APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

1897. *July 5.*

BAI BAPI (ORIGINAL PLAINTIFF), APPELLANT, *v.* JAMNADAS HATHISANG AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

Will—Construction of will—Bequest to a person with a direction that it should be used in good works (sára kám)—Direction void as being vague and indefinite—Indian Succession Act (X of 1865), Sec. 125.

A testator left a legacy to his wife in the following terms :—

"Rs. 2,000 to be credited in our shop in the name of my wife Bai Bapi. Interest at 6 per cent. to be paid to her every year. If in her lifetime she demands the money to use in a good work (*sára kám*), it should be given to her, but if she has not taken it in her lifetime, Jamnadas and Bhagubhai are to dispose of it according to their own pleasure after death."

Held, that this was not a bequest for good works (*sára kám*), but a bequest to the testator's wife, with a direction to use it in good works (*sára kám*), and as that direction was void for uncertainty she was entitled to the money as if the will had contained no such direction.

SECOND appeal from the decision of G. McCorkell, District Judge of Ahmedabad.

The plaintiff sued to recover Rs. 2,000 together with interest thereon under the will of her deceased husband. The will provided (*inter alia*) as follows :—

"Rs. 2,000. This amount should be credited in the shop of Bhagubhai Hathisang in the name of my wife Bai Bapi. Its interest should be calculated at 6 per cent. per annum which should be paid to her every year. But if in her lifetime she demands it for use in a good work (*sára kám*), it should be paid to her. But if she has not withdrawn the money in her lifetime, the said Jamnadas and Bhagubhai Hathisang should after her death use the money according to their wishes."

The testator appointed Jamnadas and Bhagubhai Hathisang his executors and also residuary legatees.

The defendants Jamnadas and Bhagubhai Hathisang pleaded that the plaintiff had no absolute right to the sum of Rs. 2,000, that they were willing to pay it to the plaintiff for the purpose of spending it in any good work, but not in order that she might give it away to her brother's son, as she intended to do.

* Second Appeal, No. 876 of 1896.

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The Subordinate Judge awarded the plaintiff's claim, holding that she was absolutely entitled to the legacy.

On appeal, the District Judge reversed the Subordinate Judge's decree and rejected the plaintiff's claim on the following grounds:—

"The present appeal turns on the interpretation to be put on the portion of the will leaving the legacy. That portion of the will must, I think, be interpreted as making a specific legacy to his wife of Rs. 2,000. But she can only obtain the money on the condition that she spends it on *sára kám*. Much argument has been wasted over the proper meaning to be attached to these words. It appears to me that the meaning is quite as vague as that to be attached to the words *dharm* or *dharmada*; and I am, therefore, of opinion that following the ruling in *Devshankar* v. *Motiram* (I. L. R., 18 Bom., 136) the bequest in favour of *sára kám* is invalid by reason of uncertainty. Such being the case, I am of opinion that the plaintiff can only claim to recover interest on the sum of Rs. 2,000 during her lifetime, and at her death the capital sum goes to the residuary legatees."

Against this decision the plaintiff preferred a second appeal to the High Court.

Ganpat Sadashiv Rao for appellant:—The bequest is not in favour of *sára kám* (or good works) but to the plaintiff personally. It is not conditional but absolute. It is no doubt coupled with a direction that the plaintiff should be paid the whole sum of money deposited in her name if she required it for a good object. But that direction does not render the legacy void for uncertainty. The money is bequeathed absolutely, and the direction to apply it in a particular manner is inconsistent with the absolute gift and cannot be given effect to—section 125 of the Indian Succession Act; see also Jarman on Wills, p. 851. The direction is, moreover, vague and uncertain, and, therefore, void.

G. M. Tripathi for respondents:—The legacy to the plaintiff is not an absolute unconditional gift. It was clearly the intention of the testator that his wife should enjoy the income of the fund deposited with the defendant's firm, and that the *corpus* should be paid to her only if it was required for some good work. The gift was thus a conditional gift, and unless the condition is fulfilled, the gift cannot take effect. The plaintiff does not state for what purpose she wants the money. She does not specify any

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good work for which the money is required. She is not, therefore, entitled to claim the *corpus*. Sections 118 to 123 of Act X of 1865 apply.

PARSONS, J. :—The plaintiff in this case is the widow and the defendants are the executors of one Hathisang, who by his will left the plaintiff a legacy of Rs. 2,000 in these terms :—"Rs. 2,000 to be credited in our shop in the name of my wife Bapi. Interest at 6 per cent. to be paid to her every year. If in her lifetime, she demands the money to use in a good work (*sára kám*) it should be given to her, but if she has not taken it in her lifetime, Jamnadas and Bhagubhai are to dispose of it according to their own pleasure after death." The plaintiff sues now for the money, as the defendants (Jamnadas and Bhagubhai) refuse to pay it to her. They say that she does not want it for a good work. The Subordinate Judge awarded the claim, holding that the expression "*sára kám*" was so vague and indefinite that the condition was invalid. The District Judge by some strange process of reasoning dismissed the claim, because he thought that the bequest in favour of *sára kám* was invalid by reason of uncertainty. There was, however, no bequest in favour of *sára kám*, the bequest was to the plaintiff, there was a direction only in favour of *sára kám*, and if that direction is void then the plaintiff is entitled to the money. In our opinion, the direction is void. It is nowhere expressed in the will what "*sára kám*" is, or who is to decide whether the purpose for which the plaintiff asks the money is *sára kám* or not. The defendants as residuary legatees would naturally say that nothing was *sára kám*. The whole thing is so vague and indefinite that it cannot be given effect to. The case seems to us to come within the class of cases provided for by section 125 of the Succession Act, X of 1865, and the plaintiff is entitled, in our opinion, to the money as if the will had contained no such direction.

The amount due at date of suit is agreed to by both Courts, and we reverse the decree of the lower appellate Court and restore that of the Subordinate Judge. We award the plaintiff interest on the amount decreed at 6 per cent. from date of that decree to payment. Costs throughout on the defendants. The defendants can pay the costs out of the estate.

RANADE, J.:—The principal contention in this appeal relates to the proper construction of the will, Exhibit 32, so far as it concerns the legacy left therein to the appellant. This portion of the will has been translated in the judgment of the lower appellate Court. It directs that Rs. 2,000 should be credited in respondents' shop in the name of the appellant, and interest should be paid to her every year at 6 per cent., and if appellant in her lifetime demands the money for any good works, the principal sum should be paid to her. If she does not withdraw the money in her lifetime, the respondents should, after appellant's death, use the money according to their pleasure. The Court of first instance held that the expression "*for good works*" was so vague that the condition was invalid on the ground of its indefiniteness, and as the appellant was allowed full liberty to withdraw the whole sum, she was entitled to the money absolutely. In appeal, the District Judge held that the legacy was a conditional legacy, and that the condition about good works was not valid for reasons of uncertainty, and that the appellant could only recover the interest of the money, and not the principal. We feel satisfied that the construction placed by the District Judge upon the terms of the will cannot be supported. The bequest clearly falls within the class of bequests with directions as to application or enjoyment, and the principal intention of the testator was to bequeath absolutely Rs. 2,000 for the benefit of the appellant, who was his wife, and this gift was meant by him as a provision for her. The will shows clearly that this portion of his estate was clearly separated by the testator from his other estate, and it was only on the default of the appellant to spend the money herself, that it was to become a part of the estate in the hands of the executors. The case thus falls clearly within the analogy of bequests referred to in section 125 of Act X of 1865, and not of section 127. There was no condition precedent in this case such as is contemplated in sections 121 or 123. The mention of good works was not intended to limit the absolute right of appellant to the money. It was only a direction, and not a condition precedent. The same direction is contained in respect of another sum of Rs. 300 bequeathed to the respondents. The lower Court of appeal was certainly in error in thinking that this case fell within the class

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of uncertain gifts referred to in *Devshankar* v. *Motiram*[1]. The bequest was not in favour of good works, but of the appellant, who was expected to spend the money on good works.

The fact that the respondents have paid a large sum to the appellant under the terms of the will, both by way of interest and principal, without raising any objection on the grounds now urged by them, is also an additional reason for holding that they understood the gift to be absolute. In their written statement they expressed their readiness to make over the money under certain guarantees to the appellant. On the whole, we must decide this issue in appellant's favour, and against the respondents.

The only other point that now remains for consideration has reference to the cross objections put in by the respondents as regards the details of the payments made by them. There is no serious contest on that point, and we see no reason for disturbing the decision of the Court of first instance on that head. We reverse the decree of the lower Court, and restore that of the Court of first instance.

Decree reversed.

(1) I. L. R., 18 Bom., 136.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

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July 12.

NASSARVANJI, APPLICANT, *v.* KHARSEDJI DHUNJISHAH AND ANOTHER, OPPONENTS.*

Civil Procedure Code (Act XIV of 1882), Sec. 25—Transfer of execution proceedings—Insolvency—Opposing creditor—Opposing creditor's right to apply for transfer of insolvency proceedings.

The power of transfer given by section 25 of the Code of Civil Procedure (Act XIV of 1882) extends to execution proceedings as well as to suits.

An application to be declared an insolvent under the Civil Procedure Code (Act XIV of 1882) is a proceeding in execution, and as such can be made the subject of an order under section 25 of the Code.

A creditor who has received notice of an insolvency petition, and whose name is entered on the record of the execution proceedings as an opposing creditor, is a

* Civil Application, No. 95 of 1897.