ORIGINAL CIVIL.

Before Mr. Justice Kania.

PRABHAKUVERBAI AMRITLAL SHAH, PLAINTIFF *v.* KASUMBHAI SAKERCHAND PAREKH AND OTHERS, DEFENDANTS.* 1949 *March* 15

Will, construction of—Bequest in favour of named charitable objects "or any other purpose of public service"—Whether bequest void for uncertainty.

A testator by clause 11 of his will directed "my executors shall utilise all that residue of the estate for the purpose of education or for rendering help to the poor or for any other purpose of public service (lokopyogi) deemed proper by them at my native place Chotila in Kathiawar . . . " On the construction of the clause :

Held, (1) that "lokopyogi" works by themselves were not charitable ;

(2) that there were no words before the expression "lokopyogi" which disclosed a general charitable intention and that the two named charitable objects did not control and limit the "lokopyogi works" (the other purpose of public service) to charity only and that the bequest contained in the clause failed on the ground of vagueness ;

(3) that the words "purposes of public service" were too vague and the mere limitation of the place where the money was to be spent did not remove the ambiguity of the words.

CONSTRUCTION of will.

On August 28, 1939, probate of the will of Sakerchand was granted to the executors and executrix named in the will. On October 3, 1939, the daughter of the testator filed a suit for the administration of the estate of her father, for construction of clause 11 of the will and for other reliefs. Defendant No. 1 was the executrix and defendants Nos. 2 and 3 were the executors of the will. The Advocate General of Bombay was the fourth defendant.

In the first instance clause 11 of the will was construed.

C. K. Daphtary and *N. P. Engineer*, for the plaintiff.

Sir Jamshedji B. Kanga and *N. H. Bhagvati*, for defendant No. 1.

* O. C. J. Suit No. 1396 of 1939.

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M. V. Desai and *K. A. Somji*, for defendants Nos. 2 and 3.

M. C. Setalvad, Advocate General, with *G. N. Joshi*, for defendant No. 4.

KANIA J. One Sakerchand Gulabchand Parekh died on December 11, 1938, having duly made and published his will in the Gujarati language and character dated February 25, 1927. Probate of that will has been granted to the executors and executrix. Plaintiff is the daughter of the testator, defendant No. 1 is his widow, while defendants Nos. 1, 2 and 3 are the executrix and executors of his said will. The Advocate General is defendant No. 4.

On the pleadings several points arise for determination, but in the first instance I am asked to construe the will in so far as it relates to cl. 11.

Clause 11 runs thus :

" As regards whatever residue of my estate that may be left after setting apart the aforesaid sums and after giving away the legacies my (executrix and) executors shall utilise all that residue of the estate for the purpose of education or for rendering help to the poor or for any other purpose of public service deemed proper by them at my native place Chotila in Kathiawar in memory of myself, my respected father and my respected mother."

The Gujarati expression used in place of " for any other purpose of public service " is *lokopyogi*. As pointed out in *Trikumdas Damodhar* v. *Haridas*,[1] the correct rendering of the word " *lokopyogi* " is " for purposes of popular usefulness ".

On behalf of the plaintiff it is urged that the words used in the will are disjunctive and as the last words give authority to the trustees to spend the whole or whatever portion they like of the residue for purposes of popular usefulness the legacy is void on the ground of uncertainty. In support of this contention the decision in *Trikumdas Damodhar* v. *Haridas*[1] is relied upon. On the other hand it is contended

[1] (1907) 31 Bom. 583 at p. 586.

that there is a general charitable intent shown in the will. Although the last words are connected with the previous words by " or " the same should be read *ejusdem generis* and the expression purposes of popular usefulness is thus limited or controlled by the two objects previously mentioned. It was next urged that this case falls within the class of cases of which *Smith, In re : Public Trustee* v. *Smith*[1] is an instance. They are generally described as " locality cases ". The contention is that the clause amounts to a bequest in favour of the village of Chotila or the inhabitants of Chotila *simpliciter*. It is further contended that the statement that the residue is to be used for purposes of popular usefulness and other charities does not take the case out of the class of locality cases. It was lastly urged that the definition of charity as understood in England and limited to the objects mentioned by Lord Macnaghten in *Commissioner for Special Purposes of Income Tax* v. *Pemsel*[2] is not applicable to India. In three Acts in particular viz. the Indian Income-tax Act, the Transfer of Property Act and the Charitable Endowments Act the term " charity " is defined with a wider meaning than what is found in the definition given by Lord Macnaghten.

This last argument about extending the scope of the term " charity " is futile before me. This contention was urged in *Subhash Chandra Bose* v. *Gordhandas Patel*,[3] which was decided by a bench of which I was a member. It was there noticed that the current of authorities in India was so strong and uniform that it was not possible now to adopt this argument and extend the meaning of the word charity when used in Indian wills.

I am equally unable to accept the contention that the case falls within the class of locality cases. The question

[1] [1932] 1 Ch. 153. [2] [1891] A. C. 531.
[3] (1939) 42 Bom. L. R. 89.

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for consideration in that respect would be: In this will is there a bequest in favour either of the village of Chotila or the inhabitants of that village *simpliciter*? A series of cases falling under that class was noticed in detail in *Smith, In re: Public Trustee* v. *Smith*,[1] and it was uniformly noticed that the gift has to be for the benefit of the inhabitants of the town or the city without any qualifications or limitations. So far back as *Goodman* v. *Mayor of Saltash*[2] it was observed that a gift for the benefit of the inhabitant of a parish or town was a charitable trust. After reviewing all the cases Lord Hanworth M. R. in *Smith*,[1] *In re*, stated that in that class of cases there was no area or purposes of distribution suggested which was not charitable. On that ground it was held that a bequest "unto my country England for .... own use and benefit absolutely" was a charitable bequest. Reading the words of the bequest in this case I do not think that that construction is reasonable. The words used here do not make either the village of Chotila or the inhabitants thereof the object of the testator's bounty. What is provided for is that the trustees should utilise the residue for any of the objects mentioned, but the place where the particular institution in which the same is to be used should be Chotila. On a plain reading of that clause I am unable to construe it as a bequest in favour of the village of Chotila or its inhabitants *simpliciter*. In the first instance the trustees have the option to select the objects. Suppose they think it fit to put up a house to accommodate visitors to Chotila only, it will not be construed as a bequest either for the benefit of the village or the inhabitants of that village. In *Mitford* v. *Reynolds*[3] the testator gave the remainder of his property to the Government of Bengal to be applied towards charitable, beneficial and public works at and in the City of Dacca in Bengal, the intent of such direction

[1] [1932] 1 Ch. 153. [2] (1882) 7 App. Cas. 633.
[3] (1842) 1 Phillip 185.

being that the amount should be applied exclusively for the benefit of the native inhabitants in the manner the Government may regard to be most conducive to that end. It was held that the words were to be read conjunctively and the bequest was therefore held to be good. In the present case if the three objects separately mentioned can be read conjunctively, there is not much difficulty in the way of defendant No. 4. But the expressions used clearly indicate that they are disjunctive, and I do not think it is proper to strain the plain words selected by the testator to read them as conjunctive.

It is possible to argue that although the words "purposes of popular usefulness" by themselves may be vague, when they are coupled with the place where they have to be used they become definite and lose the character of vagueness. This argument found favour in *Dolan* v. *Macdermot.*[1] Lord Romilly M. R. in delivering his judgment observed as follows (p. 62):—

"Therefore, if the word 'parish' here is simply an expression of locality, that is, a description of the spot in which the public purpose shall or may be performed, the gift is bad. But if the place is connected with the gift of the charity itself in this way, that the public purposes must be for the benefit of the parish so specified, then it is good."

It may be noticed that Lord Romilly also assumed that if the words "parish" was used simply as an expression of locality, that is, a spot in which the public purposes may be performed, the gift was bad. In my opinion that is the true reading of the clause in question in this suit. The last observation of Lord Romilly has been disapproved in *Houston* v. *Burns.*[2] The words there used were "for such public benevolent or charitable purposes in connection with" a particular parish. The words were read as disjunctive and it was held that they were too wide and the mere local limitation did not cure the ambiguity

[1] (1867) L. R. 5 Eq. 60.

[2] [1918] A. C. 337.

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of the wide words. One can bestow his money on purposes not charitable even if that was to be done within a particular area. The argument that the bequest in clause 11 falls within the class of locality cases therefore fails.

The last contention urged was that the last words should be read *ejusdem generis*. In this connection *Tulsidas* v. *Advocate General Bombay*,[1] was relied upon. The words there used were (p. 496) :—

"Further my executors shall appropriate.....a sum of Rs. 3,000....towards some 'sadavarat' or building 'dharmshala' or well, tank or 'havada' or towards feeding 'sadhus' (and) ascetics or spend the same towards any other object of 'dharam' . . . in order to perpetuate the memory of my wife . . ."

Having regard to the context and the whole scheme of the will I came to the conclusion that the last words there used should be read as if they were "or any other similar charitable or religious objects." I do not think it is useful to construe the words in one will by a reference to another when there is a marked difference both in the context and phraseology. The words used here are simple. In the first instance there is no general intention to bequeath the residue to charity. Before the words in question the testator has merely stated that the residue shall be utilised by the trustees for the purpose of education or for rendering help to the poor. If stress is laid on the words "any other" used before "purposes", the clause would mean that the testator meant to give the residue for purposes of popular usefulness and had mentioned out of them, two, viz., education or rendering help to the poor. It does not follow from the words used here that the words "any other" limit the scope of the words which follow them. That construction would be acceptable if before the words in question there was a clear, distinct and general charitable intention.

Bennet, In re: Gibson v. *Attorney General*[2] is a case in point. There the testatrix bequeathed her residuary

[1] (1936) 39 Bom. L. R. 495. [2] [1920] 1 Ch. 305.

estate to trustees upon trust to apply such parts thereof as were applicable by law for charitable legacies, in such manner as her trustees should, in their absolute discretion, think fit, "for the benefit of the Schools, and charitable institutions, and poor, and for objects of charity, or any other public objects in the parish of Faringdon." The bequest was considered good. It was held that the words had to be read not disjunctively but conjunctively. If so, the general charitable intention found in the first four expressions used necessarily limited the scope of the last words of the bequest. The judgment distinctly shows that the words were read conjunctively and that was the basis of the decision. It was also pointed out that the words "in the parish of Faringdon" did not make the words "public objects" charitable, because that argument was rejected in *Houston* v. *Burns*.[1] Eve J. held that the word "or" should be read as "and" and therefore the word "public" was to be read as "public charitable object". In the present case I am unable to find words before the expression "*lokopyogi*" which disclose a general charitable intention. The naming of two objects, which in law are also charitable, and which are connected with the last words by "or", does not make the last words controlled by the two objects mentioned before. On the other hand the case falls within the principle found in *Blair* v. *Duncan*.[2] The decision in *Trikumdas Damodhar* v. *Haridas*[3] also lends support to the conclusion that "*lokopyogi*" works by themselves are not considered charitable.

Under the circumstances, in my opinion, the bequest contained in clause 11 fails on the ground of vagueness. The Court's duty in construing a will is to gather the intention of the testator, but the same has to be gathered from the words used in the will and not from outside considerations. While on the one hand the Court will lean

[1] [1918] A. C. 337. [2] [1902] A. C. 37.
[3] (1907) 31 Bom. 583.

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against a construction which will tend to intestacy, it is equally the duty of the Court not to strain the words so as to create a bequest, which according to the words used in this will are not capable of bearing that meaning.

Defendant No. 4 has no further interest to this litigation and need not appear further. His costs taxed as between attorney and client to come out of the estate.

Further hearing of the suit to stand over to June 24, 1940.

Attorneys for plaintiff : Messrs. *Crawford, Bayley & Co.*

Attorneys for defendant No. 1 : Messrs. *N. C. Dalal & Co.*

Attorneys for defendants Nos. 2 and 3 : Messrs. *Kanga & Co.*

Attorneys for defendants No. 4 : Mr. *C. C. Shah.*

Order accordingly.

N. K. A.

APPELLATE CRIMINAL.

Before Sir John Beaumont, Chief Justice, and Mr. Justice Wassoodew.

1940
June 25

EMPEROR *v.* BILAL MAHOMED, No. 1 AND OTHERS Nos. 2 TO 16.*

Criminal Procedure Code (Act V of 1898), ss. 94, 162—Production of statements—Statements recorded by police officer before and after raid in offence of gaming—Discretion—Exercise of discretion—Indian Evidence Act (I of 1872), ss. 123, 124, 125.

Under s. 94 of the Code of Criminal Procedure, 1898, the Court has an absolute discretion to require the production of any document which it considers necessary or desirable for the purposes of the investigation or trial proceeding before it.

* Criminal Reference No. 11 of 1940.