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first appeal Court confirmed, and it is, therefore, unnecessary to discuss the further question raised whether the decision of the learned Judge would or would not have amounted to irregularity in the exercise of the jurisdiction within the meaning of section 115 of the Civil Procedure Code. Rule discharged with costs.

Rule discharged.

G. B. R.

APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Hayward.

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June 29.

NARANDAS VRIJBHUKHANDAS AND OTHERS (ORIGINAL DEFENDANTS 1, 2 AND 3), APPELLANTS, *v.* BAI SARASWATIBAI AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Will—Construction—Life estate to daughter—Bequest to daughter's sons—On failure of the bequest the estate to go to the testator's cousins absolutely—No son born to the daughter at the death of the testator—Failure of the bequest to daughter's son—Not a case of intestacy—Operation of the bequest in favour of the testator's cousins—The intention of the testator to retain his estate in his own family, that is, in the hands of his cousins.

A testator in his will provided *inter alia* that his daughter should have a life estate of Rs. 150 and the rent of a house and in the event of her having a male child or male children, he or they should take the whole estate of the testator on attaining the age of 18 and then bearing a good character. Should the daughter have no male issue, then on her death, the whole of the testator's estate was to go to his cousins absolutely. The daughter having borne no male issue during the life-time of the testator, the intended bequest to her male issue failed : *Tagore case, Ganendra Mohan Tagore* v. *Jatindra Mohan Tagore*[1]. A question having arisen as to whether the condition of the daughter having a son (at the death of the testator) not being fulfilled, there was a case of intestacy,

Held that there was no intestacy. The intention of the testator was to give the whole of his property to his grandson (daughter's son). That intention having failed, the dominant intention of the testator was, subject to his daughter's life estate, to retain the estate in his own family, that is to say, in the hands of his cousins.

* Second Appeal No. 527 of 1913.

[1] (1872) 9 Ben. L. R. 377.

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NARANDAS VRIJBHU-KHANDAS v. BAI SARASWATI-BAI.

SECOND appeal against the decision of B. C. Kennedy, District Judge of Ahmedabad, confirming the decree of H. K. Mehta, Additional Joint Subordinate Judge of Ahmedabad.

One Mahasukhram Chhaganlal died in March 1898 leaving a widow Parvati, who died on the 13th April 1907, and a daughter Saraswati, plaintiff 1. In 1907 Saraswati gave birth to a son Natwarlal Keshavlal, minor plaintiff 2. Mahasukhlal had executed a will, dated the 20th February 1898. Under the will the testator gave a life estate to his widow and made certain other provisions as to bequests and the management of his estate. The material portion of the will was as follows :—

Thus the management should be continued till my wife lives and after her death my daughter Saraswati's sons, if any, shall be the heirs, *i. e.*, owners of the whole of my property. But till they attain majority and reach the age of 18 and if they are of good characters my brothers, *i. e.*, cousins who might be surviving at that time shall manage my property as follows. If my daughter Saraswati comes to live in my house in which I lived she should be given Rs. 150 every year for her maintenance from the amount deposited by me as said above. She shall also take the rent of the house No. II. If the said Saraswati may have had a son, my brothers should hand over all my property whatever may be to the said son of Saraswati no sooner he attains the age of 18, and bears good character. And when the said son may make use of it just as he pleased. In case my daughter may not have sons but may have daughters then each daughter should be given ornaments worth Rs. 500. And they may do with them as they like. And my said cousins, if any, surviving, *i. e.*, my brothers shall be the owners, *i. e.*, heirs of the property that may have been left ultimately after the death of my daughter Saraswati. If none of them survives any living male member in their lines shall be the owners and take possession of my whole property with full authority and shall do with it as they please. None of my relatives nor anybody else has any claim over it and if any one holds out his claim it is null and void by this writing.

In the year 1909 the plaintiffs brought the present suit for the proper construction of the said will, for administration of the testator's estate under the directions of the Court and for an account of the management

by the defendant-executors. The plaintiffs further averred that when Mahasukhram died plaintiff 1 had no son, therefore, the disposition in the will in favour of daughter's son became inoperative and void and owing to the failure of the said bequest, the other disposition in favour of the brothers (cousins) of the testator also failed, and plaintiff 1, the daughter of the testator, became the absolute owner.

The defendants, the executors under the will and their legal representatives, answered *inter alia* that plaintiff 1, Saraswatibai, was not entitled to bring the suit for the construction of the will and the administration of the estate, that the construction sought to be put upon the will by the plaintiffs was not correct, that the disposition in the will in favour of the testator's brothers (cousins) should they be alive and in their absence in favour of their descendents was valid in law and that on a proper construction of the will, plaintiff 1 could not in any way become the full owner of the testator's estate.

The Subordinate Judge found that the provisions of the will so far as they related to the appointment of plaintiff 1's son was invalid because no son of plaintiff 1 was in existence on the date of the testator's death, that the bequest in favour of the testator's cousins failed as the contingency on which that bequest depended did not happen and had become impossible of fulfilment and that the balance in the hands of the defendants could be determined after a preliminary decree had been passed and accounts taken from them.

On the 30th September 1911 the Subordinate Judge adjourned the case to the 18th December next for making a final decree.

On appeal by defendants 1, 2 and 3 the District Judge confirmed the decree.

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NARANDAS VRIJBHU-KHANDAS v. BAI ARASWATI-BAI.

Defendants 1, 2 and 3 preferred a second appeal.

G. N. Thakore for the appellants (defendants 1, and 3).

M. K. Mehta for respondents 1 and 2 (plaintiffs 1 and 2).

BEAMAN, J. :—In this suit the plaintiff Bai Saraswati, daughter of the testator Mahasukhram, sued on behalf of herself and her minor son for the construction of a will. It has been contended on behalf of the appellants, the cousins of the deceased testator, that the minor has not been properly represented in this litigation since his interests are manifestly in conflict with those of his natural mother Saraswati. In the view we take, however, we think that it is impossible that the minor could be prejudiced. It has not been contended here, and we think that it could not be contended, that upon any construction of the will the minor would obtain any portion of the estate, nor is he under the Hindu Law an heir to the deceased in the event of there being an intestacy. The minor, therefore, has clearly no real interest in this suit. The contest lies between Saraswati, who in the event of an intestacy would take the whole estate, and the cousins of the deceased Mahasukhram, who are the appellants here.

Both the lower Courts have found that upon a proper construction of the will there is an intestacy, and that the daughter Saraswati is, therefore, entitled to the whole estate. We think the learned Judges below were in error. The will is the work of an inexpert layman, and it would be unreasonable to look for too great technical accuracy in its composition. But reading it as a whole we can feel no doubt as to the general scheme of the will and what the real desire and intention of the testator were. Briefly the will provides first a life estate for his widow Parvati. She has since died. Next the will provides that on the death of

Parvati, his daughter Saraswati should have a life estate of Rs. 150 and the rent of a house. In the event of his daughter Saraswati having male children or a male child, that male child (or possibly male children, if there should be more than one) is or are to take the whole estate of the testator on attaining the age of 18, and then bearing a good character. Presumably, if Saraswati should then have been surviving, the testator's intention was that her sons should provide for her as no provision appears in the will for the continuance of her maintenance after her male issue should have attained the age of eighteen years and at that time borne a good character. The appellants' cousins or, as they are called in this will sometimes, brothers of the deceased testator, are the general executors of the will and trustees of the life estates provided in the will, and also trustees for the minor male son or sons of Saraswati until they should attain the age of 18. Then follows a clause which has given rise to the main contest in this suit, and that is, that should Saraswati have no male issue then on her death, that is to say, on the termination of her life estate, the whole of the testator's estate is to go to the appellants, his cousins, absolutely.

Now Saraswati bore no male child during the life-time of the testator. The intended bequest, therefore, to her male issue, should she have any, fails under the rule in the *Tagore case* (*Ganendra Mohan Tagore* v. *Jatindra Mohan Tagore*[1]). After the death of the testator she has had male issue, and her son, the minor in this suit, still lives. It has, therefore, been contended, and that contention has prevailed in both the Courts below, that by reason of the apparent condition, namely, should Saraswati have no sons (that condition not having been fulfilled) the appellants cannot take after the death of Saraswati, and since the intended

(1) (1872) 9 Ben. L. R. 377.

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bequest to the son actually in existence cannot take effect either, there is an intestacy. We are entirely unable to accede to this contention. What we are to look at, and if we are able to ascertain it to give effect to, is the intention of the testator. In doing so, we must be governed by general principles such as are to be found stated in cases like that of *Jones* v. *Westcomb*[1] and many others in the English Law Reports. Now here it is perfectly clear that the dominant intention of the testator, after providing a suitable life estate for his widow, was to give the whole of his property to his grandson. That intention has unhappily been defeated as no grandson was alive at the date of his death. Failing this it is equally clear that his dominant intention was to retain his estate in his own family, that is to say, in the hands of the appellants, his cousins. To the best of his ability he appears to us to have carefully guarded against the effect of there being an intestacy, namely, his estate passing absolutely into the hands of his daughter Saraswati.

Nor do we think that so literal and strict a construction ought to be put on the condition annexed to the appellants' taking the estate after the death of Saraswati. That this could not have been the testator's intention is perfectly clear from other clauses in the will. Thus he expressly annexed a condition in the event of his grandson taking the estate that the boy shall attain the age of 18 and shall be of good character. Clearly then if the will is to have any meaning he must have contemplated the possibility of his grandson, should any such have been in existence at his death, not attaining the age of 18 or not being of good character at that time, and in either event, although this is not actually expressed, it would be equally clear

[1] (1711) 1 Eq. Cas., Abr. 245.

that he meant the appellants to take the estate after the death of Saraswati precisely as though no son had been born to her. In our opinion, therefore, it would clearly defeat the intention of the testator were we to adopt the view that in the events which have happened there has been an intestacy and so give the whole estate to Saraswati. As between her and appellants it is clear beyond all possibility of argument that the testator preferred the appellants, and desired that they should take the whole estate after having provided a suitable maintenance for Saraswati during her life-time, nor can we find anything upon a reasonable construction of the will as it stands, in the events which have happened, to preclude us from giving effect to that intention. In our opinion, therefore, the decree of the lower appellate Court must be reversed, and it must now be declared that Saraswati is entitled to the life estate reserved to her upon the condition stated in the will, and that thereafter the appellants are entitled to take the whole estate. All costs to come out of the estate.

Decree reversed.

G. B. R.

APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Hayward.

SAYAD MIR GAZI VALAD SAYAD KUTBUDIN (ORIGINAL PLAINTIFF), APPELLANT, *v.* MIYA ALI VALAD MAULVI ABDUL KADIR (ORIGINAL DEFENDANT), RESPONDENT.*

1914.

June 30.

Registration Act (III of 1877), section 17, clauses (a), (b) and (h)—Registration Act (XVI of 1908), section 17, exception (v)*—Registered conveyance—Simultaneous unregistered document to re-convey—An ordinary agreement to sell—Exemption from registration.*

The plaintiff and the defendant agreed that plaintiff should nominally sell the property in suit out and out to the defendant and thereafter to attorn to

* Second Appeal No. 548 of 1912.