ORIGINAL CIVIL.

Before Mr. Justice Starling.

1901. *December 7.*

BAI CHADUNBAI (PLAINTIFF) *v.* DADY NUSSERWANJI DADY AND OTHERS (DEFENDANTS).*

Charity—Charitable purposes—Uncertainty.

A testator directed that after the death of his wife and in default or on failure of issue his trustees should bestow certain trust premises and the interest, dividend and income thereof "upon some one or more charitable, educational or other philanthropic institutions or institution calculated to promote the public good as they shall in their discretion select."

Held, that the gift to charity was void for uncertainty.

Williams v. *Kershaw*(1) followed.

ORIGINATING summons in Chambers.

One Homiji Cursetji Dady died in 1884, leaving him surviving the plaintiff, his widow, and one son, Dady Homiji Dady.

By his will dated the 15th April, 1877, he appointed *inter alia* the plaintiff and the first defendant to be executors and trustees thereof. Probate of the will was obtained in 1884.

The will directed as follows :

(1) The residue of his property was to be invested by the trustees and held by them on trust to pay the income thereof to his widow, for the maintenance of herself and for the maintenance and education of such of his children as should be under the age of twenty-five years.

(2) Subject as aforesaid, the trustees were to stand possessed of the trust premises in trust for all his sons (he having at the date of his will only one son) living at his death or born in due time thereafter, who should attain the age of twenty-five years, in equal shares.

(3) If there should be no son living at his death or born in due time thereafter who should attain the age of twenty-five years, and no issue of such son, then in trust to pay the income of the trust premises to his wife for life and after her death and on default or failure of son or issue as aforesaid on trust to bestow *without any distinction of caste or creed* the said trust premises and the

* Suit No. 782 of 1901.

(1) (1835) 5 Cl. & F. 111 Note.

income thereof *on some one or more charitable or other philanthropic institution or institutions calculated to promote the public good as the trustees should select*, but so as only the income of the trust premises should be expended for the purposes of such charitable or other institution, the principal fund remaining intact.

The following are the material clauses of the will:

6. I hereby declare that, subject as aforesaid, my trustees or trustee shall stand possessed of my said trust premises, together with any unapplied interest or income thereof, in trust for all my sons (I having at present only one son named Dady) living at my death or born in due time thereafter, who shall attain the age of twenty-five years, in equal shares: Provided always, and I declare that if any son of mine shall die in my lifetime, leaving issue in existence at my death, or shall die after my death before attaining the age of twenty-five years, leaving issue in existence at his death, the issue of each son of mine so dying shall take by substitution as tenants-in-common in equal shares *per stirpes* if more than one the share in my trust fund which such son of mine would have taken under the trust in that behalf hereinbefore declared had he survived me or lived after my death to attain the age of twenty-five years.

9. I declare that if there shall be no son of mine living at my death or born in due time thereafter who attains the age of twenty-five years, and no such issue as aforesaid, then, subject and without prejudice to the trusts hereinbefore declared, my trustees or trustee shall hold and stand possessed of the said trust premises upon trust, to pay the income thereof to my said wife during the term of her natural life, and after the death of my said wife and on such default or failure of son or issue as aforesaid upon trust to bestow *without any distinction of caste or creed* the said trust premises and the interest, dividend or income thereof, or so much thereof, respectively, as shall not have been applied under any of the trusts or powers of this my will upon *some one or more charitable, educational or other philanthropic institution or institutions calculated to promote the public good as they, my trustees or trustee, shall in their discretion select*, but so as only the income of the trust premises as aforesaid shall be expended for the purposes of such charitable or other institution, the principal fund remaining intact: Provided always that my name or that of my wife or of my sons shall be connected with such charitable or other institution.

The testator's only son, the said Dady Homiji Dady, was married in March, 1893, to one Sirinbai (defendant 3), and on the occasion of his marriage, by a deed of settlement dated 13th March, 1893, he purported to settle certain property to which he was, should or might eventually become, entitled under the trusts of the said will (being the residuary estate of the said testator) on the trusts declared in the settlement, which were as follows:

1901.

BAI CHADUNBAI v. DADY NUSSERWANJI.

And it is hereby agreed and declared that if there shall be no issue of the said Dady Homiji Dady in existence at his death or born in due time thereafter, then and in such case and after such death the trustees or trustee shall stand possessed of the said trust premises and the income thereof in trust for the widow, if any, of the said Dady Homiji Dady and such other person or persons, object or objects in such shares and proportions and upon such conditions, with such restrictions and in such manner as the said Dady Homiji Dady by any instrument or instruments in writing, whether with or without the power of revocation or new appointments or by his last will or by any codicil thereto, shall appoint, and in default of any such appointments as last aforesaid, and so far as no such appointment shall extend upon trust as to the said income, to pay the same to such widow for the term of her natural life or until she shall re-marry (whichever event shall first happen), and as to the *corpus* of the said trust premises in trust after the death or re-marriage of such widow (whichever event shall first happen) for the right heirs of the said Dady Homiji Dady.

The said Dady Homiji Dady (the testator's only son) died in 1893 under the age of twenty-five years and without issue, but leaving him surviving his widow Sirinbai (defendant 3) and his mother, the plaintiff. He left no will and made no appointment.

Sirinbai subsequently married one Cursetji Jamsetji Wadia. At the time of her re-marriage the heirs of her first husband Dady Homiji Dady, according to the Parsi law of intestate succession, were the plaintiff (his mother) and herself.

The plaintiff filed this suit on the 14th November, 1901. The first and second defendants were the trustees of the testator's will, the third defendant was the said Sirinbai, and the fourth defendant was the Advocate General of Bombay.

On the 18th November, 1901, the plaintiff took out an originating summons for the determination of the following questions:

(1) Whether the trusts declared in the ninth clause of the will of Homiji Cursetji Dady, subject to the life interest of the plaintiff, are not void for uncertainty?

(2) Whether the plaintiff and the said Dady Homiji Dady did not, on the death of the said testator, become respectively entitled to one-third and two-thirds of the residue of his estate, subject to such life interest as aforesaid?

(3) Whether in the events which have happened, the plaintiff and the defendant Sirinbai are not entitled in equal moieties to the said two-thirds share which devolved upon the said Dady Homiji Dady?

(4) Whether the plaintiff and the defendant, or any other and what person or persons, are entitled to the residuary estate of the said testator, and in what shares?

Scott (Acting Advocate General) for plaintiff and defendant 3 :— If the trusts in clause 9 of the will are void, the life interest of plaintiff alone remains, and subject to that there is an intestacy as to the residue. He cited *In re Macduff* [1]; *Runchordas* v. *Parvatibai*.[2]

Lowndes for defendants 1 and 2 contended that the trusts in the will were valid. He cited the Charitable Trusts Act, 1853 (Stat. 16 & 17 Vic., c. 137), section 66; *Hunter* v. *Attorney General* [3]; *In re Douglas* [4]; *In re Sutton* [5]; *Dolan* v. *Macdermott* [6]; *Mitford* v. *Reynolds*.[7]

Branson for defendant 4 (the Advocate General) adopted the argument for the defendants 1 and 2 and contended that English law applied in India. He cited *The Mayor of Lyons* v. *East India Company*,[8] Stokes' Statutes, Vol. I (1st Ed.), Preface.

STARLING, J. :—The first question to be decided in this case is whether the gift in the ninth clause of the testator's will to "some one or more charitable, educational or other philanthropic institution or institutions" is a good gift to charity.

I will notice first two points raised by Messrs. Lowndes and Branson in support of the bequest. The first was that the definition of "charitable purpose" in Act VI of 1890 was to be the test by which this Court was to determine what was or was not a valid charity. There are two answers to this: first, that the Act was for the purpose of providing means for the administration of property held in trust for charitable purposes, and the definition was made only for the purposes of the Act itself which did not purport to define generally what was or was not a charity; secondly, an Act passed in 1890, which does

(1) (1896) 2 Ch. 451.
(2) (1899) 23 Bom. 725; 26 I. A. 71, 80.
(3) (1899) Ap. Ca. 309 at p. 324.
(4) (1887) 35 Ch. D. 472.
(5) (1885) 28 Ch. D. 464.
(6) (1863) L. R. 3 Ch. 376.
(7) (1841) 1 Phillips 185.
(8) (1836) 1 Moo. Ind. Ap. 175 at p. 270

1901.

BAI CHADUNBAI v. DADY NUSSERWANJI.

not purport to be retrospective in its effect, cannot affect rights which came into existence in 1884, and which must be determined on the law as it then existed. The second point raised by counsel is that the Statute of Elizabeth was never in force in India. No decision was quoted which ruled directly either way, but all the cases decided in India with regard to charities tacitly assume, where it is necessary, that the decisions should be based on the principles of that statute.

I have carefully considered all the cases cited to me, and am of opinion that the gift now in question is not a good gift to charity. I do not, however, discuss cases, because there is a case in the Rolls of *Williams* v. *Kershaw*,[1] which is on all fours with the present one, the only difference being that the gift there was more in favour of charity than the present one. There it was "benevolent, charitable and religious," and the Master of the Rolls held that it meant benevolent or charitable or religious. In the present case the words are "charitable, educational or other philanthropic," which seems to me to require more strongly to be read as charitable *or* educational *or* other philanthropic.

Charitable and educational institutions are philanthropic objects, consequently other philanthropic institutions cannot mean other philanthropic institutions of the same kind, but other kinds of philanthropic institutions, and the introduction of the word "other" confirms me in the opinion which I have formed after considering the case of *Williams* v. *Kershaw*.

The gift to charity thus being bad, there was an intestacy in respect of the residue of the testator's estate when he died in 1884, and one-third of that residue passed to the plaintiff and two-thirds to his son Dady Homiji Dady, subject, however, to the life estate of the plaintiff under clause 9 of the will, and on the death of Dady Homiji Dady, Sirinbai, his wife, having re-married, his two-thirds, subject to the life estate of the plaintiff, would be divided equally between the plaintiff and the defendant Sirinbai.

I therefore answer the first, second and third questions in the affirmative. There is no need to answer the fourth question,

(1) (1835) 5 Cl. & F. 111 Note.

1901.

BAI CHADUNBAI v. DADY NUSSERWANJI.

and I declare that the plaintiff is entitled absolutely to two-thirds of the residue of the testator's estate and to a life interest in the remaining one-third, and that Sirinbai is absolutely entitled to such one-third. Costs of all parties (those of the trustees and the Advocate General taxed as between attorney and client) to come out of the residue of the testator's estate.

Attorneys for plaintiff and defendant 3—*Messrs. Craigie, Lynch and Owen.*

Attorneys for defendants 1 and 2—*Messrs. Ardeshir, Hormasji and Dinshaw.*

Attorneys for Advocate General—*Messrs. Little & Co.*

ORIGINAL CIVIL.

Before Mr. Justice Starling.

1902.
April 1.

HARIRAM MOHANJI, PLAINTIFF, *v.* LALBAI AND OTHERS, DEFENDANTS.*

Civil Procedure Code (XIV of 1882), section 381—Order that plaintiff should give security for costs—Failure to comply with order—Dismissal of suit—Subsequently fresh suit brought on same cause of action—Dismissal of first suit no bar—Cause of action—First suit to recover property direct from defendants—Second suit to recover same property from same defendants, but alleging it to have been settled in trust for them and making trustees of settlements party defendants—Res judicata.

The plaintiff and one Naranji Virji were (it was alleged) cousins and the only members of a joint Hindu family. The plaintiff left Bombay and went to Cutch to avoid the plague, and in 1900, during his absence, Naranji died and his widows took possession of his estate. The plaintiff returned to Bombay, and as surviving member of the joint Hindu family sued (No. 124 of 1900) the widows for the property. They alleged that he was not a resident of British India, and obtained an order under section 380 of the Civil Procedure Code (XIV of 1882) directing that he should give security for costs or in default his suit should be dismissed. Being unable to comply with the order, his suit was dismissed under section 381 of the Code. Having learned for the first time during the course of that suit that, in his absence from Bombay, the deceased Naranji Virji had executed two deeds of settlement, by one of which he purported to settle some of the family property in charity and by the other to settle another portion on his

*Suit No. 493 of 1901.