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terms of this will too uncertain to enable the Court to give it administration.

For these reasons their Lordships are of opinion that this appeal must fail and ought to be dismissed with costs; the costs incurred in the Court below from the 13th March 1917, and of the appeal on the preliminary point that was argued before this hearing on the merits was reached, which were reserved, in their Lordships' opinion, should be costs in the appeal; and they will humbly advise His Majesty accordingly.

Solicitor for appellant: Mr. *E. Dalgado*.

Solicitors for respondents: Messrs. *Hughes & Sons*.

Appeal dismissed.

A. M. T.

ORIGINAL CIVIL.

Before Mr. Justice Kanga.

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February 18.

MITHIBAI (PLAINTIFF) v. MEHERBAI AND OTHERS (DEFENDANTS)*.

Hindu Law—Will—Construction of—“Malik”, meaning of—Will declaring widow “malik” of residuary property and directing that “during her life-time she shall apply the same and spend in a good way”—Widow takes life-estate with uncontrolled power of disposition by act inter vivos—Sale by a Hindu widow appointed as executrix—Construction of conveyance—Probate and Administration Act (V of 1881), section 90.

A Hindu testator appointed his widow (his only heir) the sole executrix of his will and devised the residue of his property to her in the following terms:—“As to whatever surplus of my property may remain over after my decease the (Malik) owner thereof is (shall be) my wife Diwali. She shall during her life-time apply and spend the same in a good way. As to the surplus that may remain over after the performance of her, that is to say, my wife's Karaj Avasar (funeral and subsequent ceremonies) all that shall be used for good purpose. Except my executrix no one else nor my heirs or representatives whatever shall have any right to or interest in my property.

* O. C. J. Suit No. 1962 of 1919.

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The widow having obtained probate of the will sold in her life-time an immoveable property of testator. The conveyance did not expressly mention in what particular capacity she sold, but it purported to convey "all the estate, right, title, interest &c...." she had in the property. On her death the plaintiff, the next reversionary heir of the testator, sued the legal representatives of the purchaser, praying that it might be declared that the widow took only a widow's estate under the will and that on her death the plaintiff became entitled to the property, the conveyance becoming void and inoperative after the life-time of the widow.

Held, that the words in the will "during her life-time she shall apply the same (i.e., the residue) and spend in a good way" cut down the absolute estate created by the use of the word "Malik" to a life-estate in favour of the widow and that such life-estate was with uncontrolled powers of disposition by acts, *inter vivos*.

Mafatalal v. Kanialal⁽¹⁾ and *In re Pounder*⁽²⁾, referred to.

Held further, that what was conveyed by the widow under the deed was the whole property and all the title she possessed therein and that it included the right and title she possessed as executrix.

Gangabai v. Sonabai⁽³⁾ and *Bijraj Nopani v. Pura Sundary Dasee*⁽⁴⁾, referred to.

Held also, that the sale of the property should be deemed to be a sale by the widow as the executrix of the testator, for under section 90 of the Probate and Administration Act, a Hindu widow who was appointed an executrix would be entitled to sell as executrix the property left by her husband if no restriction was imposed on her powers of disposing of the property by the will which appointed her executrix.

SUIT for construction of will.

One Jasvir Bhudar, a Desha Shrimali Bania of Bombay died at Bombay on 3rd May 1893, leaving him surviving his widow Bai Diwali and his paternal uncle's son's son Jethabai Javersha, the husband of the plaintiff.

The deceased was possessed of considerable moveable and immoveable property, and a day previous to his

(1) (1915) 17 Bom. L. R. 705.

(3) (1915) 40 Bom. 69.

(2) (1886) 56 L. J. Ch. 113.

(4) (1914) 42 Cal. 56

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death he executed a will in Gujarati character, whereby he appointed his widow Bai Diwali, the sole executrix. The material portion of the will was as follows:—

“As to my all ‘estate’ and property and shop and ornaments and jewels and pots and pans (and) immoveable and moveable property and my claims and debts which my account books may show of all those I appoint my wife Diwali executrix. And I direct my executrix that (she) my executrix shall after my decease keep supervision over the temple which I have built on the Pydhownie Road and which temple I have made over to ‘Tapa Cachi’ (sect) of the community at Nagar. And I direct my executrix that after my decease Rs. 1,000 (namely one thousand) shall be deposited at interest. Out of the interest thereof ‘Ambel’ shall be caused to be made twice a year in the ‘Ambelni Oli’ (days). Further I direct my executrix that on my debts being paid and on the abovementioned Rs. 9,000 (nine thousand) being set (apart) and on regard being had to (the outlay c my twelve months ‘Karaj’ and other (ceremonies) as to whatever surplus of my property may remain over after my decease, the (Malik) owner thereof is (shall be) my wife Diwali. She shall during her life-time apply and spend the same in a good way. As to the surplus which may remain over after the performance of her, that is to say, my wife’s Karaj Avasar (funeral and subsequent ceremonies) all that shall be used for the good purpose (Subh Khate). Except my executrix no one else nor my heirs or representatives whatever shall have (any) right to or interest in my property.”

Probate of the will was granted to Bai Diwali on 11th November 1893.

By a conveyance dated 2nd June 1894, Bai Diwali purported to sell an immoveable property at Falkland Road to one Ratanbai, wife of Haridas Dullabhadas for a sum of Rs. 4,500. In the recitals of the conveyance it was stated that Bai Diwali as the executrix of her husband’s will had proved the will and obtained probate thereof, that the testator had bequeathed all his property to Bai Diwali and that Bai Diwali as heir and residuary legatee to her husband’s estate was absolutely entitled to the property conveyed. The operative part of the conveyance ran as follows:—

“She the said Bai Diwali doth by these presents grant, bargain, sell, assign, release, convey and assure into the said Ratanbai, her heirs, executors administrators and assigns all that piece or parcel of Fazandari land or ground.....

situate on the west side of the public road Falkland Road.....together with all and singular houses..... and all the estate, right, title, interest, use, trust, inheritance, property, possession, benefit, claim and demand whatsoever of the said Bai Diwali in and to the said premises."

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The conveyance also contained a covenant of title that "the said Bai Diwali now hath good right to grant the hereditaments and premises hereby granted."

By a conveyance dated 28th November 1918, Ratanbai purported to convey the property at Falkland Road to one Nusserwanjee Cawasjee Shroff for a sum of Rs. 4,000. Nusserwanjee died subsequently, leaving a will whereof the defendants were the executrix and executors.

Bai Diwali died on 6th January 1917. On her death, plaintiff, the widow of Jethabai Javersha, who died in 1914, claimed to be entitled to the property in the hands of the defendants as the nearest reversionary heir of Jasvir Bhudar.

The plaintiff submitted that on a true construction of the will Bai Diwali took only a widow's estate in the said immoveable property and that she had no power to dispose of it beyond her life-time; that there was no legal necessity for sale by Bai Diwali; and that both the conveyances, dated 2nd June 1894 and 28th November 1918 respectively, were void and inoperative after Bai Diwali's life-time and were not binding on the plaintiff.

The defendants in their written statement put the plaintiff to strict proof of her relationship to Jasvir Bhudar and contended, *inter alia*, that on a true construction of the will Bai Diwali took the said property absolutely or that in any event she was competent to deal with the property by any act *inter vivos*; that Bai Diwali as the sole executrix of the will was competent

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to dispose of the property; and that in any view the purchaser from Bai Diwali had a complete title to the property.

Mehta, with him *Mulla*, for the plaintiffs.

B. J. Desai, with him *Sir Thomas Strangman*, Advocate-General, for the defendants.

The suit was tried by Kanga J. The following is the material portion of his Lordship's judgment.

KANGA, J.:—On the evidence of the plaintiff I hold that she is the reversionary heir of Jasvir Bhudar.

The next question that arises is, what interest did Bai Diwali take under the will of her husband? The clause in the will of Jasvir Bhudar whereby the residue is devised to Bai Diwali runs as follows:—

"As to whatever surplus of my property may remain over after my decease the (Malik) owner thereof is (shall be) my wife Diwali. She shall during her life-time apply and spend the same in a good way. As to the surplus that may remain over after the performance of her that is to say my wife's Karaj Avasar (funeral and subsequent ceremonies) all that shall be used for good purpose. Except my executrix no one else nor my heirs or representatives whatever shall have any right to or interest in my property."

It was contended by Mr. Desai that Bai Diwali took an absolute estate under the said will, and reliance was placed by him on the Privy Council decisions in *Lalit Mohun Singh Roy v. Chulchun Lal Roy*⁽¹⁾ and *Surajmani v. Rabi Nath Ojha*⁽²⁾. The word "Malik" is used by Jasvir Bhudar in his will in connection with the devise to Diwali. The said word, according to the said Privy Council decisions, imports full proprietary rights unless there is something in the context to qualify it. The fact that the donee is a Hindu widow is not sufficient for that purpose. If, therefore, there had been no qualifying words in the will, as the word "Malik" in

(1) (1897) L. R. 24 I. A. 76.

(2) (1907) L. R. 35 I. A. 17.

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connection with the devise of the residue to Diwali has been used, there would have been no difficulty in holding that Bai Diwali took an absolute estate. Mr. Mehta cited *Hirabai v. Lakshmibai*⁽¹⁾, but the word used in connection with the devise to the widow in that case was "heir" and not "Malik" and that decision has, therefore, no application to this case. The decision in *Harilal v. Bai Rewa*⁽²⁾, cited by Mr. Mehta, seems to be in point; for, there the Gujarati word in the will is translated "owner". But Mr. Mehta has not informed me, and I have not been able to find out, what the Gujarati word used in the will in that case was. My impression is that the Gujarati word used there was "*dhani*." I take it that the Gujarati word translated "owner" would import full proprietary rights and in the will before the Court in the case of *Harilal v. Bai Rewa*⁽²⁾ there was nothing to qualify the word translated "owner". The Court of Appeal in that case thought that the fact that the legatee was a Hindu widow was sufficient to qualify the word translated "owner", and accordingly held that the legatee in that case took a widow's estate. The authority of *Harilal v. Bai Rewa*⁽²⁾ is, in my opinion, considerably shaken by the above cited Privy Council decisions. However, the word used in this will, viz., "Malik", is the same as that used in the Privy Council decisions, and, unless there are some words to qualify it, I must hold that Bai Diwali took an absolute estate.

The qualifying words in the will which are relied upon by the plaintiff's counsel are—"During her lifetime she shall apply and spend the same in a good way." No doubt, the law requires that if there is an absolute gift in the first instance you must have very clear words to cut down the absolute estate; and it may

(1) (1887) 11 Bom. 573.

(2) (1895) 21 Bom. 376.

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be said that the words "during her life-time she shall apply and spend the same in a good way", used by the testator, express the object of his having made an absolute gift : *In re Jones; Richards v. Jones*⁽¹⁾. But taking into consideration the fact that the aforesaid words are used in reference to a Hindu widow and the fact that the qualifying words used in the will are very similar to those used in the will in *Mafatlal v. Kanialal*⁽²⁾, where the learned Judges of the Court of Appeal held that a life-estate had been created, I come to the conclusion that the words "during her life-time she shall apply the same and spend in a good way" cut down the absolute estate created by the use of the word "Malik" and hold that Bai Diwali took a life-estate and not an absolute estate.

The next question for consideration is, what are the nature and incidents of such life-interest ? Mr. Mehta has contended that whatever might be Bai Diwali's powers during her life-time over moveables, in immovables she had only a life-estate, and that she could only enjoy the income of the immoveable properties and nothing more. In the will itself there are no words to the effect that she was to use and spend the income only. The will says : "She shall during her life-time apply and spend the same", that is to say all the residue of the testator's property. The clause in the will containing the disposition of the residue of the testator's property is very much like the clause in the will in *Mafatlal's case*⁽³⁾, where, on the construction of the will, the Court of Appeal held that the testator's son's widow took a life-estate with full powers of disposition by acts *inter vivos*. Mr. Mehta contended that *Mafatlal v. Kanialal*⁽³⁾ was the case of a daughter-in-law and was not the case of a widow of the testator.

(1) [1898] 1 Ch. 438.

(2) (1915) 17 Bom. L. R. 705.

But, in my opinion, that does not make the slightest difference, because a daughter-in-law in the Bombay Presidency inherits only as a widow of a *gotraja sapinda* and is entitled, when she succeeds as an heir, to a widow's estate. She is in the same position as a Hindu widow. I, therefore, hold that Bai Diwali took a life-estate with uncontrolled powers of disposition by acts *inter vivos*: *Mafatlal v. Kanialal*⁽¹⁾ and *In re Pounder*⁽²⁾.

Mr. Desai further argued that even if Bai Diwali took a life-estate with no powers of disposition during her life-time, she being an executrix the conveyance to Ratanbai should be deemed to have been a conveyance by her as executrix. Bai Diwali took out probate in 1893 and conveyed the property to Ratanbai in June 1894. The conveyance (Exhibit B) does not mention in what particular capacity Bai Diwali sold and conveyed. All the various capacities are mentioned and then the conveyance says, "She the said Bai Diwali doth by these presents grant, bargain, sell, assign, release, convey and assure unto the said Ratanbai" the said property "and all the estate, right, title, interest, use, trust, inheritance, property, possession, benefit, claim and demand whatsoever of the said Bai Diwali in and to the said premises and every part thereof." Then, in the conveyance there is a covenant for title given by Bai Diwali. At the date of the conveyance (Exhibit B) the Falkland Road property, which is in dispute in this suit, was in the hands of Bai Diwali as executrix and she was competent as executrix to sell it to Ratanbai, who was a *bona fide* purchaser for valuable consideration. But it is argued that she did not sell or convey as executrix because the deed shows that she intended to convey as beneficial owner being under the

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impression that she took the property absolutely under the will of her husband. I am of opinion that the deed shows that Bai Diwali conveyed the whole property and all the title she possessed in the property, and that would include the right and title possessed by her as executrix : see *Gangabai v. Sonabai*⁽¹⁾ and *Bigraj Nopani v. Pura Sundary Dasee*⁽²⁾.

Mr. Mehta argued that in the petition for probate the value of the property was given at Rs. 10,800 and that the sale by Bai Diwali to Ratanbai was for Rs. 4,000, and, therefore, Ratanbai must have thought that the title was doubtful and paid to Bai Diwali a very low price. But as pointed out by Mr. Desai the value in the petition for the purposes of probate was arrived at by taking into consideration the fifteen years' rent of the property. As the lease was thought to be determinable at will no purchaser would pay anything more than the value of the building to Bai Diwali.

Mr. Mehta has further argued that it would be dangerous to hold that if a Hindu widow, who is also an executrix, sold and conveyed, she should be deemed as conveying as an executrix. I do not see any danger in so holding. The Legislature has expressly applied section 90 of the Probate and Administration Act to all Hindus, including Hindu widows, and under section 90 of the Probate and Administration Act a Hindu widow, who is appointed an executrix, would be entitled to sell as executrix the property left by her husband, if no restriction was imposed on her powers of disposing of the property by the will which appointed her executrix. There are no words used in this will imposing any restriction on the powers of the executrix. Therefore, there was nothing to prevent Bai Diwali selling and conveying this property as executrix. If she

(1) (1915) 40 Bom. 69.

(2) (1914) 42 Cal. 56.

could have sold as executrix under section 90 by so stating expressly in the conveyance, I do not see any difficulty in holding that she sold in all the capacities she possessed when the deed (Exhibit B) does not expressly say in what particular capacity she has sold but merely recites all the capacities. I, therefore, hold that the sale to Ratanbai should be deemed to be a sale by Bai Diwali as the executrix of the will of Jasvir Bhudar.

Suit dismissed with costs.

Solicitors for the plaintiff : Messrs. *Mehta Dalpatram & Lalji*.

Solicitors for defendants : Messrs. *Merwanji Kola & Co.*

Suit dismissed.

G. G. N.

ORIGINAL CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

MANAJI KUVERJI (APPELLANT AND APPLICANT) *v.* ARAMITA (RESPONDENT AND OPPONENT)².

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June 11.

Civil Procedure Code (Act V of 1908), Order XXI, Rule 89—Execution of decree—Decree absolute for sale of mortgaged property—Auction sale—Deposit in Court of the amount realized by sale but not the full decretal amount—Application to set aside the sale—Part-payment with an undertaking to pay full amount is not payment under Rule 89.

Under a decree absolute for sale the property of the applicant was directed to be sold and the nett proceeds to be applied towards the satisfaction of the decretal amount. The sale was held in due course ; and within thirty days from the date of the sale the applicant brought into Court not the amount for

² O. C. J. Appeal No. 9 of 1921 : Suit No. 733 of 1913.