APPELLATE CIVIL.

Before Sir C. Farran, Kt., Chief Justice, and Mr. Justice Fulton.

LALLU (ORIGINAL DEFENDANT), APPELLANT, *v.* JAGMOHAN (ORIGINAL PLAINTIFF), RESPONDENT.*

1896. *August* 18.

Will—Construction—Bequest by a Hindu to his wife—Life estate—Reversioner—Vested remainder—Contingent bequest.

One Jamnadas Natha died in 1876, leaving a will which after stating his property in detail provided as follows:—"When I die, my wife named Suraj is owner of that property. And my wife has powers to do in the same way as I have absolute powers to do when I am present, and in case of my wife's death, my daughter Mahalaxmi is owner of the said property after that (death)."

Held that Suraj took only a life estate under the will, with remainder over to Mahalaxmi after her death.

Held, also, that the bequest to Mahalaxmi was not contingent on her surviving Suraj, but that she took a vested remainder which upon her death passed to her heirs.

APPEAL from the decision of Ráo Bahádur Lalshankar Umiashankar, First Class Subordinate Judge of Ahmedabad.

One Jamnadas Natha, a separated Hindu, died on 19th July, 1876, leaving a widow Bai Suraj and a daughter Mahalaxmi by a predeceased wife.

He left a will dated 19th January, 1874, of which the following is the material part :—

"My property consists of dwelling-houses and moveables such as cash, jewels and furniture, the silk, &c., appertaining to my business, and outstanding debts, whatever the same may be. As to this, when I die, my wife named Suraj is owner of that property. And my wife has powers to do in the same way as I have absolute powers to do when I am present, and in case of my wife's *kajá rajá* (death), my daughter Mahalaxmi is owner of the said property after that (death). I have, therefore, made this my will in respect thereof."

In accordance with this will the testator's widow Suraj took possession of all his property, both moveable and immoveable, after his death in 1876.

*Appeal, No. 170 of 1894.

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His daughter Mahalaxmi died in July, 1883.

Suraj died on 11th March, 1893, leaving a will dated 27th December, 1883, whereby she bequathed the whole of the property in her possession to her brother's son Lallu (the defendant). On her death Lallu took possession.

The plaintiff was the grandson of Mulchand, the separated brother of Jamnadas Nathu. In 1894 he brought this suit claiming as reversionary heir of Jamnadas Natha to be entitled to his property on the death of his widow Suraj. He contended that under the will of Jamnadas Nathu his widow Suraj took only a life interest in the property and that she had no power to bequeath it to Lallu.

The defendant pleaded (*inter alia*) that Suraj took an absolute interest under the will of Jamnadas Natha and that she had, therefore, full power to bequeath the property to him (the defendant) as she had done.

The First Class Subordinate Judge of Ahmedabad held, on the construction of Jamnadas' will, that Suraj took only a life interest in the testator's property, that she was not competent to dispose of it by will, and that her will, therefore, did not confer any title on the defendant to any part of the property in dispute.

He accordingly decreed the plaintiff's claim.

Against this decision the defendant appealed to the High Court.

Ganpat Sadashiv Rao for appellant (defendant):—The defendant holds the property under the will of Suraj. The question is whether Suraj under the will of her husband Jamnadas took an absolute estate which she could bequeath to the defendant. We say she did. The will gives her as full an estate in the property as the testator had. The Court must give effect to these words in the will. They show that he did not mean to give her only a life estate.

The gift over to his daughter Mahalaxmi is to take effect only in the event of the wife's death during the lifetime of the testator. It is a substitutionary bequest, contingent on the lapse or failure of the prior absolute devise—*Gee* v. *Mayor, &c., of Manches-*

ter [1]; *Woodburne* v. *Woodburne*[2]; *Clayton* v. *Lowe*[3]. The rule is well established that where a bequest is simply to A and "in case of his death," or "if he die," to B, A surviving the testator takes absolutely—Williams on Executors, 1082, 3 (4th Ed.). In the present case the wife did survive the testator: she, therefore, took the property absolutely; and was competent to dispose of it by will as much as by gift *inter vivos*. Her will is, therefore, valid.

But assuming that she took only a life estate, it is clear that Mahalaxmi took a vested remainder. That being so, then although she predeceased Suraj, her interest passed on her death to her heirs. The principle laid down in section 106 of Act X of 1865 applies by analogy to the present case, so that even if Suraj took only a life estate, the plaintiff cannot succeed, as he is not the heir of Mahalaxmi.

Goverdhan M. Tripathi for respondent (plaintiff):—The will does not confer an absolute interest on Suraj. The gift over to Mahalaxmi clearly shows that the testator intended to give his wife nothing more than a life estate. The rules laid down by English Courts for the construction of English wills do not apply in the case of Hindu wills. Hindu wills are to be construed according to the laws and usages of Hindus. The principle is now well settled that unless a will contains words of inheritance or words giving an express power of alienation to a widow, a bequest by a husband to a wife does not confer on her an absolute estate—*Hirabai* v. *Lakshmibai*[4]; *Harilal* v. *Bai Rewa*[5]. There are no such words in the will in question. Suraj, therefore, took a life estate only.

As to the gift over to Mahalaxmi, it is a contingent bequest, contingent on her surviving the widow. And as she did not survive the widow, her legacy fails. The property is, therefore, undisposed of after the death of Suraj, and the plaintiff is entitled to inherit as the next of kin of the testator Jamnadas Natha. Even assuming that Mahalaxmi took a vested interest in the legacy, which passed on her death to her heirs, we do not admit that the plaintiff

(1) 17 Q. B., 737.
(2) 23 L. J. Ch., 386.
(3) 5 B. & Ald., 636.
(4) I. L. R., 11 Bom., 573.
(5) I. L. R., 21 Bom., 376.

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is not her heir. The question as to who are Mahalaxmi's heirs has not been raised in the lower Court, and there are no materials before this Court to enable it to decide that point.

FARRAN, C. J.—This is an appeal from the decree of the Subordinate Judge, First Class, at Ahmedabad allowing the plaintiff's claim. The plaintiff as the nearest reversionary heir of Jamnadas Natha after the death of Bai Suraj, the widow of Jamnadas, sued to recover from the defendant, who claims under a will of Bai Suraj, the property left at her death. The defendant contends that Bai Suraj had, in consequence of Jamnadas having made a will in her favour, power to deal with his property by her will; and also, if she had not such power, that the heir of Mahalaxmi, the daughter of Jamnadas, and not the plaintiff, is the person now entitled to the property. The rights of the parties in the main, therefore, depend upon the construction and effect of the will of Jamnadas. The argument before us on appeal was confined to this part of the case.

The facts which it is necessary to remember as bearing upon the construction of the will and the devolution of the property are these. The testator Jamnadas, who was a trader and had a shop, was a separated Hindu. When he made his will in March, 1874, he had a wife Bai Suraj and a daughter Mahalaxmi by another wife (then deceased) who was young. His separated brother Mulchand was alive and had a son. The plaintiff is Mulchand's grandson. Jamnadas died in July, 1876, leaving his widow Bai Suraj and his daughter Mahalaxmi surviving him. The latter married, but died in July, 1883, without leaving issue. The parties are not agreed as to who her heir is. The lower Court has not considered that question. Bai Suraj made a will in December, 1883, leaving the property to the defendant No. 1. She died in 1893. The present suit was filed in 1894.

The will is short. After referring to the state of his family and his separation and enumerating his property the testator proceeds: "As to that when I am not alive my wife named Suraj is the owner of the property and has the same right of doing things independently as I myself during my lifetime have, and after her death my daughter Mahalaxmi is the owner of the

said property. I have, therefore, made this my will in respect thereof." This is the translation which has been furnished to us. Though it conveys the general meaning it is not literally accurate. The Subordinate Judge renders it thus: "And my wife has powers to do in the same way as I have absolute powers to do when I am present, and in case of my wife's death after that my daughter Mahalaxmi is the owner of that property." The words "*téné kájá rajá hoé to*" which the translator renders "after her death" and the Subordinate Judge renders "in case of her death" are still more literally rendered "should death to her be." They do not in our view import a contingency but are a euphemism to denote the time of the wife's future death which native feeling does not permit of being expressed in speech as a certainty. The words "after that" which follow the word "death" show, we think, that this is certainly so in the present case.

Mr. Rao, who argued the appeal with much ability for the appellant, contends that the true intention of the testator to be gathered from the words of the will was to give an absolute and unqualified estate in perpetuity with the fullest powers of alienation and disposition to the widow, and that the gift to Mahalaxmi was substitutionary to provide for the event of Bai Suraj dying in the lifetime of the testator. He relied upon the rule deducible from the cases of *Gee* v. *Mayor, &c., of Manchester*[1] and *Woodburne* v. *Woodburne*[2]. He argues that unless this construction is adopted, and if Bai Suraj takes only a life estate, the words giving her such ample powers over the property must be rejected as meaningless. It appears to us, however, that, as we have already said, the gift over to Mahalaxmi is not expressed as a contingency by the testator, but as a certainty, and that, therefore, there is no room or basis for the argument. The words which gave the widow such ample power over the property are, we think, only intended to enlarge the Hindu widow's ordinary power and to provide that she is to be perfectly untrammelled in its enjoyment and management so long as she lives, but that the estate is still to pass to Mahalaxmi on her death. We are of opinion that Bai Suraj took only a life estate in the property with remainder to Mahalaxmi after her death.

(1) 17 Q. B., 737. (2) 28 L. J. Ch., 336.

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Mr. Govardhanram, on the other hand, contended that the gift to Mahalaxmi was contingent on her surviving Bai Suraj, but we think that his contention also ought not to prevail, and that Mahalaxmi took a vested estate in the property subject to the life interest given to Bai Suraj. In the first place, there are no words to be found in the will expressive of contingency, and the will certainly in express terms disposes of the entire estate of the testator in the property. This is the rule laid down in section 106 of the Indian Succession Act, which, though inapplicable to the will which we are construing, has been made applicable by the Hindu Wills Act to Hindu wills executed in the Presidency Town. It is argued that this construction would defeat the probable intentions of the testator, but we think not. It is clear that if Mahalaxmi had survived Bai Suraj she would have taken an absolute estate under the will and that it would then have passed to her heirs if she died intestate. The same result follows if she dies before Bai Suraj. It passes on her death to her heirs. If she had survived Bai Suraj (in the absence of a will) she would also have taken an absolute estate in the property which would in that case also have passed to her heirs. The case of the property passing to Mahalaxmi absolutely and after her death to her heirs may well, therefore, have been the intention of the testator in any event; but it is, we think, idle to speculate on intention where none is expressed. What the testator has done is to give his whole property to his wife and daughter and to leave the result to the general rules of law. We must, therefore, hold that Bai Mahalaxmi took a vested estate in the property after the death of the widow Bai Suraj which upon her death passed to her heirs. This will defeat the plaintiff's claim in this suit unless he is the heir of Mahalaxmi. It is not conceded that he is not. We must send down an issue to have it determined whether the plaintiff is the heir of Mahalaxmi. Finding to be certified within two months. Further evidence on the issue may be received.

Issue sent down.