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APPELLATE CIVIL.

31 C. 895=8 C. W. N. 821.

ing to indicate that he was insane when he made the will, unless a violent and abusive temper indicates insanity. Certain witnesses, who were examined on commission by the objector, say that the testator was insane, but their evidence is obviously partial and prejudiced. The witnesses who were examined in Court on both sides say clearly and positively that he was not insane. We therefore hold that the will cannot be invalidated upon this objection.

A further objection has been taken to the effect that the application has been made on behalf of the Empress of India by the Secretary of State for India; but this was never taken in the Lower Court nor in the grounds of appeal, and we cannot entertain it now. But even if it had been taken, we should not have been prepared to affirm it.

In the view we have expressed, the question of the relationship, which the objector alleges between himself and the testator, becomes immaterial, except perhaps for the purpose of considering whether it is likely that the testator should have made the will bequeathing his property to the Empress. There can be no doubt that he did execute the will, and no question has been raised before us on that point. We, therefore, decline to express any opinion as to the alleged relationship.

We thus find that the will was duly and validly executed by the testator, and that the applicant can prove the will by means of the certified copy put in. Hence this case falls under section 24 of the Probate Act (V of 1881). The Secretary of State is, therefore, entitled under that section to get letters of administration on the strength of the copy of the will, limited until the original will be produced. The appeal is, therefore, dismissed with costs.

Appeal dismissed.

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31 C. 895 (=8 C. W. N. 653.)

[895] ORIGINAL CIVIL.

Before Mr. Justice Henderson.

PARBATI BIBEE *v.* RAM BARUN UPADHYA.*

[27th May, 1904.]

Hindu Law—Will—Bequest to religious and charitable purposes.

A residuary clause of the will of a Hindu governed by the Mitakshara school of Hindu law was as follows:—

"And as to the rest and residue of my estate I give and devise the same to my executor in trust to spend and give away the whole thereof in charity in such manner and to such religious and charitable purposes as he may in his discretion think proper."

The bequest of the residuary estate was held to be a valid charitable bequest.

The direction to spend and give away the whole of the residue in charity governs the word that immediately follow and therefore the purposes for which the fund is to be spent must be charitable, although they may at the same time be religious.

Ramgopal Bonnerjea v. *Sibkissen Bonnerjea* (1) followed.

In re White (2), *Baker* v. *Sutton* (3), *Pocock* v. *Attorney-General* (4), *Morarji Cullianji* v. *Nenbai* (5), *Dev Shankar Naranbhai* v. *Motiram Jogeshvar* (6),

* Original Civil Suit No. 100 of 1904.

(1) (1859) 1 Bom. H. C. 76 note.
(2) (1898) 2 Ch. 41.
(3) (1836) 1 Keen 224.
(4) (1876) L. R. 3 Ch. D. 342.
(5) (1892) I. L. R. 17 Bom. 351.
(6) (1893) I. L. R. 18 Bom. 136.

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Runchordas Vandrawandas v. *Parbatibhai* (1), *Morice* v. *Bishop of Durham* (2), *Gangbai* v. *Thavar Mulla* (3), *Advocate-General* v. *Damothar Madhowjee* (4), *Blair* v. *Duncan* (5), *Sib Chunder Mullick* v. *Treepoorah Soondry* (6), and *Townsend* v. *Carus* (7) referred to.

[Ref. 75 P. R. 1907=168 P. L. R. 1908; 33 Bom. 122; 37 Cal. 128.]

THIS suit was instituted by the widow of one Debi Prosad Agarwalla against the executor appointed by his will for the construction of the said will. The only question tried in the suit **[896]** was what was the proper construction of the residuary clause in the will, which was as follows :—

" And as to the rest and residue of my estate I give and devise the same to my executor in trust to spend and give away the whole thereof in charity in such manner and to such religious and charitable purposes as he may in his discretion think proper."

The plaintiff contended that the gift of the residue was void for uncertainty.

Mr. *Dunne* and Mr. *B. C. Mitter* for the plaintiff.

Mr. *Garth*, Mr. *Chakrabarti* and Mr. *Knight* for the defendant.

HENDERSON, J. This suit was set down by consent for settlement of issues, and the only question, which I have to try, is what is the proper construction of the residuary clause in the will of the deceased Debi Prosad Agarwalla, a Hindu governed by the Mitakshara School of Law, who died in June last year.

The will is in the English language and was prepared by an English solicitor.

The clause is as follows :—

" And as to the rest and residue of my estate I give and devise the same to my executor in trust to spend and give away the whole thereof in charity in such manner and to such religious and charitable purposes as he may in his discretion think proper."

The executor appointed by the will is a Hindu.

On behalf of the plaintiff, who is the widow of the testator, it is contended that the gift of the residue is void for uncertainty.

Had the testator been an Englishman or a person governed by the Succession Act, it was, I understood, admitted that the residuary clause in the will would create a perfectly valid charitable bequest. Among western lawyers the term " charity," has acquired a more or less definite meaning and a bequest for religious purposes is held to be *prima facie* a bequest for charitable purposes. The leading cases on this point are referred to in *In re White* (8). A gift therefore to such religious and charitable purposes as the testator's trustee or executor may think proper is a good charitable bequest. **[897]** See *Baker* v. *Sutton* (9), *Pocock* v. *Attorney-General* (10). Other cases were quoted to the same effect, but it is unnecessary to refer to them in detail.

The will before me is the will of a Hindu. The social and religious systems in England and in India widely differ in many respects and therefore, it is said, that in construing the words "religious purposes" the Court should be guided not by principles which have come to be applied to the will of an Englishman, but by what a Hindu may be supposed to mean when he uses these words. It is obvious, it is said, that when a

(1) (1899) L. R. 26 I. A. 71.
(2) (1805) 10 Ves. 522.
(3) (1868) 1 Bom. H. C. 71.
(4) (1859) 1 Bom. H. C. 76 note.
(5) (1902) A. C. 37.
(6) (1842) 1 Fulton 98.
(7) (1844) 3 Hare 257.
(8) (1893) 2 Ch. 41, 52.
(9) (1836) 1 Keen 224.
(10) (1876) L. R. 3 Ch. D. 342.

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Hindu speaks of religious purposes he does not necessarily mean to convey quite the same idea as a person governed by the Succession Act would in using the same expression.

In a number of cases in Bombay, it has been held that a devise or bequest to *dharam*, which is frequently translated religion or religious purposes, is void for uncertainty. See *Morarji Cullianji* v. *Nenbai* (1), *Dev Shankar Naranbhai* v. *Motiram Jageshvar* (2). In a recent case *Runchordas Vandrawandas* v. *Parvatibhai* (3), the cases in which this had been laid down were referred to generally with approval by the Privy Council. In that case the word *dharam* in the will is rendered in the translation set out in the report as "charitable or religious purposes." Their Lordships, after referring to the case of *Morice* v. *Bishop of Durham* (4), where a bequest to charitable and benevolent purposes was held to be too vague an indication of the testetor's intention to be a valid gift to charity, say at p. 81:—"In Wilson's Dictionary '*dharam*' is defined to be law, virtue, legal or moral duty, and the language of Lord Eldon (in the case referred to) applies as strongly, if not more so, to *dharam* as to the words used in the English cases. The objects which can be considered to be meant by that word are too vague and uncertain for the administration of them to be under any control."

31 C. 895=8 C. W. N. 653.

In *Gangabai* v. *Thavar Mulla* (5) the testatrix was a Khojo Mahomedan and her will was in the English language and drawn [898] by an English solicitor. A gift of "one-fourth to be disposed of in charity as my executors shall think fit," was held to be a valid charitable gift. The Court was asked to admit evidence to show that in giving her instructions for this particular bequest the testatrix used the word *dharam* and that the draftsman had rendered this "charity," but this was not allowed. The Chief Justice said:—"The testatrix was not obliged to make her will in English, but having selected that language to convey her intentions under the safeguard of an English solicitor, the will must, after thirteen years, and in the absence of any allegation of deception or fraud, be now taken to have intended what is clearly expressed in it. Her general object was charity, and the Court cannot be called upon to speculate upon the particular views which she might have had with reference to the classes of objects upon which that charity should be conferred, beyond what she has thought proper to express by the language which she has employed."

In a note to that case at p. 76, a judgment of the same learned Judge in the case of *Advocate-General* v. *Damothar Madhowjee* (6) is set out and there the same view was taken. In that judgment the various meanings of the word *dharam* are given on the authority of Dr. Wilson, and it appears that the expression includes many objects, which do not come within the term "charitable" as understood by western lawyers. There is no warrant for reading the words religious purposes in the present will as meaning the same as *dharam*.

On the question of construction it is contended on behalf of the plaintiffs that the testator, having directed his executor "to spend and give away the whole of the residue of his estate in charity," merely goes on in the words that follow to explain what he means by charity—that is to say, "religious and charitable purposes." It is said that the words religious purposes ought not in the case of the will of a Hindu, as they

(1) (1892) I. L. R. 17 Bom. 351.
(2) (1893) I. L. R. 18 Bom. 136.
(3) (1899) L. R. 26 I. A. 71.
(4) (1805) 10 Ves. 522.
(5) (1863) 1 Bom. H. C. 71.
(6) (1857) 1 Bom. H. C. 76 note.

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would be in the case of an Englishman, to be construed as meaning charitable purposes, and this on the ground that in the mind of a Hindu religious purposes include many objects, which are in no sense charitable, even in the wide sense in which that word is used under English law. If the [899] words be taken as meaning something more than and different from charitable purposes, then it is contended that the principles applied in the case of *Moriće* v. *Bishop of Durham* (1) and in *Blair* v. *Duncan* (2) where, in the one case a bequest to "charitable and benevolent purposes," and in the other a bequest to "charitable or public purposes," were held to be bad for uncertainty, should be applied.

In *Sib Chunder Mullick* v. *Tripoora Sundari* (3) where the bequest was "for pious acts to procure me future bliss," the Supreme Court held that the trust was too indefinite for the Court to understand and carry out.

The question raised is not free from difficulty and, so far as I know, it does not appear to have been raised before, but in the view which I take as to what is the proper construction of the residuary bequest in the will before me, it is not really necessary to decide it. It appears that in the case of *Advocate-General* v. *Damothar Madhowjee* (4) the case *Ram Gopal Bonnerjea* v. *Sibkissen Bonnerjea* (5), was quoted. In that case a bequest of the annual income of certain property "to be devoted to religious and charitable purposes under the direction of my executor" was declared to be a valid charitable bequest. The judgment is not now with the record, but from the newspaper report of the case which was referred to in the Bombay case, it would appear the Supreme Court proceeded upon the authority of *Baker* v. *Sutton* (6) and *Townsend* v. *Carus* (7). It does not appear that the point raised before me was taken then. The case, however, is an authority for holding that the bequest in the present case, even if it be treated as a bequest for religious and charitable purposes, is a good charitable bequest.

In my opinion, however, the direction to spend and give away the whole of the residue in charity governs the words that immediately follow and, therefore, the purposes for which the fund is to be spent must be charitable though they may at the same time be religious. Upon this construction, the executor will not be [900] justified in applying the subject of the trust to objects which are not charitable.

In that view I declare the bequest of the residuary estate of the testator to be a valid charitable bequest, but having regard to the nature of the trust, there ought, I think, to be a scheme framed for the administration of the trust, due regard being had, in framing it, to the fact that the testator was a Hindu. The executor is willing that a scheme be submitted.

Instead therefore of dismissing the suit, I will direct that it be referred to the Official Referee to prepare a scheme, and I give the executor the conduct of the proceedings. Under the circumstances I think that the plaintiff ought to have her costs of the suit out of the estate as also the executor in his case as between attorney and client and I direct accordingly.

Attorney for the plaintiff *Subodh Chunder Mitter*.

Attorneys for the defendant. *Leslie and Hinds*.

(1) (1805) 10 Ves. 521.
(2) (1902) A. C. 37.
(3) (1842) 1 Fult. 98.
(4) (1859) 1 Bom. H. C. 76 note.
(5) (1859) 1 Bom. H. C. 76 note.
(6) (1836) 1 Keen 224.
(7) (1844) 3 Hare 257.