

N. B. Pendse (for *S. R. Bakhale*) for the respondent :—There is no section in the Code of Civil Procedure which enables a Judge to set aside his decree. By section 208 of the Indian Contract Act, an agent's authority, although it ends with the death of his principal, continues with respect to strangers until it comes to their knowledge. This analogy should be applied to a Pleader's authority.

FULTON, J. :—We think that as the appellant had died before the hearing of the appeal and his representative had not been placed on the record, the decree of the Appellate Court was a nullity. Section 571 of the Civil Procedure Code only authorizes the Court to pronounce judgment after hearing the parties, and judgment pronounced without hearing them is unauthorized by the Code. As the representative of the plaintiff applied within the prescribed time to have his name entered on the record, the Court was bound under section 365 to enter his name. In not doing so the Court failed to exercise a jurisdiction vested in it by law.

We must, therefore, under section 622, direct that the applicant's name be entered on the record and that the Appellate Court do thereafter proceed to dispose of the appeal according to law. Costs to abide the result.

Order accordingly.

ORIGINAL CIVIL.

*Before Mr. Justice Starling ; and, on appeal, before Sir L. H. Jenkins,
Chief Justice, and Mr. Justice Russell.*

**HUSENBHOY AHMEDBHOY (PLAINTIFF), v. AHMEDBHOY
HABIBBHOY (DEFENDANT).***

1901.
June 15.
September 20.

Will—Construction—Absolute gift—Period of payment to legatee—Age of majority of legatee—Direction in will for postponement of payment until a later period than majority, effect of—Privy Council, leave to appeal to—Civil Procedure Code (XIV of 1882), section 596—Value of subject-matter.

Where a will confers an absolute gift, but directs that the property so given shall not be made over to the legatee until he has attained a certain age beyond

* Suit No. 224 of 1901.

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the period of his majority, such direction is inoperative, unless the will confers an interest in the property upon some person for the intervening period, and the legatee is entitled to have the property handed over to him as soon as he attains his majority.

A question arose between an executor and a residuary legatee as to whether, under a will, the legatee was entitled to have the residue handed over to him on his attaining majority, or whether such payment was not to be postponed until he reached the age of twenty-five, the executor in the meantime having a right to the income. The Court held that payment should be made to the legatee on his attaining majority and that the will conferred on the executor no right to the income. The executor applied for leave to appeal to the Privy Council and contended that the matter in dispute was of the value of Rs. 10,000 as required by section 596 of the Civil Procedure Code, inasmuch as it involved the right to the whole fund.

Held, refusing leave, that the subject-matter of the dispute was only the income and was not of the requisite value. The case had proceeded on the hypothesis that the executor held the *corpus* of the estate as a trustee, and the only question was as to the income.

In chambers. Originating summons taken out by the plaintiff to obtain the construction of a will dated the 12th March, 1890, of one Fatmabai, who died on the 20th May, 1892, unmarried.

The defendant Ahmedbhoi was the sole executor and trustee of the said will, and was the father of the plaintiff.

By the said will, the testatrix authorized her executor (the defendant) to recover her property and pay her funeral expenses and to expend Rs. 2,000 for the benefit of her soul as he might think proper, and after giving Rs. 500 in charity, she bequeathed the residue of her property to the plaintiff and appointed him her sole heir, and directed that her executor should hand over the said residue to him on his attaining the age of twenty-five years, and that till then the executor should keep the same and use the interest in such manner as he might think proper.

The following are the material clauses of the will :

5. The sums directed to be paid agreeably to what is written above having been deducted, as to any sum which may have been obtained as my share and as to the sum which may have been left out of the moneys belonging to me which there are at the said Ahmedbhoi's, and besides these as to any immoveable and moveable property belonging to me there may be in my possession or in the possession of any one (else) in Bombay or in any other foreign country, I appoint my paternal uncle's youngest son Bhai Husenbhoi Ahmedbhoi Habibbhoi as the sole heir to the whole of that property.

6. When the said Husenbhoj Ahmedbhoj attains the age of twenty-five years my 'executors' shall make over my said property to him and till then my 'executor' Ahmedbhoj Habibbhoj shall keep with him the whole of that property. And as to such interest as may be realized by him, he shall deal with the same in such manner as he thinks fit. The said Husenbhoj Ahmedbhoj or any one else has no right to ask for an account, &c., in respect of that matter. Agreeably to what is written above, I of my free will and pleasure and in (my) sound mind and consciousness have on this the 12th day of March in the year 1890 made this my last will, &c.

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The property of the testatrix was property to which she was entitled under the will of her father, Fazalbhoy Habibbhoj. His estate had not been fully administered at the date of her death and was then in the hands of the Administrator-General.

In March, 1901, the defendant obtained probate of Fatmabai's will. In his application for probate the defendant admitted that Rs. 1,449-14-3 was due by him to Fatmabai's estate.

On the 12th April, 1901, the plaintiff filed this suit against the defendant to obtain payment of the residue of Fatmabai's estate, alleging that on the 30th March, 1901, the defendant had received Rs. 8,894 from the Administrator-General in respect of a legacy left to Fatmabai by her father, and that he would shortly receive Fatmabai's share in the residue of her father's estate.

The following paragraphs of the plaint set forth the plaintiff's claim :

10. The plaintiff says that he is now over twenty-three years of age and he is advised that he is now entitled to have the residue of the estate of the said Fatmabai handed over to him.

11. The plaintiff called upon the defendant to hand over to him the portion of the estate which had already come to his hands and also the moneys due by him to the said estate and referred to in the will of the said Fatmabai, together with interest thereon at 9 per cent. per annum, and also to signify his consent to hand over to the plaintiff the remainder of the said estate when received by him, but the defendant has declined to comply with the plaintiff's said request.

On filing the plaint, the plaintiff took out this originating summons, praying for the determination of the following questions :

(1) Whether the plaintiff is now entitled to have the estate of the deceased Fatmabai handed over to him.

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(2) Whether defendant should not forthwith hand over to plaintiff the said sum of Rs. 8,894 with interest from the date at which it came to his hands, and also the sum of Rs. 1,449-14-3 which the defendant admitted to be due by him to the said estate, after deducting (a) funeral expenses, (b) costs of probate, (c) legacies, &c.

Scott (Acting Advocate General) for plaintiff:—The plaintiff is entitled at once to the residue of the estate, although he has not yet attained the age of twenty-five: *Gosavi Shirgar v. Rivett-Carnae*⁽¹⁾; *Gosling v. Gosling*.⁽²⁾

Branson for the defendant:—The plaintiff is not entitled to the estate until he is twenty-five years of age. Under the will, the defendant until that time may use the interest of the money as he pleases and without rendering any account. The defendant has a counter-claim against the plaintiff in respect of money wrongfully received by the plaintiff, and ought not to be required to pay over the estate to the plaintiff until that counter-claim is determined.

STARLING, J.:—It is clear from the authorities cited that the plaintiff, as admitted by the defendant's counsel, has attained the age of twenty-one, and thus being three years past his majority is entitled to have the property of Fatmabai handed over to him although his enjoyment of it was by her will to be postponed till he was twenty-five, unless in the meantime the income was clearly disposed of in favour of some one else: *Gosling v. Gosling*⁽²⁾; *Gosavi Shirgar v. Rivett-Carnae*.⁽¹⁾

Then, is the direction, that—

As to such interest as may be realized by him (*i.e.* Ahmedbhoj Habibbhoj, the trustee), he shall deal with the same as he thinks fit. The said Husenbhoj Ahmedbhoj or any one else has no right to ask for an account in respect of that matter,—

a disposition of the income in favour of the defendant absolutely? Looking to the cases we find that in *Gibbs v. Rumsey*⁽³⁾ there was an absolute gift to the trustees and executors of the residue of estate, followed by words authorizing them to dispose

(1) 13 Bom. 403.

(2) (1859) Johns., 265; Rep. 265

(3) (1813) 2 V. & B. 294.

of it in such manner and to such persons as in their discretion they should think fit. The Court held that there being an absolute bequest of the residue to the trustees and executors, followed by no conditions, the words which followed the absolute gift were only expressions of what the legatee had power to do with what was his own property, and that they, therefore, took the residue absolutely for their own use. In *Fowler v. Garlike*⁽¹⁾ and *Yeak Cheah v. Ong Cheng*⁽²⁾ the money was given absolutely to the executors, but *in trust* to apply it at their discretion, and the Court held that the words "in trust" showed that they were not to take for their own benefit, but in trust for some one, and the trust, being too indefinite for the Court to execute, therefore failed.

The present case differs from both these classes in that there is an absolute gift of the whole to Husenbhoj, and that would necessarily carry with it the gift of the income as it accrued from time to time. The income thus *prima facie* being Husenbhoj's, do the words of the will I have previously set out divest him of it until he is twenty-five? Looking to the fact that the executor and the trustee was Husenbhoj's father, and that according to the custom of the country he would be likely under ordinary circumstances to be living with his father until he was twenty-five, I am of opinion that these words do not constitute an absolute gift to the defendant for his own benefit, but that he, as trustee, could use the interest for such purposes as a trustee could properly use it without rendering an account, and that power to use the interest as trustee would cease as soon as the legatee was in a position to claim to have the property handed over to him.

The plaintiff being now of age and thus being otherwise competent to have the property delivered to him, the words of clause 6 of the will do not operate to deprive him of that which by a previous clause was given to him absolutely. The plaintiff is, therefore, now entitled to have the estate of Fatmabai handed over to him, and I make a declaration to that effect.

As to the counter-claim the defendant wishes to set up, it is a claim by the defendant personally against the plaintiff and should not be allowed to be brought forward in an administration suit.

¹ (1830) 1 R. & M. 382.

⁽²⁾ (1875) L. R. 6 P. C. 381.

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At present no order can be made for the delivery of property to the plaintiff, as it has not been ascertained what amount of property the plaintiff is entitled to. Consequently I shall refer the matter to the Commissioner to take the usual administration accounts and to ascertain and report what is now the amount and nature of the estate of Fatmabai, all costs and further directions reserved. Liberty to apply. Counsel certified.

The defendant appealed. On the 2nd August, 1901, the Court of Appeal (Jenkins, C.J., and Russell, J.) confirmed the above decree so far as it related to the construction of the will. It held that under clause 5 there was an absolute gift to Husenbhoi, and that the provision postponing his enjoyment until the age of twenty-five was inoperative, inasmuch as there was no interest in the property given to any person in the interval. Clause 6 did not operate to cut down the absolute gift to Husenbhoi, nor did it confer any intervening interest upon Ahmedbhoi.

In the Court of Appeal certain concessions were made by the parties which enabled the Court to dispense with the order for administration. With this variation, therefore, the order of Starling, J., was confirmed.

On the 20th September, 1901, the defendant Ahmedbhoi applied for leave to appeal to the Privy Council. The application was heard by Jenkins, C.J., and Russell, J.

Branson for the applicant (defendant); *Rivett-Carnac* for the opponent (plaintiff).

JENKINS, C.J. :—This is an application for leave to appeal to the Privy Council from a decision of the Division Bench.

The question at issue was the true construction of a will. For the present applicant it was contended that he was beneficially entitled to the income of the residue until the respondent attained twenty-five; while the respondent claimed that he was entitled to the income, and as a consequence to have the residue made over to him inasmuch as he had reached his majority. Starling, J., on this question of construction decided in the respondent's favour, and on appeal this Bench took the same view

of the will. His decree, however, was varied to this extent, that the usual administration decree was dispensed with. This we were enabled to do by virtue of what was conceded before us after we had determined the question of construction. It is from this decree that the applicant seeks to appeal.

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We have to satisfy ourselves, therefore, that the value of the subject-matter of the suit and of the matter in dispute on appeal to the Privy Council is Rs. 10,000 or upwards, and also that the point of construction on which we affirmed Starling, J., involved some substantial question of law. The only question argued before us on the appeal was as to the destination of the income until the respondent attained twenty-five, and I am clear on the evidence that this subject-matter is not of the requisite value. Mr. Branson has suggested before us that the test of the value has been complied with, as the applicant contended that he was absolutely entitled to the whole fund until the respondent attained twenty-five. But this clearly is not so. The case has throughout proceeded on the hypothesis that the applicant held the *corpus* as trustee and that the only question was as to the income. No other view was or could reasonably have been put forward; nor does this suggestion of Mr. Branson involve a substantial question of law.

In my opinion, therefore, the application must be dismissed with costs.

Attorneys for plaintiff—*Messrs. Tyabji, Dayabhai & Co.*

Attorneys for defendant—*Ardeshir, Hormusji, Dinshaw & Co.*