PRIVY COUNCIL.

DADACHANJI (DEFENDANT No. 1) *v.* RATANBAI (PLAINTIFF) AND ANOTHER (DEFENDANT No. 2).

J. C.*
1924.
October 28.

[On Appeal from the High Court of Judicature at Bombay.

Indian Succession Act (X of 1865), section 107, exception—Will—Gift to son on attaining majority—Contingent interest—Provision for maintenance and education of son.

By the exception to section 107 of the Indian Succession Act, 1865: "where a fund is bequeathed to any person upon his attaining a particular age, and the will also gives to him absolutely the income to arise from the fund before he reaches that age, or directs the income or so much of it as may be necessary to be applied for his benefit, the bequest of the fund is not contingent."

A Parsi by his will directed his executor to maintain himself and the testator's son, and to defray the expenses of educating the son, out of the testator's "property and effects", and to make over the "remaining properties" to the son upon his reaching his majority. The son died an infant.

Held, that under section 107 of the Indian Succession Act, 1865, the interest of the son was contingent upon his reaching majority, and that the provision for his benefit before he did so did not bring the bequest within the above exception to that section.

Judgment of the High Court reversed.

APPEAL (No. 148 of 1923) from a decree of the High Court in its Appellate Jurisdiction (August 2, 1922) varying a decree of the Court in its Originai Jurisdiction.

The appeal arose out of an Originating Summons taken out in the High Court for the construction of the will of a Parsi named Rustomji Edalji Dadachanji, who died on July 17, 1913. The parties to the summons were the testator's widow, Ratanbai (the plaintiff, and respondent No. 1) his brother (the executor and the present appellant), and respondent No. 2, the testator's daughter by a predeceased wife. The testator left him surviving a son who was born after the date of the will and died in infancy.

* *Present*:—Lord Dunedin, Lord Carson, and Sir John Edge.

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The material terms of the will appear from the judgment of the Judicial Committee.

There were three main questions on which the opinion of the Court was required, namely: (1) whether a bequest of the residuary estate in favour of the testator's son was vested or contingent on his attaining majority; (2) whether if the bequest was vested it was divested by the death of the son before attaining majority: (3) whether if the bequest was contingent there was a gift of the residuary estate to the appellant, or the testator died intestate in regard thereto.

Both Courts in India held that the bequest to the testator's son was contingent within the meaning of section 107, but they differed as to whether it came within the exception. The trial Judge (Kanga J.) held that it did not, but upon the wording of the material clauses the appellate Court (Shah and Pratt JJ.) held that it was within the exception. On the conclusion come to by the trial Judge as stated above it was not necessary for him to consider the second question. On the third question he held that there was a good gift of the residue to the appellant and he passed a decree in accordance with this construction. The appellate Court held on the second question that the residuary estate having vested under the exception to section 107, there was nothing in the will to divest it on the death of the testator's son; and on the third question that on the occurrence of this event the estate passed to the 1st respondent as his heir subject to her obtaining Letters of Administration.

1924 July 30.—*Upjohn K. C.*, *Sir George Lowndes K. C.* and *E. B. Raikes*, for the appellant.

M. R. Jardine and *R. J. T. Gibson* for the first respondent.

Reference was made to *Dinbai* v. *Nusserwanji Rustomji*[1] and *Norendra Nath Sircar* v. *Kamalbasini Dasi*[2].

October 28.—The judgment of their Lordships was delivered by

SIR JOHN EDGE :—The only question which this Board is asked to decide is whether upon the true construction of the will, dated July 10, 1913, of a Parsi named Rustomji Edalji Dadachanji, who died on July 17, 1913, a bequest of the residuary estate in favour of his son since deceased was vested or contingent upon his attaining his majority.

The clauses of the will which are material for the determination of this question are in the words and figures following :—

"(5) My present surviving wife Ratanbai is now in the family way. And she has expressed in my presence her free will and accord to live as a member of the family with my executor (i.e.) my elder (or eldest) brother Doctor Kavasji Edaljee Dadachanji. As to whatever children (child) that may be born of her womb, my brother shall bring up and maintain the same. And my said executor shall defray all the expenses in connection therewith out of my property and effects. And he shall maintain the family. (The expression maintenance of the family includes that of the maintenance of my said executor also.) Should a daughter be born of the womb of my wife Ratanbai, she shall be brought up and maintained and shall be educated properly and my executor or after his death his executors or executrices shall after making outlays in accordance with my circumstances get her married at a proper place (i.e., in a suitable family). Should a son be born he also shall be cherished and maintained, and educated and brought up. And when he comes of age my executor or after his death his executors or executrices shall make over the whole of my remaining properties to the said son. Should the child (whether) daughter or son born of the womb of my wife, die in tender age (i.e., a minor) and should my wife for any reason whatever be unwilling to live as a member of the family with my executor, then my executor shall out of my property purchase Bonds for Rupees five thousand bearing interest at four per cent., at the market rate and shall transfer the same to the name of my said wife Ratanbai.

[1] (1922) 49 Cal. 1005 ; L. R. 49 I. A. 323.

[2] (1896) 23 Cal. 563 ; L. R. 23 I. A. 18.

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14. After having defrayed all the household expenses out of the income of my Punji (property), as to whatever there may remain over my executor shall, if he thinks proper expend the same in giving encouragement to education and the works of science and arts as well as in erecting troughs for cows (and) cattle to drink water from. In case my executor should not do that then he has absolute authority to do so. If he likes he may make outlays in this manner or he may not even make the same.

15. As to my property (or properties) and lands at Nasik and Kherwadi and as to my share in my paternal property and Punji situated at Navsari, I bequeath the same also to my executor my brother Dr. Cawasji Edalji Dadachanji. And I annul and cancel the right of my heirs from all those.

16. My executor shall make such use thereof as he may think proper. He is the owner of all these. As to the whole of the effects and furniture chattels in my home and the goods and property whatever there may remain over after payment of the above Warsas, I bequeath the same to my said executors."

The parties are governed by the Indian Succession Act (X of 1865), the material section of which is in the following terms :—

"107. A legacy bequeathed in case a specified uncertain event shall happen does not vest until that event happens . . . until the condition has been fulfilled, the interest of the legatee is called contingent.

* * * * * *

Exception.—Where a fund is bequeathed to any person upon his attaining a particular age, and the will also gives to him absolutely the income to arise from the fund before he reaches that age, or directs the income, or so much of it as may be necessary, to be applied for his benefit, the bequest of the fund is not contingent."

Both the Courts in India held that the bequest to the testator's son is contingent within the meaning of the first clause of section 107, a decision with which their Lordships agree.

The main contention, however, before this Board on behalf of the contesting respondent was that the terms of the gift came within the exception contained in section 107.

The trial Judge held that the case did not fall within the exception to section 107. The appellate Court,

however, took a different view and held that by reason of the exception "the bequest in favour of the son was vested in interest at the date of the testator's death". It is necessary, therefore, to examine the clauses referred to in the will to see whether the fund is bequeathed to the son "upon his attaining a particular age, and the will also gives to him absolutely the income to arise from the fund before he reaches that age or directs the income, or so much of it as may be necessary, to be applied for his benefit".

In the first place it is to be noticed that there is no direct gift to the son, but only a direction to hand over, not any particular fund, but the whole of the testator's remaining properties when the son comes of age. Nor is the income of such remaining properties to be employed in any way in accordance with the terms of the section absolutely for the son, nor is it directed that the income, or so much of it as may be necessary, should be applied for his benefit. That would be impossible, as the remaining properties are not in any way ascertained or ascertainable : see *In re Gossling*[1].

As the learned trial Judge states in his judgment in analysing the will : "In this case the executor is directed to maintain the family of the testator and the maintenance of the family includes the maintenance of the executor. The direction to the executor is that he should maintain himself, the testator's wife and the son or the daughter of the testator out of the properties and effects of the testator. The executor it seems may, for the purpose of maintenance of the testator's family, spend the corpus, for the maintenance of the family was to be out of the property and effects and not out of the income only of the property. If the maintenance of the family did not exhaust the whole income, a discretionary power was given to the executor by

[1] [1902] 1 Ch. 945 ; on appeal [1903] 1 Ch. 448.

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clause 14 of the will to spend the surplus income in giving encouragement to education and works in science and arts as well as in erecting troughs for cows and cattle to drink water from". There is, therefore, no definite ascertained interest "to arise from the fund".

Their Lordships agree with the trial Judge that the case does not fall within the exception to section 107 of the Indian Succession Act, and, as has been already stated, their Lordships agree that the bequest of the residue to the son is contingent on his attaining the age of majority. Their Lordships will therefore humbly advise His Majesty that the appeal should be allowed, and the decree of the trial Court restored. The order as to costs made by the High Court in appeal will stand.

The respondents will pay the costs of this appeal.

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

Solicitors for respondent: Messrs. *Lattey* and *Hart*.

A. M. T.

ORIGINAL CIVIL.

Before Mr. Justice Marten.

1924.

July 4.

A. CECIL COLE (PLAINTIFF) *v.* NANALAL MORARJI DAVE, and another (DEFENDANTS)*.

Hire purchase agreement—Sale—Distinction.

The plaintiff handed over nine motor lorries to the defendant, receiving from him Rs. 5,000, upon the terms of a written agreement, the material parts of which were as follows:—

"I have to-day agreed to sell to you on the hire purchase system for Rs. 25,000 my nine lorries... in consideration of payment as under. In case of failure to pay any of the instalments on due date previous payments will be considered null and void, and the lorries are not considered as sold until the final payment has been received. The purchaser has no right to

* O. C. J. Suit No. 4879 of 1923.