

PRIVY COUNCIL.*

SHIRINBAI (APPELLANT) v. RATANBAI AND OTHERS (RESPONDENTS)

P. C.

1921.

January 13.

[On appeal from the High Court at Bombay.]

*Will—Construction—Gift to wife for life—Direction to wife to make will—
“As I have directed her orally”—General power of appointment.*

A Parsi by his will, after giving to his wife a life interest in his property, directed as follows: “And in her lifetime, keeping God and Meher Daver (the Dispenser of Justice) before her mind, my wife shall duly, as I have directed her orally, and according to the times, make her will, and all my heirs.....shall duly act agreeably to the same” :—

Held, that the clause did not mean that the testator’s wife should dispose of the estate according to oral directions given by the testator, but according to her own discretion, and accordingly that the wife had a valid general power of appointment.

In re Hetley⁽¹⁾, distinguished.

Judgment of the High Court reversed.

APPEAL from a judgment and decree of the High Court (September 3, 1918) affirming, subject to a modification, a decree of Beaman J. (November 17, 1917).

The suit was instituted in the High Court by the first respondent and related to the will of Bomanji Kaikhushro Modi, a Parsi, to whom the Indian Succession Act (X of 1865) applied.

The material terms of the will and the questions raised by the suit appear from the judgment of their Lordships. The decision of the High Court on appeal, the effect of which is stated shortly in the judgment of their Lordships, is reported at I. L. R. 43 Bom. 845.

1920, December 9. :—*Upjohn K. C.* and *E. B. Raikes* for the appellant. The effect of the will was to give

* *Present* :—Viscount Haldane, Viscount Cave, Lord Sumner, Lord Parmoor and Sir John Edge.

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to the testator's wife a life-interest with a power of disposal *inter vivos*, and a testamentary power of appointment. The power of appointment was either general or confined to the children and grandchildren of the testator ; it is not material which, as the power was exercised in favour of that class. The decision in *In re Hetley*⁽¹⁾ is not applicable to this case. By clause 7, upon its true construction, the testator did not direct his wife to make a will the provisions of which should be in accordance with his instructions. The words "as I have directed her orally" refer merely to a direction to make a will ; her discretion in the exercise of the power was not intended to be fettered by oral instructions. There is nothing in the will indicating a contrary conclusion.

If, however, it was rightly held that the wife's will was ineffectual to dispose of her husband's property, it was also rightly held that clause 8 did not come into operation. Clauses 8 and 10 were conditional upon the power given by clause 7 being effectually exercised. With regard to the power of disposal *inter vivos* the view of the trial Judge was right and that of the appellate Court wrong. [Reference was made to *In re Thomson's Estate*⁽²⁾ and *In re Pounder*⁽³⁾, also as to the word "malik" to *Lalit Mohun Singh Roy v. Chukkeun Lal Roy*⁽⁴⁾].

[Their Lordships directed that the argument with regard to limitation should be postponed.]

Tomlin K. C. and *Rawlence* for the respondents. The testator did not, upon the true construction of his will, give his wife a valid power of appointment by will. There are no words expressly giving a testamentary

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(2) (1880) 14 Ch. D. 263.

(3) (1886) 56 L. J. Ch. 113.

(4) (1897) 24 Cal. 834 at p. 839 ;
L. R. 24 I. A. 76 at p. 88.

power. It cannot be ascertained from clause 7 who are the persons in favour of whom the power can be exercised without inquiring into the oral wishes of the testator. *In re Hetley*⁽¹⁾, therefore, applies. The High Court rightly held that the wife had no power of disposition *inter vivos*. The use of the word "malik" is accounted for by the powers of management given to the wife. Clause 8 did not operate because the wife made a will; it is not material for this purpose whether the will was or was not a valid disposition of the property.

Upjohn K. C. replied.

1921, January 18. :—The judgment of their Lordships was delivered by

VISCOUNT CAVE :—This appeal from the High Court of Judicature at Bombay raises questions as to the construction of the will of one Bomanji Kaikhushro Modi, who died in or about the year 1875. The parties are Parsis to whom the Indian Succession Act No. X of 1865 applies.

*The testator made his will, dated the 9th January 1872. By clause 3, after reciting that he had two sons, named Nusserwanji and Sorabji, and a wife named Kuvarbai, he appointed his wife as his executrix with full powers of management. By clause 4, after referring to his immovable and movable property of all kinds, he proceeded :

"Of all that I duly make my wife, the said Kuvarbai, '*malek mukhtiyar*' (absolute owner) during her life, just as I am the owner, and during her life none of my other heirs, representatives or relatives or kinsmen can question her in regard to any matter whatever."

Clause 7 was as follows :—

"7. Agreeably to what is written above, my wife shall, during her lifetime, duly carry on *vahivat* (*i.e.*, management) in respect of every kind of

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my property and effects and make expenses on auspicious and inauspicious occasions just as I (have been doing). And in her lifetime, keeping God and Meher Daver (the Dispenser of Justice) before her mind, my wife shall duly, as I have directed her orally, and according to the times, make her will, and all my heirs and the heirs of my heirs shall duly act agreeably to the same."

Clause 8 commenced with the following words :—

"Should my wife, that is to say, executrix, die without making her will, that is to say, testamentary writing, as mentioned in paragraph seven above, then both my sons, Nusserwanji and Sorabji, shall duly become *malels* (i.e., owners) in equal shares of all kinds of my property and effects, and both of them shall duly take certificate (that is, obtain probate) from the Court";

and there followed directions to the sons to pay out of the property which they might take certain sums to the testator's daughters and their children. Clause 10 contained certain dispositions which were to take effect if the testator's wife died without making a will and if any of his sons should die before his wife. The will concluded as follows :—

"I have made this will of my free will and pleasure and while in sound mind and consciousness. My wife and children, that is to say, heirs, all shall duly act agreeably to the same."

The testator died, as above stated, in or about the year 1875. The testator's son Nusserwanji died in or about the year 1904.

It appears that the testator's widow, Kuvarbai, during her lifetime made over certain parts of his estate to her surviving son, Sorabji. Kuvarbai made her will, dated the 16th May 1905, and thereby appointed her son Sorabji her executor, and after certain dispositions in favour of her other issue, concluded as follows :—

"With regard to my remaining immovable or movable property and moneys in cash, &c., whatever there may be and wherever the same may be, and whether the same may be mine or whether the same may have been received by me on behalf of (from) my husband, or which I myself may have

been authorised according to my husband's will to give away, I make over the whole thereof (i.e.) everything to my said son Sorabji Bomanji Modi."

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This will evinced a clear intention on the part of the widow to execute the power given to her by her husband's will. Kuvarbai died in 1906 and Sorabji in 1915.

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Shortly after the death of Sorabji this suit was commenced by Ratanbai, daughter and representative of Nusserwanji against Shirinbai, daughter and representative of Sorabji, and other members of the family, alleging that the property made over by Kuvarbai to Sorabji remained part of the testator's estate and that Kuvarbai had no power to make a will dealing with the testator's estate, and that the whole of such estate was divisible on the death of Kuvarbai either under clause 8 and the succeeding clauses of the will or among the testator's heirs as on an intestacy, and claiming administration of the estate on the above footing. The defendant Shirinbai by written statement has denied the plaintiff's claim and alleged that Kuvarbai took an absolute interest under the will or a life interest with power to dispose of the corpus during her lifetime or by will. She also pleaded the Statute of Limitations. The other defendants who appeared supported the plaintiff's claim.

The trial Judge, Mr. Justice Beaman, held on the construction of the will (1) that Kuvarbai took a life estate with an uncontrolled power of disposition by acts *inter vivos*; (2) that the power given to her to dispose of the testator's estate after her death was not a general power but a special power enabling her to dispose of it in accordance with directions which he had given to her orally, that parol evidence was inadmissible to show the nature of the directions so given, and accordingly that the power was void for uncertainty (*In re Hetley*⁽¹⁾); (3) that as Kuvarbai had made a will, although

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such will was ineffectual to dispose of the testator's estate, yet she had not, within the meaning of clause 8, "died without making her will", and accordingly that clause 8 and the subsequent clauses failed to take effect, and the testator's estate became distributable on the death of Kuvarbai as on an intestacy; and (4) that the suit was not statute-barred; and he made a decree for administration on that footing.

On appeal to the High Court, the learned Judges of that Court (Scott C. J. and Macleod J.) held that Kuvarbai took a life-interest without power of disposition by acts *inter vivos*, and varied the decree accordingly; but in other respects they affirmed the judgment of the trial Judge. Thereupon this appeal was brought by the defendant Shirinbai, the plaintiff and the other defendants being made respondents.

Their Lordships think it plain that Kuvarbai took a life-interest only, and not an absolute interest, under the will; and it is convenient, before considering the nature and incidents of such life-interest, to consider the second question dealt with by the trial Judge, namely, the nature of the power of disposition given to Kuvarbai by clause 7 of the will. The relevant words are:—

"And in her lifetime, keeping God and Meher Daver (the Dispenser of Justice) before her mind, my wife shall duly, as I have directed her orally, and according to the times, make her will, and all my heirs and the heirs of my heirs shall duly act agreeably to the same."

It is plain from the direction to the testator's heirs to act agreeably to his wife's will, as well as from the gifts over, that these words were intended to give to the testator's wife some power of testamentary disposition over his estate; and the question is whether he meant to give her a general power of disposition or only a power exercisable in manner specified in his oral directions. In other words, did he mean that she should

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in accordance with his oral directions make her will disposing of the property as she should in her discretion think fit, or did he intend that she should by her will dispose of the property in accordance with his oral directions? In their Lordships' opinion, the former is the true view. The structure of the sentence favours it; for if the testator had intended that his wife's disposition should be in accordance with his oral directions, the words "as I have directed her orally" would properly have followed and not preceded the words "make her will". The direction that the wife's will shall be made "according to the times," or (as Mr. Justice Macleod translates the Gujarati words) "according to the circumstances", and the reference to the "Dispenser of Justice", show that she was to have a discretion; and, although it may be conjectured that the testator had explained to his wife his reasons for giving her a power over his estate and had enjoined her to exercise it if occasion should arise, there is nothing in the will to show that he had attempted by any oral directions to prescribe the manner in which the power should be exercised. Indeed, the later clauses of the will afford a strong indication to the contrary effect; for, if the testator had intended that his will should be declared by his wife, he would hardly have proceeded himself to make a declaration of his wishes. The language of the will in this case is very different from that used in the case of *In re Hetley*^(a), upon which the respondent relied, where the testator, after giving his property to his wife for life, desired and empowered her to dispose of his estate "in accordance with his wishes verbally expressed by him to her" and made no other disposition.

For the above reasons their Lordships are of opinion that upon the true construction of the testator's will

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his widow Kuvarbai took a general testamentary power which was duly exercised by her will. If so, the questions raised at the trial as to the widow's right to dispose of part of the capital of the estate in her lifetime, as to the construction of the gift over in the event of her not making a will, and as to the Statute of Limitations, do not call for a decision. Their Lordships accordingly express no opinion upon these questions.

Their Lordships will humbly advise His Majesty that this appeal be allowed and the decree of the High Court set aside, except as to costs, and that it should be declared that the testator's widow had power by will to dispose of his estate. No order for administration appears to be required, but the plaintiff and the other persons entitled as legatees under the will of Kuvarbai will have liberty to apply as to their legacies. The respondent Ratanbai will pay the costs of this appeal.

Solicitors for appellant: Messrs. *T. L. Wilson & Co.*

Solicitors for respondents: Messrs. *Waltons & Co.*

Appeal allowed.

A. M. T.

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February
11.

BHAIDAS SHIVDAS (PLAINTIFF) v. BAI GULAB AND OTHERS (DEFENDANTS).

[On appeal from the High Court at Bombay.]

Procedure—Bombay High Court—Original Civil Jurisdiction—Appeal—Disagreement of Judges—Letters Patent, 1865, section 36—Code of Civil Procedure (V of 1908), sections 4 and 98, sub-section 2.

Section 36 of the Letters Patent of the Bombay High Court which provides that if the Judges composing a division bench are equally divided in opinion

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