all-important power given to a widow to adopt, which, as regards the property of her husband, is simply the power to appoint the person to succeed him in the event of his not having a son; an event which may not, in some cases, be ascertained until after his death. There are also other powers, such as those which experience shows are frequently found in Hindu wills. Can it, then, be said that there is any general principle of Hindu law which forbids a testamentary power to appoint the person to succeed in a certain event being recognized, and effect being given to it, according to its terms? Such powers are undoubtedly of great convenience in practice; a consideration which, it is to be

remarked, distinctly weighed with the Privy Council in *Shree-mutty Soorjeemoney Dossee* v. *Denobundoo Mullick*[1].

After the best consideration we have been able to give to the question we have arrived at the conclusion that there is no clear principle of Hindu law which forbids our construing such a bequest as the one under consideration according to its plain and literal terms, subject, however,—and this is of importance—to the same restrictions as the Hindu testamentary law imposes on the testator himself; *viz.*, that the appointment should be made during the life of the tenant for life, so that the appointee may be ascertained when the event arises on which he is to take; and also that he should be a person who was alive at the death of the testator.

As to the first point, Jamnádás has made his will whilst the survivor of the two ladies is still alive; but, as regards the second, his appointment in favour of his two daughters must be regarded as invalid as regards Bái Moti, who was born since Manchárám's death.

This disposes of the question as to the construction of the gift over in default of male issue of Jamnádás, but we think it right to express our opinion as to the construction which the learned Judge of the Division Court has placed on it, which, we think, is open to serious objection.

The learned Judge has found that the will should be read as giving Jamnádás, upon his declaring his opinion in writing, "power" over the estate, in the Hindu sense, to do what he pleased with it, which, it is said, should be construed as amounting to an absolute estate, on the above condition—in other words, the will is to be remodelled so as to be capable of having effect given to it by the Hindu testamentary law, in order to carry out what is supposed to have been the intention of the testator. But that intention can only properly be gathered, as the Privy Council points out in the *Tágore Case*[2], "upon a reading of the whole will, assuming that the limitations as expressed in the will were to take effect."

(1) 9 Moore's I. A., a p. 135.

(2) 18 W. R., at p. 371.

1891.

JAVERBÁI v. KABLIDÁI.

Now here it is to be remarked that Jamnádás was appointed a trustee, by his brother, of his will to carry out the several purposes mentioned in it, one of which was, in a certain event, to appoint the persons to succeed the survivor of the two ladies. The intention, therefore, which was present to the mind of the testator, was doubtless to give Jamnádás the ultimate disposal of the property, but not that it should form part of his estate; and it is plain, from the language of Jamnadás's own will, that he considered that he was disposing of the property "under an authority given to him by the last clause of his brother's will." The circumstance that English Courts in such cases, acting on some principle of equity which is not very clear (as appears from the judgment of Sir W. Grant and Lord Eldon in *Holmes* v. *Coghill*[1]), treat the property, when the power has been exercised, as part of the estate of the appointor, in the interest of creditors, and some other persons favoured by the Court of Equity, cannot affect the question as to what was the intention of Manchárám when he made his will.

Lastly, it is impossible to deduce the intention to give the property to his brother, without at the same time attributing to the testator the intention to attach to the gift the useless condition of assenting to it.

Construing the will, therefore, as we have already stated we think it may be construed, according to its plain terms, the share in the residue which is appointed to Ben Moti by Jamnádás's will would lapse to Manchárám's heir.

Attorneys for appellant:—Messrs. *Chitnis, Motilál and Malvi.*

Attorneys for respondents:—Messrs. *Jefferson, Bháishanker, Dinshá and Kánga*, and Messrs. *Little, Smith, Frere and Nicholson*

(1) 7 Ves., 499.