ORIGINAL CIVIL.

Before Mr. Justice B. J. Wadia.

KRISHNADAS TULSIDAS *v.* DWARKADAS KALIANDAS.* 1936 *January* 10

Indian Succession Act (XXXIX of 1925), sections 97, 105 and 106—Hindu will—Legacy to a person, his sons and daughters—Death of legatee during lifetime of testator—Whether legacy to his sons and daughters will take effect—Principles governing construction of statutes—Illustration to a section of an Act considered as part of section itself—In construing Hindu will ordinary notions of Hindus as to devolution of property should be considered.

A Hindu testator died in 1930 leaving a will made in 1914 whereby he bequeathed, *inter alia* "Rs. 10,000 to Bhai Tulsidas Keshavdas and (his) sons and daughters". At the date of the will Tulsidas had two sons and one daughter. Tulsidas died in 1919 and his daughter died in 1924. Tulsidas' sons survived the testator and they claimed the legacy of Rs. 10,000. It was contended on behalf of the persons entitled to the residue of the testator's estate that Tulsidas having died in the testator's lifetime, his sons were not entitled to the legacy.

Held, on the construction of the whole will, that being a Hindu, the sons and daughters of Tulsidas took beneficially with him and that the legacy was meant for parent and issue concurrently. That under section 106 of the Indian Succession Act, which also applies to Hindus, when one of the joint legatees dies, the survivor takes the whole legacy. Therefore the sons of Tulsidas were entitled to the whole legacy of Rs. 10,000.

In construing the will of a Hindu, it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindus with respect to the devolution of property.

Mahomed Shumsool v. *Shewukram*,[1] followed.

An illustration to a section of an Act, unlike a marginal note, is considered as a part of the section itself, and is to be accepted as being both relevant and valuable for the construction of the section. But an illustration ordinarily exemplifies the particular section to which it is appended, and the Court cannot import into an illustration to one section which is applicable to Hindu wills a substantive proposition of law or a rule of construction embodied in another section which is not so applicable.

Mahomed Syedol Ariffin v. *Yeoh Ooi Gark*[2] and *Durga Priya Chowdhury* v. *Durga Pada Roy*,[3] referred to.

*O. C. J. Suit No. 1019 of 1935 (O. S.).

[1] (1874) L. R. 2 I. A. 7, at p. 14.

[2] (1916) L. R. 43 I. A. 256, s. c. 19 Bom. L. R. 157.

[3] (1927) 55 Cal. 154.

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ORIGINATING SUMMONS.

Ranchhoddas Tribhovandas Mody, a Hindu, died in 1930 leaving a will which was prepared by himself. The will was made on December 17, 1914. Clause 5 of this will ran as follows :—

"(5) Legacies shall be paid as mentioned below :—

Rs.

10,000 to Bhai Dwarkadas Kalyandas and (his) sons and daughter.

10,000 to Bhais Jugmohandas and Bhagwandas Kalyandas.

10,000 to Bhai Tulsidas Keshavdas and (his) sons and daughters.

5,000 to Bhai Amratlal Pranjiwan and (his) son Harilal.

2,000 to Harkison, son of my brother-in-law Vithaldas.

2,000 to my maternal aunt's daughter Ratan and (her) son Gopal.

2,000 to my maternal aunt Parvati and (her) sons and daughters."

The testator appointed his wife Putlibai and defendants Nos. 1, 2 and 3 as executors of the will. Tulsidas Keshavdas died on February 3, 1919, leaving him surviving his sons, the plaintiffs and a daughter Kusumbai, who died on February 2, 1924.

The plaintiffs claimed to be entitled to the legacy of Rs. 10,000 on the ground that the testator gave that legacy to Tulsidas and his sons, the plaintiffs, and his daughter Kusumbai, jointly, and that as Tulsidas and Kusumbai died before the testator, they as the surviving legatees were entitled to the whole of the amount of the legacy.

Putlibai, the widow of the testator, was entitled to the residue of the estate under the terms of the will. She died in 1932 leaving a will, of which defendants Nos. 3-6 were the executors. The executors of Putlibai's will contended that the legacy in dispute was given to Tulsidas and as he died in the testator's lifetime, the legacy lapsed and formed part of the residue of the testator's estate.

The plaintiffs took out an originating summons for the construction of clause 5 of the will so far as it affected them.

V. F. Taraporewala, with *Sir Jamshed Kanga*, for the plaintiffs.

M. C. Setalvad, for defendants Nos. 3 to 6.

B. J. WADIA J. Plaintiffs have taken out this originating summons for the construction of a portion of clause 5 of the will of one Ranchhoddas Tribhowandas Modi, relating to the payment of a legacy of Rs. 10,000. The legacy was to be paid to "Bhai Tulsidas Keshavdas and (his) sons and daughter". Plaintiffs are the sons of Tulsidas. The will was made in 1914, and at that date the only children of Tulsidas who were in existence were his two sons, the plaintiffs, and one daughter Kusumbai. Tulsidas died in 1919, and Kusumbai died in 1924. The testator died at Bombay on or about May 10, 1930. Plaintiffs contend that the legacy was given jointly to Tulsidas and his sons and daughter, and that Tulsidas and Kusumbai being both dead, they are entitled to the entire legacy.

Defendants Nos. 1, 2 and 3 are three of the proving executors of the will. In 1930 a suit was filed by Jugmohandas Kaliandas against the executors of the will for the administration of the estate of Ranchhoddas Modi, being Suit No. 1889 of 1930, and a consent decree in the suit was passed on October 7, 1931, by which it was declared that the widow of the deceased testator, Putlibai, was entitled, as the residuary legatee, to her husband's estate, subject to the payment *inter alia* of the legacies under his will. The estate was accordingly handed over to her. Thereafter Putlibai died in 1932, leaving a will of which defendants Nos. 3 to 6 are the executors. Probate of her will was granted to them on October 2, 1933. Defendants Nos. 1 and 2 are agreeable to the payment of the legacy of Rs. 10,000

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to the plaintiffs. Defendants Nos. 3 to 6 contend that on the death of Tulsidas in the lifetime of the testator the legacy lapsed and formed part of the residue. They deny that the legacy was given jointly as alleged, and submit that the plaintiffs are not entitled to it.

The will of Ranchhoddas Modi is in the Gujarati writing. There is some dispute between the parties as to the correctness of the translation of the particular portion of clause 5 which is under consideration. In the petition for probate of the will the translation was as follows: "Rs. 10,000 to Bhai Tulsidas Keshavdas and sons and daughters", and that was also the translation of the clause contained in the will annexed to the probate which was granted on October 5, 1931. Subsequently, that is after the probate was granted, but before the originating summons was taken out, the translation was corrected by the Court translator at the instance of the plaintiffs' attorneys into "Rs. 10,000 to Bhai Tulsidas Keshavdas and sons and daughter". On consulting one of the senior Gujarati translators of this Court I was informed that the Gujarati word used by the testator for "daughter" can be translated both in the singular and in the plural, that is both as "daughter" as well as "daughters". The word is translated in the singular in setting out clause 5 in paragraph 2 of the plaint, and in the affidavit of defendant No. 4 on the originating summons paragraph 2 of the plaint is admitted, which means that the translation of the word in the singular as "daughter" is accepted as correct. Counsel for defendants Nos. 3 to 6, however, said that this was by mistake. It may be mentioned here that as a matter of fact Tulsidas had only one daughter at the date of the will, and never had another.

The only question, therefore, is, what is the correct and proper construction of the words of the legacy? It is the will of a Hindu testator, and was drawn, as the Court was informed, by the testator himself. It is provided by section 97

of the Indian Succession Act of 1925 (which corresponds to section 84 of the Act of 1865) that—

"Where property is bequeathed to a person, and words are added which describe a class of persons but do not denote them as direct objects of a distinct and independent gift, such person is entitled to the whole interest of the testator therein, unless a contrary intention appears by the will."

According to the first illustration to that section, if a bequest is made, for instance, "to A and his children", or "to A and his heirs", or "to A and his issue", "A" will take the whole interest which the testator had in the property which is the subject-matter of the bequest. That would be so in accordance with a rule of the English law regarding bequests of personality, viz., that where there is a gift to "A" and his heirs, or to "A" and the heirs of his body, the words "and his heirs" or "and the heirs of his body" are to be construed as words of limitation of the gift to A, that is, as words which describe the nature and extent of the interest conferred on A. The heirs or heirs of the body do not take by purchase, unless the testator has so intended by his will. On the other hand, if a bequest is made "to A and his brothers", as in the 2nd illustration to section 97, A and his brothers are jointly entitled to the legacy. They will take it jointly, because a bequest to A's brothers along with A does not enlarge the estate of A. If section 97 was applicable in this case, Tulsidas would take the entire interest in the legacy for himself absolutely. But it is provided by section 57 of the Act of 1925, read along with Schedule III to the Act, that section 97 does not apply to wills made by Hindus. It applies, for instance, in the case of Parsis. In *Dadabhoy Framjee* v. *Cowasji Dorabji*,[1] a Parsi lady settled some property on herself for life and then for her son for life, and then for "his sons and their male heirs absolutely in equal shares as tenants in common". It was held that the words "male heirs" did not imply any limitation, and that the son's sons, that is the grandsons,

[1] (1922) 47 Bom. 349.

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took the property absolutely as tenants in common. It was held that if section 84 (now section 97) was applicable to wills, there was no reason why a different effect should be given to the expression "male heirs" in a deed of settlement. This was confirmed by the Privy Council in *Dadabhoy Framji* v. *Cowasji Dorabji*[1].

Counsel for defendants Nos. 3 to 6, however, relied on section 105 of the Indian Succession Act which deals with a case in which the legacy lapses, and principally on illustration (ii) to that section. Illustration (ii) runs as follows :—

"A bequest is made to A and his children. A dies before the testator, or happens to be dead when the will is made. The legacy to A and his children lapses."

I have already referred to Schedule III to the Act before. It enumerates the sections of the Act which are applicable to the wills of Hindus, and section 105 is one of them. It also mentions certain "restrictions and modifications" in the application of those sections, and in clause 5 of those "restrictions and modifications" it is stated that in applying certain sections, including section 105, the words "son", "sons", "child", and "children" shall be deemed to include an adopted child. It was argued that as section 105 was applicable to wills made by Hindus, and as the word "children" occurs only in the 2nd illustration to that section, the illustration must be taken as laying down a rule of construction which applies to wills made by Hindus. I do not agree with this contention. It is true that an illustration to a section, unlike the marginal note, is considered as a part of the section itself, and is to be accepted as being both relevant and valuable for the construction of the section: see *Mahomed Syedol Ariffin* v. *Yeoh Ooi Gark*[2] and *Durga Priya Chowdhury* v. *Durga Pada Roy*[3]. But an illustration ordinarily exemplifies the particular section to which

[1] [1925] A. I. R. P. C. 306.

[2] (1916) L. R. 43 I. A. 256, s. c. 19 Bom. L. R. 157.

[3] (1927) 55 Cal. 154.

it is appended, and the Court cannot import into an illustration to one section which is applicable to Hindu wills a substantive proposition of law or a rule of construction embodied in another section which is not so applicable. If the bequest to A and his children in illustration (ii) to section 105 is to be construed according to the rule of construction laid down in section 97, A will no doubt take the entire interest which the testator had in the property, and in the event of A dying in the lifetime of the testator the legacy will fail to take effect and fall into the residue. But a bequest in a will to A and his children, or to A and his sons and daughters, cannot be construed according to section 97, if the will is made by a Hindu, nor can the added words "and his children" or "and his sons and daughters" in a will made by a Hindu be rejected as mere surplusage having no effect, in the absence of any indication of a contrary intention in the will itself. I do not think the word "children" is different in meaning from the words "sons and daughters", for "children" include both : see *Krishnarao Ramchandra* v. *Benabai*[1], where it was held that a bequest to children does not mean a bequest to sons only. Section 105 of the Act has been made applicable to Hindus as the section is one of general application. There may be instances where a legacy is given to A, a Hindu, alone, and if in such a case A predeceased the testator, the legacy would lapse. But from that it does not follow that illustration (ii) will apply, if the bequest is contained in a will made by a Hindu. To say so would be inconsistent with the rule of construction laid down in section 97 which the Legislature has expressly made inapplicable to such wills.

It was argued that if section 97 did not apply to wills made by Hindus, its principle should be made applicable to such wills. Counsel referred to Trevelyan on Hindu Wills, 2nd edition, page 86, where the author says that the

[1] (1895) 20 Bom. 571, at p. 591.

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principle of section 84 (now section 97) applies to Hindu wills; on what grounds, he does not say. It was argued that there was nothing in the rule of construction contained in the section which was repugnant to notions of Hindu law. But the provision of the Legislature is clear. Section 97 embodies an artificial rule of construction of wills taken from the English law, and it is expressly provided that that section, which, I take it, means the rule of construction contained in it, does not apply to wills made by Hindus. In a case which went up to the Privy Council, *Skinner* v. *Naunihal Singh*,[1] there was a bequest to the testator's eldest son Thomas Brown Skinner, "and to his lawful male children according to the law of inheritance", and in the event of Thomas dying without lawful male children, to the testator's next male heir, and in default to the female children. Here the testator, Thomas Skinner, was not a Hindu. Still it was held that English rules of interpretation, in so far as these are artificial rules of construction which have arisen in the administration of English Courts of Equity, should not be allowed to govern the interpretation of a will made in India in 1864, that is, before the Act of 1865 came into force, and that questions affecting the construction of that will, or the regulation of a succession under it, must be determined by principles of natural justice, or "according to justice, equity and good conscience". In other words, the will was to be construed according to the intention of the testator, and it was held by the Privy Council that Thomas Brown Skinner took only a life interest.

In every case it is purely a question of construction of each particular instrument, and the real basis of construction of the portion of the clause in dispute in this case is to ascertain the intention of the testator in adding to the name of the legatee the words, "and (his) sons and daughter" (or daughters) in the legacy. It is always the intention

[1] (1913) L. R. 40 I. A. 105. 35 All. 211, P. C.

of the testator as expressed or implied in the language of the will which must be given effect to so far and as nearly as may be done consistently with the law. That intention must be collected with reasonable certainty, and it may be collected from the entire clause or, if necessary, from the whole will itself. The question is whether the added words were intended to be words of inheritance, so as to denote the absolute interest of Tulsidas in the sum of Rs. 10,000, or whether they were meant to refer to the sons and daughter of Tulsidas existing at the date of the will, or whether they were meant to describe his sons and daughters as a class of persons who were to be the direct objects and recipients of the testator's bounty along with their father. It has been held that even if the words used by the testator are words of general inheritance, the context of the will together with extrinsic circumstances, if the evidence of such circumstances is properly admissible, may show that a limited interest only was meant to be given. The construction of the will must, therefore, ultimately depend on what the testator intended his words to mean. I do not think that in the view I take it makes much difference whether the Gujarati word in the will is to be taken as meaning "daughter" or "daughters". It is quite probable that the word was used in the singular, as both Dwarkadas Kaliandas, the first legatee under the clause, and Tulsidas Keshavdas had only one daughter each at the date of the will. Dwarkadas had another daughter, but she was born nearly a year after that date. The legatee lastly mentioned in the clause is the testator's maternal aunt Parvati. She was a widow, as the Court was informed, and had only one daughter, and the same Gujarati word is also used for "daughter" in the legacy given to her. Wherever a legatee had only one son, his name is mentioned, except in the case of Parvati who had also one son but whose name does not appear. It was admitted in argument that the translation of the Gujarati word in her case should be "son",

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and not "sons". Whether, therefore, the testator meant to refer to the existing daughter of a legatee or to refer to daughters along with sons as a class he has throughout used the same Gujarati word. Jugmohandas and Bhagwandas, the brothers of Dwarkadas, had no children at all at the date of the will, and, therefore, none are referred to in the legacy given to them.

It is also quite probable that the testator was using a word for "daughter" in exact relation to the existing facts. But, as I have said before, it is not very material whether the word is taken in the singular or in the plural. It is the will of a Hindu, and it has been held by the Privy Council in *Mahomed Shumsool* v. *Shewukram*[1] that "in construing the will of a Hindu it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindus with respect to the devolution of property". Ordinarily, a daughter does not come in a Hindu's conception of an heir, either of himself, or of a Hindu legatee. Daughters in a Hindu family are entitled to certain rights of maintenance and residence. If, therefore, a Hindu testator mentions the daughter or daughters along with the sons of a legatee in connection with the legacy, the Court can infer that the testator intends that the daughter or daughters along with the sons shall take the benefit which the words of the will purport to give. I do not think that a Hindu testator, who is a layman, and presumably, therefore, unaware of the legal import of particular words, would use them deliberately in order to give an absolute estate to the legatee according to an artificial rule of construction taken from the English law. It was argued on behalf of defendants Nos. 3 to 6 that the Court does not as a rule impute to a testator the use of additional words without some additional purpose or without any purpose at all, and that he intended to make an absolute gift to Tulsidas more emphatic by the use of the additional

[1] (1874) L. R. 2 I. A. 7 at p. 14.

words. But that in my opinion is merely an assumption, which is not warranted. There is nothing in the whole will to show that the testator was capable of choosing words clearly apt by law to produce a particular disposition of property in favour of a legatee. Moreover, under section 95 of the Indian Succession Act, an absolute estate can be conferred on a legatee without any words of limitation at all. I do not think that the testator who drafted his own will had any particular legal principle in view on which he based his words. He based them on the facts relating to the family of each legatee, and it will correspond more nearly with his intention if the Court adopts a construction which benefits not only Tulsidas but his children as well, and confers a benefit on them jointly.

The amounts of the different legacies may also be noted in this connection. The testator has given Rs. 10,000 between Jugmohandas and Bhagwandas, the two brothers of Dwarkadas, as they had no children at all, whereas he has given Rs. 10,000 to Dwarkadas and his sons and daughters, just as he has given Rs. 10,000 to Tulsidas and his sons and daughters. Plaintiffs' counsel argued that the testator could not have meant the whole sum of Rs. 10,000 for Dwarkadas or for Tulsidas absolutely, when he had given Rs. 10,000 to the two other brothers of Dwarkadas jointly. The amount of the legacy, however, is not a sure guide to the testator's intention. Much must depend on his wishes and predilections, and there is nothing before me to show whether he had regard for all those three brothers equally, or for any one of them more than for the others. Further it must be remembered that a testator's bounty is absolute, without control as to the amount of the bequest or as to his motive.

Unless it is clear to the Court that the testator intended to use the particular words under consideration in their legal and technical sense, that is, as words of inheritance,

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the only proper way to construe them is to take them in their plain and appropriate usual sense. In order to deprive them of such sense there must be a sufficient indication to satisfy the Court that the words were meant to be used by the testator in some other sense, and the burden of proof in such cases lies on those who attribute to those words such other sense. I am not satisfied that they were so used. Taking everything into consideration I hold that the sons and daughters of Tulsidas took beneficially with him, and that the legacy was meant for parent and issue concurrently. It is provided under section 106 of the Indian Succession Act that where a legacy is given to two persons jointly, and one of the joint legatees dies before the testator, the surviving legatee takes the whole legacy. In my opinion, therefore, the plaintiffs as the survivors in a legacy to Tulsidas and his sons and daughters jointly are entitled to the legacy of Rs. 10,000. There is no dispute between the parties that if the legacy is payable, interest is to run on Rs. 10,000 at six per cent. per annum from May 10, 1931, till payment, that is, from the expiry of a year after the date of the testator's death.

Costs of plaintiffs and defendants Nos. 3 to 6 to come out of the estate of Putlibai, Putlibai having taken the residue of the estate of Runchhoddas Modi under the consent decree in Suit No. 1889 of 1930, those of defendants Nos. 3 to 6 when taxed as between attorney and client.

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Attorneys for defendants Nos. 1 and 2: Messrs. *Ardeshir, Hormusji, Dinshaw & Co.*

Attorneys for defendants Nos. 3-6: Messrs. *Dayalji & Dipchand.*

Order accordingly.

B. K. D.