

Kulsambai and others - - - - - *Appellants*

v.

Khensabai and others - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT BOMBAY.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 2ND DECEMBER, 1919.

Present at the Hearing :

LORD SHAW.

LORD PHILLIMORE.

SIR JOHN EDGE.

MR. AMEER ALI.

SIR LAWRENCE JENKINS.

[*Delivered by* LORD PHILLIMORE.]

The suit in which this appeal was brought was instituted for the purposes of obtaining administration of the estate of one Karmali Soorjee, a Khoja resident of Bombay, who died on the 1st January, 1880, having made a will, dated the 15th December, 1879, and the point on which the appeal has been brought turns upon the consideration of certain clauses in his will by which he gave certain benefits to his eldest son and to the wife and children of the son. The matter has been argued before their Lordships as a pure point of construction.

At the time of the will and of the testator's death his eldest son, Alibhai, had a wife, Ruttonbai, and they had two sons and two daughters. Before the testator's death another grand-daughter was born, but she died in infancy. After the testator's death Alibhai married a second wife, but had no children by her. The younger of the two sons of Alibhai attained the age of twenty-one in 1891. The wife, Ruttonbai, died before her husband, and Alibhai died in 1898.

The testator had another son and a daughter who survived him, and for whom he made separate provision.

The will starts by a direction that the trustees are to set apart Rs. 3,000, and pay the income to Alibhai for life, with a provision against his disposing of it, the sum so set apart to fall

into residue at Alibhai's death. Then follow the clauses to be construed, omitting some portions which are not material.

" I direct that my said son Alibhai Karmali who has given me a release, but whom I had allowed to reside in my house together with his wife and children, shall three days after my death quit the said house and remove therefrom together with his family, and my said trustees or the survivor or survivors of them shall not allow the said Alibhai Karmali to remain in my said house after the lapse of three days after my death. I direct my said trustees or the survivor or survivors of them to set apart a sum of Rs. 80,000 and the house No. 83 situate at Dhoorga Moholla which was lately purchased by me from one Ebrahim Ramji, and I declare that my said trustees or the survivor or survivors of them shall invest the said sum of Rs. 80,000 in such manner as they, she or he may think proper, and shall out of the net income or produce thereof give to my daughter-in-law Ruttonbai, the wife of the said Alibhai Karmali, every month a sum of rupees not exceeding Rs. 200 for the maintenance and household expenses of herself, her husband the said Alibhai Karmali and of their children present and future, if and so long as my said son Alibhai Karmali should live with the said Ruttonbai my daughter-in-law and her children, and if the said Alibhai Karmali live separate from his wife the said Ruttonbai and family, then I direct my said trustees or the survivor or survivors of them to pay Rs. 150 a month to my said daughter-in-law Ruttonbai for the purposes aforesaid and the sum of Rs. 50 to the said Alibhai Karmali, and my said trustees or the survivor or survivors of them shall invest the surplus of such produce or income in such manner as they shall think proper, such surplus to be spent on the marriage of the children of my said son Alibhai Karmali by the said Ruttonbai. I declare that my said daughter-in-law Ruttonbai shall be at liberty to keep charge of and use and enjoy the ornaments which I have made for her but she shall have no power to dispose of them or any of them, and I direct that the said ornaments shall on the death of the said Ruttonbai be equally divided amongst the wives of the sons of the said Alibhai Karmali by the said Ruttonbai I declare that after my said son Alibhai Karmali, his wife and children have removed from my house they shall be allowed to reside in the said house No. 83 situate at Dhoorga Moholla, and I direct that on the youngest son of my said son Alibhai Karmali either by the said Ruttonbai or any other lawful wife attaining the age of twenty-one years, my said trustees or the survivor or survivors of them shall convey to them jointly the said house No. 83 and shall divide amongst them equally the said sum of Rs. 80,000 and the accumulations thereof if any for their sole and absolute use and benefit free from all control, power and authority of my said trustees or any of them or of their father the said Alibhai Karmali."

It should, perhaps, be added that later on in the will there is a bequest of Rs. 10 a month to each of the two daughters of Alibhai, to commence upon their marriage and to last during their lives free of the control of their husbands.

Disputes having arisen, the two daughters of Alibhai instituted this suit on the 16th February, 1916, and it appearing that a preliminary question to be decided would be whether or not they were sharers in the capital sum of Rs. 80,000 and the house, No. 83, that issue was first determined; and Kemp, J., before whom the matter came, being of opinion that the daughters had no share in the capital sum and the house, made an order dismissing their claim. On their appeal to the High Court in its appellate jurisdiction, Scott, C.J. and Heaton, J. reversed this

decree, and declared that " the plaintiffs are entitled to the benefit of the directions contained in the will of Karmali Soorjee, mentioned in the plaint in the above suit regarding the house No. 83 at Doorga Moholla, and the sum of Rs. 80,000 and the accumulations thereof, and that the word ' them ' referred to in the said directions in the said will refers to Alibhai Karmali, his wife Ruttonbai and their children." and remanded the suit with this direction for further proceedings in the Court of First Instance. From this decree the representatives of the eldest son of Alibhai have brought the present appeal.

The part of the will under consideration is not well drawn, and it looks as if some contingencies had not been thought out, with the result that there are curious consequences. No provision is made for any other wife of Alibhai or the children of any such marriage, and yet the date when the capital is to be distributed is fixed with reference to the youngest son of Alibhai, either by Ruttonbai or by any other lawful wife attaining the age of twenty-one. It is evident that the intention was to deal with the income only during minority of the children, and yet the date of distribution is fixed by the quasi majority of the youngest son and not by the quasi majority or marriage of the youngest daughter. If the daughters are to share, there is no provision that their property is to be free from the control of their husbands, and yet there is a careful provision to this effect with regard to the considerably smaller sum of Rs. 10 a month. But what is still more noticeable is the provision that the father, Alibhai, shall have no control over house and capital when the time comes for their conveyance to the beneficiaries. As till Alibhai died it could not be certain whether or not he would have another son by any wife whom he might marry, the period of distribution could not be ascertained till his death, though it might have arrived, as in the particular case it did, many years before his death.

The fact, however, that this provision is nugatory does not prevent its language being some guide to the construction of the whole clause ; and it was contended on behalf of the appellants that Alibhai cannot be his own father, nor the father of his wife, and that therefore the word " their " in this clause must mean either the children or the sons ; and it was suggested that for other reasons it must mean the sons, and that if this be so, the word " them " in the clause of conveyance must equally mean sons and sons only.

The argument is of some force as far as it tends towards an exclusion of Alibhai and his wife from the class of beneficiaries to whom the property is to be conveyed. But even so, it would be a long step onward to conclude that the beneficiaries were to be restricted to sons only. However, their Lordships are of opinion, agreeing with the reasons given by the Judges on appeal, that the language of the clause about control does not operate to destroy the plain language of the clause of conveyance : " After my son, his wife and children have removed from my house they shall be allowed to reside in house No. 83, and I direct

that (on a certain event) my trustees shall convey to them jointly the said house and shall divide among them equally the said sum." This, omitting immaterial words, is the language of the bequest, and the "they" and the "them" must be the same throughout. If the control clause had ever come into operation it would probably have been right to read it as meaning that the beneficiaries other than Alibhai should be free from his control, and that the words "their father" was an inaccurate description, a *falsa demonstratio* of Alibhai.

In the Court of First Instance and in the argument before their Lordships, stress was laid upon the improbability of a Khoja making such a disposition of his estate as would give his daughters equal shares with his sons, and that free from the control of their husbands. The topic is one which can legitimately be introduced, but the argument from it only goes a certain way. As their Lordships observed of similar arguments in the case of *Venkata Narasimha Appa Row v. Parthasarathy Appa Row* (41 J.A. 51):—

" . . . all this is solely as an aid to arriving at a right construction of the will, and to ascertain the meaning of its language when used by that particular testator in that document. So soon as the construction is settled, the duty of the Court is to carry out the intentions as expressed, and none other."

Some other arguments, some of them drawn from other portions of the will, have been used in support of one or other construction. Their Lordships think it unnecessary to refer to them in detail. They have given consideration to them all, and in the result they have arrived at the conclusion that the decision of the Court of Appeal was right, and that the word "them" in the clause of conveyance refers to Alibhai, his wife Ruttonbai and their children, and they will humbly advise His Majesty that this appeal should be dismissed with costs.

In the Privy Council.

KULSAMBAL AND OTHERS

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LITIGATED BY LORD PHILLIMORE.

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