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MOOSA HAJEE HASSAM v. SECRETARY OF STATE FOR INDIA.

Their Lordships will humbly advise His Majesty to dismiss the appeals, but there will be no costs to either party before this Board.

Solicitors for the appellant in Appeal 139 : Messrs. *T. L. Wilson & Co.*

Solicitors for the appellants in Appeal 140 : Messrs. *Latteys and Hart.*

Solicitor for respondent in both appeals : *Solicitor, India Office.*

Appeals dismissed.

J. V. W.

PRIVY COUNCIL.*

P. C.*

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October 29.

November 2, 26.

JEHANGIR DADABHOY (DEFENDANTS 1 AND 2) *v.* KAIKHUSRU KAVASHA (PLAINTIFF) AND OTHERS (DEFENDANTS 3 AND 4).

[On appeal from the High Court of Judicature at Bombay.]

Will—Construction of will of Parsi—Devise to two sons in equal shares—Gift over to son of elder son, if he should have one—Failure of male issue to elder son—Provision for adopted son on failure of natural son—Adoption after testator's death and according to Parsi custom three days after death of father—Gift over to grandson on attaining majority—Elder son surviving testator—Succession Act (X of 1865), section 111.

A Parsi having two sons P. and J. made a will in 1866 in the following terms :—Clause 2 stated " The said two sons are proprietors half and half alike and in equal (shares) of my whole estate, outstandings, debts, title and interest, and both the heirs living together are duly to enjoy the balance which may remain after the Sarkar's assessment. In this my testamentary writing I the testator have appointed my two sons as (my) heirs." Clause 5 said that " P. the elder son being in a confused state of mind," the management of the estate was entrusted to the younger son J. " by his true and pure integrity, and both the heirs are to equally enjoy half and half alike the whole estate with equanimity with my elder son P. in such a way as not to injure his (P.'s) rights. At present my elder son P. has no male issue of his body. (He) has only a

* *Present :*—Lord Dunedin, Lord Shaw, Sir John Edge and Mr. Ameer Ali.

daughter. Therefore if my elder son P. gets a male issue half of the estate is to be made over to him on his attaining his full age." Clause 11, after prohibiting any alienation of the property, continued, "If my son P. does not get a son, J. is to give away his son as P.'s *palak* (or adopted son). All the clauses of this will are applicable to the said adopted son. If a son be born of the body of P. he (shall) on attaining (his) full age be the owner of a half share of the whole of the immoveable and moveable estate belonging to me . . . . all the clauses written in this will are applicable to the said son of (his body)."

The testator died on 21st August 1866 leaving his two sons, and J. entered upon the management of the estate having obtained probate of the will in 1867. P. was twice married but had no son. He died in 1897 leaving a widow and other representatives his heirs according to the Parsi Intestate Succession Act (XXI of 1865) who brought a suit to ascertain the rights and interests of the parties in the estate and for partition, basing their claim on P.'s right as the owner of one-half of the estate from the date of the testator's death. The defendants were J. and his son B. who was five years old at the death of the testator, and who it was alleged had been, though not in the testator's life-time, adopted as the *palak* son of P., and, as the defendants contended, succeeded under the will to the half share of the estate which P. had enjoyed though on the terms of the will it had never vested in P.

Held, (affirming the decisions of the Courts below) that the proper interpretation of the will in the events that had happened was that the date of distribution was the death of the testator, at which date one-half of the estate vested in P. The destination over to a son who should take upon attaining majority would be using language appropriate to the events of the death of P. during the life-time of the testator, and of his having left a son—the situation also being provided for of that son not having at that time attained majority. But when P. himself survived the testator there were no words in the will sufficient to cut down the right of P. to one-half the estate, to a tenancy for life, or a less period therein according to the appellant's contention. On the contrary the words employed appeared suitable to the case of the entire estate being, on the testator's death, divided into two portions, and of each portion then becoming the absolute property of one of the two sons of the testator.

The same result was arrived at by the application of section 111 of the Indian Succession Act which their Lordships agreed with the Courts below was applicable.

APPEAL 78 of 1913 from a judgment and decree (9th December 1910) which affirmed a judgment and decree (2nd April 1910) of the Court of the Subordinate Judge of Thana.

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JEHANGIR DADABHOY v. KAIKHUSRU KAVASHA.

The principal questions for determination on this appeal related to the construction and effect of a will dated 8th August 1866 by one Dadabhoy Byramji.

The facts and the material clauses of the will are sufficiently stated in the judgment of the High Court (Batchelor and Rao, JJ.) now on appeal, which was as follows :—

"One Dadabhoy Byramji, a Parsi inhabitant of Tarapur, died on 21st August 1866 after having made a will in the Gujarathi language on 8th August 1866. He left two sons Pallonji and Jehangirji (defendant No. 1). Pallonji, the elder son, was a person of weak intellect and unable to look after his affairs. Jehangirji entered upon the management of the whole estate immediately after his father's death. He obtained probate of his will in 1867. His son Byramji (defendant 2) was about 5 years old at the time of the testator's death.

"Pallonji died in 1897 leaving a widow Cooverbai (defendant 3), his son-in-law Kavasha husband of a predeceased daughter (defendant 4), and his daughter's son Kaikhusru (plaintiff). Pallonji was twice married but had no son born to him. Pallonji was living with his brother Jehangirji up to his death.

"On 7th March 1906 the plaintiff as the constituted attorney of Cooverbai applied for letters of administration to Pallonji's estate : On 22nd December 1909 letters of administration were granted to the plaintiff.

"On 6th April 1909 the plaintiff filed the present suit, praying (*interalia*) for the following reliefs (*a*) that defendant 1 be ordered to account for his management of the estates of Dadabhoy and Pallonji ; (*b*) that the rights and interests of plaintiff and defendants 3 and 4 in the estates aforesaid be ascertained, declared and awarded to them ; and (*c*) that partition be made of the properties of Pallonji, and defendant 1 amongst the parties entitled thereto in accordance with their respective interests.

"Defendants 1 and 2 contended (*inter alia*) (*a*) that under the will of Dadabhoy the moiety of the property bequeathed to Pallonji passed on his death to defendant 2 as the *palak putra* of Pallonji ; (*b*) that defendant 1 did not manage the property as a trustee for Pallonji and (*c*) that the suit was barred by limitation.

"The Subordinate Judge held that upon the true construction of Dadabhoy's will, his sons Pallonji and Jehangirji took an absolute interest in equal shares in the residuary estate ; that Jehangirji managed Pallonji's half share in the estate as a trustee for Pallonji ; that Byramji (defendant 2) did not take any

interest under Dadabhoy's will ; that the suit was in time ; and that Pallonji's estate passed on his death to his heirs—plaintiff and defendants 3 and 4, their shares being one-ninth, two-thirds, and two-ninths respectively.

"The Subordinate Judge passed a preliminary decree appointing a commissioner to take an account of the property of Dadabhoy, which came into defendant 1's possession since Dadabhoy's death, and report as to what fund, moveable as well as immoveable, was now available for distribution among the heirs of Pallonji. Against this decree defendants 1 and 2 appeal to this Court.

"It is contended on behalf of those defendants that under Dadabhoy's will, Pallonji did not take an absolute interest in the moiety of the estate given to him ; that he had only a right to enjoy the income of the moiety till his natural born son attained the age of majority ; and that on the happening of that event, the son would be entitled to take possession of the moiety. It was further contended that as no son was born to Pallonji, Byramji (defendant 2) was given as a *palak* son to Pallonji, and as such was entitled to the whole of Pallonji's half share in the same way, and on the same conditions as his natural born son, if he had any. Lastly, it was contended that defendant 1 had not been in management of Pallonji's share as an express trustee, and that the suit was therefore governed by Article 120 and not by section 10 of the Limitation Act XV of 1877. At an early stage of the argument we expressed our opinion that the suit was not barred by limitation, as Jehangirji was not only an executor but also a trustee in whom a moiety of the estate was vested in express trust for the benefit of Pallonji, and that the case fell within the purview of section 10 of the Limitation Act.

"The case entirely turns on the construction of Dadabhoy's will. The material portions of the will bearing on the questions at issue are clauses 2, 3, 5, 8 and 11.

"The first question to be determined is, what interest does Pallonji take in the property bequeathed to him ?

"Clause 2 provides—'the name of the elder son is Pallonji, the name of the younger son is Jehangirji. The said two sons are proprietors half and half alike and in equal shares of my whole estate, outstandings, debts, title and interest.' Under this clause it is perfectly clear that Pallonji took an absolute estate in one moiety of the testator's property. Section 82 of the Indian Succession Act provides—'Where property is bequeathed to any person, he is entitled to the whole interest of the testator therein, unless it appears from the will that only a restricted interest was intended for him.' This is also the rule laid down in the case of *Ganendra Mohan Tagore* v. *Jatindra Mohan Tagore*[1] where their Lordships of the Privy Council observe that

[1] (1872) L. R. I. A. Sup. Vol. 47 at p. 65 : 9 Ben. L. R. 377 at p. 395 ; 18 W. R. 359 at p. 365.

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'If an estate were given to a man simply without express words of inheritance, it would, in the absence of a conflicting context, carry by Hindu Law (as under the present state of law it does by will in England) an estate of inheritance.' Applying this principle to the present case there is no doubt whatever that Pallonji took an absolute interest in the property given to him by clause 2 of the will. Is there anything in the rest of the will to control or restrict this absolute interest? Clause 3 provides—'none of my heirs have power in any way to mortgage or sell or give in gift or in charity, etc., or to dispose of in any other way whatsoever the immoveable and moveable estate belonging to me, the testator, which there is or may be according to (my) books and according to the partition, etc., the half share of the Inam Khoti Watan village of Velgam appertaining to my share. Both the heirs are to take care of the said estate and look after it and both the heirs living together are duly to enjoy the balance which may remain after payment of the Government assessment.' Clause 8 further provides :—'If any of my heirs after my death carry on any trade or business of any nature whatsoever, and if a loss or deficiency occur therein, the risk on account thereof (shall) be on the heir (so) trading. The claims or demands of the creditors in regard to the same shall not avail at all against my estate. The whole of my estate is given by me for the maintenance of my heirs and their descendants.'

"These clauses undoubtedly place restrictions on the powers of enjoyment, alienation, and disposal of the property given to both Pallonji and Jehangirji. But such restrictions being repugnant to the absolute gift already made under clause 2 of the will are invalid and inoperative and opposed to law. In *Ashutosh Dutt* v. *Doorga Churn Chatterjee*[1], the testatrix by her will provided *inter alia* as follows : 'This property of mine will not be liable for the debts of any person. None will be able to transfer it. None will have the rights of gift and sale.' The Privy Council held that these restrictions on alienation 'being inconsistent with the interest given were wholly, beyond her power, and must be rejected as having no operation.' Mr. Shah contends that reading clause 5 with clauses 3 and 8 it was the intention of the testator not to confer an absolute estate on Pallonji, but to give him only a right to enjoy the income of one half of the estate subject to the control and management of his younger brother Jehangirji. It is urged that he must live with his brother and enjoy the income but has no right to separate possession, enjoyment, and partition of his share. In support of this contention, Mr. Shah relies on the words in clause 3—'Both the heirs are to take care of the said estate and look after it and both the heirs living together are duly to enjoy the balance which may remain after payment of the Sarkar's assessment' and in clause 8—'The whole of my estate is given by me, the testator, for the maintenance of my heirs and

[1] (1879) 5 Cal. 438 at p. 442 : L. R. 6 I. A. 182 at p. 186.

their descendants'; in clauses 5 'Therefore he (Jehangirji) is to carry on according to my testamentary (writing) the whole management by his true and pure integrity, and both the heirs are equally to enjoy half and half alike the whole estate with unanimity with my elder son Pallonji in such a way as not to injure his (Pallonji's) rights'. It appears to me that these directions about the mode of enjoyment of the property given to Pallonji and Jehangirji are inconsistent with the absolute gift to both, and therefore void under section 125 of the Indian Succession Act: see also *Haliburton* v. *The Administrator-General of Bengal*(1): *Lala Ramjewan Lal* v. *Dal Koer*(2): and *Raikishori Dasi* v. *Debendranath Sircar*(3).

"It was next argued for the defendants 1 and 2 that whatever interest Pallonji took under the will, it was liable to be defeated when a son was born to him and attained the age of majority, or failing the natural born son when a *palak* son was given to him. In either of these contingencies, it was urged, a moiety of the estate would pass either to the natural born son, or to the *palak* son. Reliance was placed on the following passages in the will:—'Therefore if my elder son gets male issue, half of the estate is to be made over to him on his attaining full age', (clause 5). 'If a son be born of the body of Pallonji, he (shall) on his attaining his full age be the owner of a half share in the whole of the immoveable and moveable estate belonging to me. My heir (and) vakil (or executor) Jehangirji or his heirs shall raise no objection to give him the share. If they raise any objection, the responsibility arising therefrom is on their heads. All the clauses written in this will are applicable to the said son of (his) body', (clause 11). There can be no doubt that the effect of these passages is to make the absolute gift to Pallonji defeasible in the event of his having a son, and that son attaining majority. But as that event did not occur, the absolute gift became indefeasible. That being the case, Pallonji's half share of the estate would pass on his death to his heirs and next-of-kin.

"But it is urged that Byramji was given as a *palak* son to Pallonji on the third day after his death and that as such he is entitled under clause 11 of the will to the same rights as the natural born son. It is contended that the *palak* stands on the same footing as the natural born son, and that the executory devise in favour of Byramji took effect on Pallonji's death. In support of his contention Mr. Shah relies on the following passage—'If my son Pallonji does not get a son, my son Jehangirji is to give his son as Pallonji's *palak*. All the clauses of the will are applicable to the said *palak* son.' In this passage there is no doubt a direction to Jehangirji to make his son a *palak* son to Pallonji. But there is no express gift either to Byramji or to the *palak* son in this

(1) (1894) 21 Cal. 488. (2) (1897) 24 Cal. 406.
(3) (1887) 15 Cal. 409: L. R. 15 I. A. 37.

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passage or in any other part of the will. A gift is sought to be spelt out of the words, 'All the clauses of the will are applicable to the said *palak* son.' These words are in the first place too vague to be susceptible of the interpretation put upon them. The same words are used in respect of the natural born son. It is difficult to say with precision what the testator really meant by these words. But an explanation is offered by Mr. Taraporewala for the respondents, who has argued the case with great care and ability, that these words refer to the restrictive clauses 3 and 8. It appears from the will read as a whole that the dominant idea in the testator's mind was that his estate should go down to his descendants unimpaired and undiminished and free from all claims on the part of his relatives or strangers to the family. For this purpose he places every possible restriction on the power of alienation, and enjoyment of the property, and these restrictions apply not only to his sons and heirs but also to Pallonji's wife, daughter, or any other person claiming through Pallonji. It is therefore reasonable to suppose that he intended that Pallonji's son, whether natural born or *palak* should be placed under the same restrictions. But whatever be the precise meaning of these words, it is difficult to infer from them that any gift was made to the *palak* son. It may be that the testator intended to make a gift to the *palak* son, but he has not said so. 'The question is,' as Lord Wensleydale observes in *Bullock* v. *Downes*[1] 'not what the testator meant, but what is the meaning of the words used.' This is the established rule of construction. There are no words to be found in the will to indicate a gift to the *palak* son. Byramji's name is not even mentioned. I am therefore of opinion that there is no legacy given to Byramji either as a *persona designata* or as a *palak* son.

"Even assuming that there was an executory bequest to Byramji as a *palak* son, the bequest would be void under section 111 of the Indian Succession Act. The bequest to the *palak* son is to take effect on the happening of an uncertain event, namely, if no son was born to Pallonji. No time is mentioned in the will for the occurrence of this event. The bequest would therefore be void unless such event happened before the period of the payment or distribution of the fund bequeathed. So long as Pallonji was alive there was a possibility of his having male issue, and until his death without male issue there was no chance of Byramji becoming a *palak* son. It follows therefore that the event on the happening of which the legacy to Byramji was to take effect did not occur before the testator's death which would ordinarily be the period of payment or distribution of the fund bequeathed. But Mr. Shah relies on *Edwards* v. *Edwards*[2] and *O' Mahoney* v. *Burdett*[3] and contends that the period of distribution in the present case would be either the time when the natural born

(1) (1860) 9 H. L. C. 1 at p. 24. (2) (1852) 15 Beav. 357.
(3) (1874) L. R. 7 H. L. 388.

son of Pallonji came of age, or the death of Pallonji when Byramji was made his *palak* son. But it is to be observed that according to the second rule laid down in *Edwards* v. *Edwards*[1] relating to executory bequests such as we are considering in the present case, and afterwards affirmed by the House of Lords in *O' Mahoney* v. *Burdett*[2], the event on which the gift over is to take effect may happen at any time either before or after the testator's death. This rule is not adopted by the Indian Legislature in section 111 of the Succession Act according to which the contingency must occur before the period of distribution. Mr. Shah contends that in the present case the period of distribution should be taken to be the time of Pallonji's death; he says that though Byramji was in fact given as *palak* on the 3rd day after Pallonji's death, his rights relate back to the date of Pallonji's death. No authority is cited in support of this proposition and none can be found. I am of opinion that in this case the period of distribution should be taken to be the death of the testator. See *Norendra Nath Sircar* v. *Kamalbasini Dasi*[3], where their Lordships of the Privy Council observe—'To search and sift the heaps of cases on wills which cumber our English Law Reports in order to understand and interpret wills of people speaking a different tongue, trained in different habits of thought and brought up under different conditions of life seems almost absurd. In the Subordinate Courts of India such a practice, if permitted, would encourage litigation and lead to idle and endless arguments. The Indian Legislature may well have thought it better in certain cases to exclude all controversy by positive enactment. At any rate in regard to contingent or executory bequests the Succession Act, 1865, has laid down a hard and fast rule, which must be applied, wherever it is applicable, without speculating on the intention of the testator.'

"I therefore hold that even assuming that there was a gift to Byramji as a *palak* son, it would be void under section 111 of the Indian Succession Act.

"This being the case, I am of opinion that on the proper construction of the will of Dadabhoy Byramji, his son Pallonji took an absolute interest in the moiety of the residuary estate and that on his death it passed to his legal heirs under the Parsi Succession Act.

"I would therefore confirm the decree of the Subordinate Judge and dismiss the appeal with costs."

On this appeal,

De Gruyther K. C. and *Horace Miller*, for the appellants contended that according to the true interpretation of

(1) (1852) 15 Beav. 357. (2) (1874) L. R. 7 H. L. 388.
(3) (1896) 23 Cal. 563 at p. 572 : L. R. 23 I. A. 18 at p. 26.

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the will Pallonji did not take an absolute interest under its provisions, but only an interest that was defeasible; and that in the events which had happened the interest taken by him passed on his death to the second appellant Byramji, who had been adopted as Pallonji's *palak*. The Courts in India were wrong in holding that Byramji did not acquire any interest under the will. The intention of the testator was the very usual and natural one that the property should be kept in his family; and that object he endeavoured to secure by leaving it to a natural son of Pallonji's if there should be one, and if there was not one by making a gift to a son to be adopted to Pallonji who would take the place of a natural son. If the property went to the respondents that would be, it was submitted, contrary to the intention of the testator, and not in fact under the will but according to the Parsi Succession Act (XXI of 1865) applicable to intestate estates. As to the construction of wills of Indians, reference was made to *Hunoomanpersaud Panday* v. *Mussumat Babooee Munraj Koonweree*[1]; *Chunilal Parvatishankar* v. *Bai Samrath*[2]; and *Narasimha* v. *Parthasarathy*[3]. [LORD DUNEDIN:—Your difficulty is that there is no clear gift in the will to the *palak* son.] By clause 11 "if Pallonji does not get a son, his brother Jehangirji is to give his son as a *palak* (adopted son)." As Pallonji left no natural son, Byramji was given as a *palak* son, and he took, it was submitted, just as the natural son would have taken. The Courts in India relied upon section 111 of the Succession Act (X of 1865). That section was taken from one of the rules laid down in *Edwards* v. *Edwards*[4], a rule which was not approved of in *O'Mah-*

(1) (1856) 6 Moo. I. A. 393 at p. 411.
(2) (1914) 38 Bom. 399.
(3) (1913) 37 Mad. 199 at p. 221; L. R. 41 I. A. 51 at pp. 70, 71.
(4) (1852) 15 Beav. 357 at p. 361.

oney v. *Burdett*[1], and on the authority of the last-named case it was contended that the gift over was to take place on the death of Pallonji "at any time," whether before or after the death of the testator; and the recent case of *Chunilal Parvatishankar* v. *Bai Samrath*[2] was referred to, as adopting that construction. [LORD DUNEDIN.—How do you get rid of *Norendra Nath Sircar* v. *Kamalbasini Dasi*[3], which is against you?] In the present case to decide in accordance with that decision would be contrary to the testator's intention which must be considered; and see Jarman on Wills, 6th Ed. 452, and 2209, paragraph 7. It was also contended that the suit so far as the moveable property was concerned was barred by Article 120 of Schedule II of the Limitation Act (XV of 1877); and *Mahomed Riasat Ali* v. *Hasin Bani*[4] was referred to.

Sir R. Finlay K. C. and *G. R. Lowndes*, for the respondents called on as to whether under the will there was a gift over to the second appellant, the *palak* son of Pallonji, contended that there was not, and even if there were, such a gift over would be void under section 111 of the Succession Act. That section applied to all property whether immoveable or moveable, and to all contingent bequests whether substituted or not; see *Norendra Nath Sircar* v. *Kamalbasini Dasi*[5] per Lord Macnaghten. Reference was made to *Sreemutty Soorjeemonee Dossee* v. *Denobundoo Mullick*[6]; and Mayne's Hindu Law, 7th Ed., 557, paragraph 420. What was in the mind of the testator, as to an adopted son, was an adoption in the life time of Pallonji if he had

(1) (1874) L. R. 7 H. L. 388.
(2) (1914) 38 Bom. 399.
(3) (1896) 23 Cal. 563: L. R. 23 I. A. 18.
(4) (1893) 21 Cal. 157: L. R. 20 I. A. 155.
(5) (1896) 23 Cal. 563 at p. 572: L. R. 23 I. A. 18 at p. 27.
(6) (1862) 9 Moo. I. A. 123 at p. 135.

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no son; such an adoption was alleged but not proved: that was the whole of the appellants' case as to adoption in their written statement. In the events that had happened Pallonji's share in the estate of the testator passed on Pallonji's death to the respondents as his heirs.

De Gruyther K. C. replied.

1914 November 26th:—The judgment of their Lordships was delivered by

LORD SHAW:—This is an appeal from a decree of the High Court of Judicature at Bombay, dated the 9th December 1910. The High Court affirmed a decree of the Subordinate Judge of Thana, dated the 2nd April 1910.

The case has reference to the construction of a will executed by one Dadabhoy Byramji on 8th August 1866. By this will the testator narrated that of his three sons then living he has given one in adoption to a paternal uncle. His other two sons were named Pallonji and Jehangirji. The material portions of the will disposing of the "estate" are these:—

"The said two sons are proprietors, half and half alike, and in equal (shares), of my whole 'estate,' outstandings, debts, title, and interest. . . . Both the heirs are to take care of the said 'estate' and look after it, and both the heirs living together, are duly to enjoy the balance which may remain after payment of the Sarkar's assessment. . . . In this my testamentary writing, I, the testator, have appointed my two sons as (my) heirs."

The will then states that Pallonji, the elder, a man then of about thirty-nine years of age, was in a confused state of mind, and that the other son Jehangirji was accordingly entrusted with the management of the "estate"

"by his true and pure integrity, and both the heirs are to equally enjoy half and half alike the whole 'estate' with unanimity with my elder son Pallonji in such a way as not to injure his (Pallonji's) rights."

Upto this point in the will there can be no doubt whatsoever that the property of the estate was effectually and equally divided between these two sons. There then follow, however, the clauses which are said to create difficulty. They are these :—

"At present my elder son Pallonji has no male issue of his body. (He) has only a daughter. Therefore, if my elder son Pallonji gets a male issue, half of the 'estate' is to be made over to him, on his attaining (his) full age."

And it may be proper that the 11th clause of the will should be quoted in full. It reads thus :—

"I, the testator, have in the second clause of this will appointed my two sons Pallonji and Jehangirji as my heirs. The wife of Pallonji, the elder of them, has now gone to her father's house. On her return, if she, by instigating her husband, or by any (other way) cause to be mortgaged, sold, given in gift, charity, etc., or disposed of, whatsoever in any way to any one, any immoveable and moveable 'estate' etc. appertaining to the half share during the lifetime of my son Pallonji or, after his death, which God forbid, my son Pallonji or his wife, or daughter, or any (other) person (shall) as stated in the third clause of this will have no authority, power and right so to do. If my son Pallonji does not get a son, my son Jehangirji is to give away his son as Pallonji's *palak* (or his adopted son). All the clauses of this will are applicable to the said adopted (son). If a son be born of the body of Pallonji he (shall) on his attaining (his) full age be the owner of half share in the whole of the immoveable and moveable 'estate' belonging to me. My heir (and) vakil (or executor) Jehangirji, or his heirs shall raise no objection to give him the share. If they raise any objection, the responsibility arising therefrom is on their heads. All the clauses written in this will are applicable to the said son of (his body)."

The material facts of the case are that the testator having executed this will on 8th August 1866 died within a fortnight thereafter, *viz.*, on 21st August 1866. He was survived by his two sons. Pallonji, the elder, was of weak intellect as the will indicates. Jehangirji entered upon the management of the whole estate, having obtained probate of the will in 1867. This state of matters lasted for thirty years, *viz.*, till 1897, when Pallonji died. Pallonji was twice married but had no son. He left a widow and other representatives who

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are respondents in this appeal and are his heirs according to the Parsi Intestate Succession Act. The nature of the suit by these heirs is for an account, for an ascertainment of the rights and interests of the parties in the estate and for partition, and the claim is grounded on the right of Pallonji as, it is contended, the owner of one-half of the estate from the date of the testator Dadabhoy's death.

One other fact may now be mentioned, *viz.*, that it is alleged, that on 3rd December 1886 Pallonji adopted, as his *palak*, Byramji his nephew, and son of Jehangirji. Jehangirji and his son Byramji resist the suit, maintaining that Byramji as *palak*, or adopted son of Pallonji, succeeds in terms of the settlement to the half of the estate which Pallonji so long enjoyed. It is, of course, also maintained that under the terms of the settlement Pallonji never was owner of the one-half of the estate, or, as it would be expressed in English phraseology, the terms of the will were such as to prevent vesting in Pallonji.

The learned Judges of the Court below have not only dealt with this question but with certain others, including the special situation of Byramji as *palak* of his uncle. The points among others discussed were (1) whether such a *palak* could ever take under the will, looking to the fact that it remained uncertain until Pallonji's death that the condition of a *palak* taking could ever be purified, *viz.*, that Pallonji should die without a son, and (2) the peculiar point as to the office of a *palak* to a Parsi becoming effectual only three days after the adoptive father's death. (3) A further question was keenly argued, *viz.*, whether the will contained in itself sufficient words of grant or gift to the *palak*.

In the view taken of this case by their Lordships these questions, however interesting, are not necessary

for the decision about to be pronounced. For their Lordships are clearly of opinion that under the terms of Dadabhoy Byramji's will one-half of the estate conveyed vested in Pallonji *a morte testatoris*. The result of the argument presented would be that if Pallonji had had a son who reached twenty-one during his father Pallonji's life, then in that event that son would have taken so as to cut out Pallonji from all rights under this will. The right of Pallonji would accordingly be restricted to that of enjoyment, not even for life, but until the majority of his own son. Their Lordships cannot agree with such a construction.

The destination over to a son, who should take upon attaining twenty-one years of age, would appear to their Lordships to be language appropriate to the events of the death of Pallonji during the lifetime of the testator and of his having left a son—the situation also being provided for of that son being at that period of time under twenty-one.

But when the father Pallonji himself survived the testator, it does not appear to their Lordships that there are any words in the will sufficient to cut down the right of Pallonji to one-half of the estate to a tenancy for life therein, or for a less period, according to the argument. On the contrary, the words employed seem to fit the case of the entire estate being on the testator's death divided into two portions, and of each portion becoming then the absolute property of one of the two sons.

While these are the general principles which would be applicable in the construction of such a will, in their Lordships' opinion the same result is precisely reached by the application of section 111 of the Indian Succession Act. Their Lordships agree with the view that has been taken as to the applicability of that section in

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the Courts below. No further question, this being so, need be dealt with.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed, and that the appellants will pay the costs.

Solicitors for the appellants: Messrs. *T. L. Wilson & Co.*

Solicitors for the first and second respondents: Messrs. *Ranken Ford, Ford & Chester.*

Appeal dismissed.

J. V. W.

CRIMINAL REFERENCE.

Before Mr. Justice Heaton and Mr. Justice Shah.

EMPEROR *v.* NARAYAN GANPAYA HAVNIK.*

1914.

August 10.

Criminal Procedure Code (Act V of 1898), section 195 (1) (c)—Sanction to prosecute—Mamlatdar's Court—Enquiry into Record of Rights—Mamlatdar's Court is Revenue Court—Land Revenue Code (Bombay Act V of 1879), Chapter XII.

A Mamlatdar holding an enquiry relating to Record of Rights, under Chapter XII of the Land Revenue Code (Bombay Act V of 1879), is a Revenue Court within the meaning of section 195 (1) (*c*) of the Criminal Procedure Code (Act V of 1898).

THIS was a reference made by V. M. Ferrers, Sessions Judge of Kanara.

The facts were as follows. The accused claiming under a document purporting to be the will of one Bidre Tamanna, applied to the Mamlatdar praying that

* Criminal Reference No. 47 of 1914.