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the lunatic and such persons as the Court may hereafter from time to time order.

Next friend to pay fourth defendant's costs of suit and plaintiff's costs other than those above specifically provided for. Liberty to apply.

Attorneys for the plaintiff:—*Messrs. Captain and Vaidya.*

Attorneys for defendants:—*Mr. F. P. Pavri, Messrs. Payne & Co.* and *Messrs. Maganlal, Jehangir and Gulabbhai.*

R. R.

ORIGINAL CIVIL.

Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batty.

1906.
January 26.

BAI JAIJI AND OTHERS (ORIGINAL DEFENDANTS 6—11), APPELLANTS, *v.* N. C. MACLEOD AND OTHERS (ORIGINAL PLAINTIFF AND DEFENDANTS 1—5), RESPONDENTS.*

Will—"Such debts and liabilities as aforesaid"—"Such"—Construction—Time no part of the description.

A will contained a clause providing,—

"11. As regards the remaining one equal fourth share of the said residue I direct that if at the time the said residue is divisible my son Ardeshir shall have no debts due by him or any liabilities likely to result in a debt or debts of more than Rupees five thousand the said share shall be made over to him absolutely, but if otherwise then I direct that the said share shall be held or settled by my Executors upon trust until the said Ardeshir shall be free from such debts and liabilities or until he shall die to apply the income of the same in or towards the maintenance and support of him, his wife and children or such or one or more of them the said Ardeshir, his wife and children as the trustees may at their absolute discretion determine and the education or other benefit of such children including their marriage, but when and so soon as the said Ardeshir shall be free from such debts and liabilities as aforesaid upon trust to pay the same and all unapplied income, if any, to him the said Ardeshir absolutely."

A question having arisen as to whether the expression "when and so soon as he the said Ardeshir shall be free from such debts and liabilities as aforesaid" had reference only to debts and liabilities existing at the time when the residue was divisible,

* Appeal No. 1411 of 1905 : Suit No. 857 of 1904.

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Held, that the debts and liabilities to which the clause related were debts or any liabilities likely to result in a debt or debts of more than Rupees five thousand and it was with debts of that description that a comparison was implied by the word *such*. Time was no part of their description and reference was made to time only to indicate the event on which certain consequences were to follow according as debts and liabilities of the description indicated did or did not exist.

APPEAL from CHANDAVARKAR, J.

One Cursetji Pallonji Powalla, a Parsi inhabitant of Bombay, died at Bombay on or about the 5th October, 1889, leaving him surviving four sons, namely, Ardeshir, Jamsetji, Kaikobad and Pallonji, then a minor about thirteen years old, and six daughters, namely, Dhanbai, Sonabai, Meherbai, Bachubai, Chandanbai and Ratanbai, his only heirs according to Parsi Law. Prior to his death Cursetji made his last will and testament, dated the 16th October, 1888. Under the will the testator appointed his son-in-law, Sorabji Edulji Warden, his three adult sons and his nephew, Jamshedji Dorabji Powalla, as executors. After making provision for certain bequests and legacies to his daughters, the testator directed that the residue of his property should be divided into four equal shares and one share should be given to each of his four sons. With respect to the fourth share of Ardeshir, clause 11th of the will provided as follows :—

11. As regards the remaining one equal fourth share of the said residue I direct that if at the time the said residue is divisible my son Ardeshir shall have no debts due by him or any liabilities likely to result in a debt or debts of more than Rupees five thousand the said share shall be made over to him absolutely, but if otherwise then I direct that the said share shall be held or settled by my Executors upon trust until the said Ardeshir shall be free from such debts and liabilities or until he shall die to apply the income of the same in or towards the maintenance in support of him, his wife and children or such or one or more of them the said Ardeshir, his wife and children as the trustees may at their absolute discretion determine and the education and other benefit of such children including their marriage, but when and so soon as he the said Ardeshir shall be free from such debts and liabilities as aforesaid upon trust to pay the same and all unapplied income, if any, to him the said Ardeshir absolutely.....

Probate of the said will was granted to the executors on the 21st March, 1890, but before the grant of the probate, that is, on the 8th February, 1890, Ardeshir filed a petition in the Court for

the relief of insolvent debtors and attached to it a schedule of his debts amounting to Rs. 58,265-14-6. On the 20th August, 1890, he obtained his personal discharge and judgment was entered up against him in the name of the Official Assignee for the amount of the scheduled debts. On the 30th January, 1895, satisfaction was entered up by the Court of Insolvency in respect of his scheduled debts. Ardeshir, however, continued to contract debts and on the 19th February, 1904, he filed a second petition of insolvency and under the vesting order his estate became vested in the Official Assignee, who, thereupon, filed the present suit for the recovery of Ardeshir's share in the residue of his father's property, alleging that by the 11th clause of his will the testator directed that Ardeshir's share should be given to him absolutely if, at the time the residue became divisible, he had no debts or liabilities of more than Rs. 5,000; but if otherwise the executors should hold his share in trust until he should become free from such debts; that the residue became divisible on the expiration of "the executor's year," that is, on the 5th October, 1890; that the debts and liabilities which existed on that date came to an end and were extinguished on the 30th January, 1895, when the Insolvents' Court entered up satisfaction in Ardeshir's favour who since that date became entitled to receive from the executors "absolutely" his share of the residue.

Defendants 1—5, executors under the will, practically supported the case of defendants 6—11, wife, daughters and sons of Ardeshir, who maintained that the suit was pre-mature because the estate of the testator had not been fully administered so as to enable any one to insist that the residue had become divisible; that even if it be assumed that the time when it became divisible was on the expiration of "the executor's year," the second condition prescribed by the testator to enable defendant 2, Ardeshir, to have his share absolutely had not been fulfilled since he, defendant 2, had all along continued indebted for more than Rs. 5,000.

The issues raised at the trial were:—

1. Whether on the 30th January, 1895, the second defendant became free of all his debts and liabilities within the meaning of the 11th clause of the will in the plaint referred to?

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2. Whether on the said date the executor-defendants held one-fourth share of the residuary estate on trust for the second defendant absolutely?

3. Whether the second defendant is now or has ever been entitled under the said will to be paid his one-fourth share of the said residuary estate?

The findings on the first two issues were in the affirmative and that on the third was, "the second defendant became entitled under the said will to be paid his one-fourth share on the 30th January, 1895, and he has since then been and is now so entitled."

On these findings the claim of the plaintiff, Official Assignee, was allowed.

Defendants 6—11, wife, daughters and sons of Ardeshir, appealed.

Setalvad (with *Jardine*) for the appellants (defendants 6—11) :—The question turns on the construction of the 11th clause of the will. That clause contains the words "such debts and liabilities, &c.," and the question is what does the word "such" refer to. We contend that it refers to debts and liabilities of more than Rs. 5,000 mentioned in the clause and not to the time when the residue became divisible. It is not correct to say that the word "such" in this particular clause refers to the time when the residue became divisible. The lower Court based its judgment on the ground that the word "such" occurring in the other clauses of the will relates to time and that, therefore, the testator intended to use the word in one and the same sense throughout the will. The word "such" is not a technical word and so it cannot be construed with reference to its use in the other parts of the will. A reference to the other clauses of the will will clearly show that in those clauses the word cannot but refer to time and nothing else.

Davar for respondents 2—6 (defendants 1—5, executors) :—We support the appellants' contention. The will should be construed with reference to the intention of the testator who was a Parsi and who intended to provide for his sons. He was perfectly aware that one of his sons had incurred liabilities and was anxious that his money should not go to the creditors of that son. He, therefore, devised in favour of his three sons absolutely

and created a trust with reference to the one in pecuniary troubles to enure to that son's wife and children. It is of no consequence whether that son incurred debts for a reasonable or an unreasonable purpose. It was the desire of the testator that his money should not be claimed by the creditors of his son and that his grandchildren should not starve. If the construction put by the lower Court be upheld that predominant intention of the testator would be entirely defeated because there is nothing to prevent the son from contracting fresh debts and then claiming from the executors his share absolutely to pay up his fresh creditors. In this way the son can wholly undo the wishes of his father.

Lowndes (with *Raikes*, acting Advocate General and *Inverarity*) for respondent 1 (plaintiff):—The conclusion arrived at by the lower Court is correct. We do not support that conclusion on the grounds given in the judgment. We do not contend that the term "such" should be construed with reference to its use in the other clauses of the will. The will was written in English and its draft was settled by Mr. Latham, one of the best conveyancers we ever had. It must, therefore, be construed in its grammatical sense, when it is so construed, the conclusion arrived at by the lower Court is correct.

JENKINS, C. J.:—The only question arising on this appeal is whether the defendant Ardeshir Cursetji Powalla acquired under his father's will an interest, which vested on his insolvency in the Official Assignee.

The testator by the 10th clause of his will directed that all the rest residue and remainder of his property should be divided into four equal shares; that one such share should be given to each of his sons, the 3rd and 4th defendants: and that another share should be held in trust to pay the income thereof to his son Pallonji Cursetji Powalla until he should attain the age of 21 years; and on his attaining that age in trust to pay the share to him absolutely.

By the 11th clause of his will the testator directed as follows:—

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"11. As regards the remaining one equal fourth share of the said residue I direct that if at the time the said residue is divisible my son Ardeshir shall have no debts due by him or any liabilities likely to result in a debt or debts of more than Rupees Five thousand the said share shall be made over to him absolutely, but if otherwise then I direct that the said share shall be held or settled by my Executors upon trust until the said Ardeshir shall be free from such debts and liabilities or until he shall die to apply the income of the same in or towards the maintenance and support of him, his wife and children or such or one or more of them the said Ardeshir, his wife and children as the trustees may at their absolute discretion determine and the education and other benefit of such children including their marriage but when and so soon as he the said Ardeshir shall be free from such debts and liabilities as aforesaid upon trust to pay the same and all unapplied income if any to him the said Ardeshir absolutely . . ."

On the 5th October, 1889, the testator died.

On the 8th of February, 1890, the defendant Ardeshir filed his petition for relief under the Insolvent Debtors Act, and on the 20th of August, 1890, judgment was entered up against him in the name of the Official Assignee for Rs. 58,265-14-6, the amount of his scheduled debts.

On the 30th of January, 1895, it was ordered that satisfaction be entered up on the judgment, and that the Official Assignee should deliver over to the defendant Ardeshir the balance of moneys, property, books of account, papers, documents, &c., relating to his dealings and transactions, if any, in the Official Assignee's possession, or subject to his control, and it was further ordered that the same be vested in the defendant Ardeshir.

Notwithstanding these Insolvency proceedings and the entry of satisfaction, it is common ground that the defendant Ardeshir still continued to have debts due by him of more than Rs. 5,000, and at no time has he been free from indebtedness to that extent.

It is in these circumstances that the question involved in this appeal arises:—the Official Assignee contends that the debts and liabilities, to which the 11th clause refers, are only those in existence at the time the residue was divisible: the appellants, who are Ardeshir's wife and children, contend that the clause must not be read in this limited sense.

Though it was argued before Chandavarkar, J., that the residue would not be divisible until the whole estate had been realized,

this point was abandoned before us, and the only question discussed has been whether the trust in Ardeshir's favour "when and so soon as he the said Ardeshir shall be free from such debts and liabilities as aforesaid" has reference only to debts and liabilities existing at the time when the residue was divisible, for if not, then admittedly the trust in favour of Ardeshir has not arisen and the Official Assignee is not entitled to the share he claims.

Chandavarkar, J., decided in the Official Assignee's favour: "such debts and liabilities" in his opinion mean such as existed when the residue became divisible.

But he was led to this conclusion by the sense in which he thought the word *such* had been used in other parts of the will. The extent to which this consideration influenced the learned Judge in rejecting the defendant's contention appears from that part of his judgment where he says, "If in the will this had been the only use of the word 'such' I should have allowed that contention."

Mr. Lowndes, however, has sought to support the conclusion wholly on other grounds: he has argued that the antecedent to such debts and liabilities is to be found in an expansion of the words "but if otherwise." If that which is involved in them is expressed, then, according to his argument, the antecedent will be found to be debts and liabilities existing when the residue becomes divisible.

Is this the true construction of the testator's will? If so, then it was within Ardeshir's power to defeat the testator's scheme at any time, by the simple expedient of discharging the debts and liabilities existing at that point of time by borrowing money or creating substituted liabilities for that purpose. But in my opinion, the view, for which Mr. Lowndes contends, cannot be accepted. The debts and liabilities of Ardeshir to which clause 11 relates are "debts due by him or any liabilities likely to result in a debt or debts of more than Rupees five thousand," and it is, I think, with debts of that description that a comparison is implied by the use of the word *such*. Time (in my opinion) is no part of their description; it is extraneous to

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it, and the reference to time is made only to indicate the event on which certain consequences are to follow according as debts and liabilities of the description indicated do or do not exist.

The point does not admit of elaboration, and is one which would strike different minds in different ways. And though I naturally hesitate to differ from so careful a Judge as Chandavarkar, J., this is the conclusion to which I come.

The result then is that the decree of the first Court must be reversed and the suit dismissed. The cost of all parties throughout will come out of the residue, those of the executors as between attorney and client.

Decree reversed.

Attorneys for appellants :—*Messrs. Unwalla & Pherozshaw.*

Attorneys for respondents :—*Mr. K. D. Shroff*, and *Messrs. Ardeshir, Hormusji, Dinshaw & Co.*

G. B. R.

ORIGINAL CIVIL.

Before Mr. Justice Batchelor.

1906.

February 26.

EMMA AGNES SMITH, PLAINTIFF, *v.* THOMAS MASSEY AND OTHERS, DEFENDANTS.*

Indian Succession Act (X of 1865), sections 20, 22, 105—Relationships contemplated by the Act are legitimate relationships only—Gift by will of the residue to such charities as the trustees may think deserving, is good.

The Indian Succession Act (X of 1865) contemplates only those relationships which the law recognizes, that is, those flowing from a lawful wedlock.

The gift, by will, of the residue to "such charities as the trustees may think deserving" is a good gift, the objects being wholly charitable.

ORIGINATING SUMMONS.

This summons was taken out by Emma Agnes Smith, executrix of the will of one Mary Anne Houghland.

* O. C. J. Suit No. 875 of 1905, O. S.