Privy Council Appeal No. 123 *of* 1919.

Bhaidas Shivdas - - - - - - - - *Appellant*

v.

Bai Gulab and another - - - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT BOMBAY.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 25TH OCTOBER, 1921.

Present at the Hearing:

LORD BUCKMASTER.
LORD ATKINSON.
LORD CARSON.
SIR JOHN EDGE.

[*Delivered by* LORD BUCKMASTER.]

This is an appeal against a decree dated the 23rd March, 1917, of the High Court of Judicature at Bombay (Appellate Civil Jurisdiction), affirming a decree dated the 8th September, 1916, of the High Court in its Ordinary Original Civil Jurisdiction.

The question raised for determination arises on the construction of the will dated the 6th August, 1894, of one Nathoo Moolji who died on the 8th December, 1894.

The appellant is the husband of one of the two daughters of the testator, who predeceased her mother, the testator's widow. The respondents claim under the other daughter who survived her mother.

At the date of the will there were living the testator's widow, his two daughters, and the widow of a pre-deceased son. The two daughters were named Jamnabai and Diwali. Diwali died on the 13th May, 1906, and the testator's widow on the 15th August, 1911.

In these circumstances the appellant claims as the husband of Diwali that according to the true construction of the will the two daughters took a vested interest in the testator's residuary estate, which was not divested by reason of the death of one of the daughtersbefore the death of the widow. The history of the suit has been fully dealt with by their Lordships when this appeal was formerly before them, and need not be repeated.

The will was made in the Gujarati language, and in the translation is divided into clauses. By clause 2 the testator appoints his wife as his sole executrix. In the next clause, after stating that as he has no son he appoints his wife to be his heir; and the clause continues in these words:—

> "And I constitute her the owner. And as to whatever property there may remain after her death my wife shall leave the said property to my two daughters in such manner as she may like (either) by making a 'will' or by making (some) other instrument. Of my two daughters one named Bai Jamnabai was married to Shah Haridas Hemchand, but as he subsequently died she has now become a widow. To her and to (my) other daughter Bai Diwali who has been married to Shah Bhaidas Shivdas (*i.e.*) to both of them my wife shall give (my) property in such manner as (she) may like."

By later clauses of the will the testator referred to powers that he desired his wife to enjoy; for example, by clause 6 he expressly states that he gives his wife authority to do what she thinks right with the profits and the ready moneys of a shop where he carried on business, and further to continue in partnership with the partners if she so desired. By clause 18 he provides that after there have been defrayed out of the rents of certain specified immoveable property, the expenses in connection with a religious object, for which he had made provision, the wife should apply the surplus for her maintenance and use and for the maintenance and use of her daughters if they were living with her, and if the surplus were insufficient she should deal with the moveable and immoveable properties in such manner as she thought fit. By clause 20, again, he gave express power to his wife to mortgage, lease, sell and use the properties. Finally by clause 23 he provided that after the death of his wife his daughters should be named executrixes, and he gave them authority to deal with or manage the whole of his property and effects. There is no dispute that the word that was used in clause 3 as the original word of gift was the word "malik" which could be appropriately used to constitute the wife absolute owner. It is not that the word is a "term of art," it does not necessarily define the quality of the estate taken but the ownership of whatever that estate may be; and in the context of the present will their Lordships think the estate was absolute. At the time when the will was executed it may well have been that whoever drew the will was aware that at that time words of absolute gift in favour of a Hindoo widow might not be supposed capable of conferring upon her a power of alienation, for in the case of *Mussammat Surajmani and others* v. *Rabi Nath Ojha and another* which ultimately came before

this Board (reported in 35 I.A. at page 17) we find that the High Court had ruled :—

> " that under the Hindu law, as interpreted up to the present in the case of immoveable property given or devised by a husband to his wife, the wife has no power to alienate, unless the power of alienation is conferred upon her in express terms."

The decision in 35 I.A. showed that that provision was no longer sound and that if words were used conferring absolute ownership upon the wife, the wife enjoyed the rights of ownership without their being conferred by express and additional terms, unless the circumstances or the context were sufficient to show that such absolute ownership was not intended. If clause 3 stood by itself it would, their Lordships think, be difficult to dispute that whatever the testator desired with regard to the disposition of his property after the death of his wife he had not expressed his wishes in such a manner that they bound the property. The words under which the appellant claims are words which only attach to whatever property there may remain after the death of the wife. Without for the moment considering whether the desire expressed by the testator is expressed in a form that makes her disposition of it mandatory or no, it is sufficient to say that if that clause stood alone the principle stated in the case of *Horwood* v. *West* in the Simons and Stuarts' Chancery Reports at page 387, would be applicable to this will as it would to a will in England. The Vice-Chancellor says at page 389 :—

> " It is essential to the execution of a trust that the subject should be certain ; and if this testator intended that his wife should, at her pleasure, during her life, dispose of the property which he left to her, and that his recommendation should extend only to what, if anything happened to remain of his property at her death undisposed of by her, then there is no trust to be administered by this court."

But the appellant points out with considerable force that clause 3 does not stand by itself ; but that the clauses referred to, and most notably clauses 18 and 23, are in their terms inconsistent with the view that the provisions of clause 3 constituted the wife the absolute owner. Their Lordships are very far from saying that there is not force in this argument ; but so far as clause 18 is concerned it should be remembered that even there there is a provision that the surplus, after the property has been used for maintenance in the manner suggested, is to remain with the wife for her maintenance and use, and power is given to her to deal with the immoveable or moveable property as she may think fit. Again, with regard to clause 23, the appointment of the daughters as executrixes of the property, if in fact there had been a gift to them after the widow's death would be quite unnecessary. The only purpose for creating them executrixes would on either hypothesis be to see that the religious purpose to which part of the property had been devoted and a certain beneficial trust given to

the widow of the son should be carried out. If and so far as they were absolute owners it had little value.

Their Lordships therefore think that these subsequent clauses in the will are not sufficient to displace the language of clause 3, fortified by the powers given in clause 20, and by that language there is no trust created in favour of the two daughters of the testator. In forming this conclusion their Lordships have not considered the serious difficulty that is placed in the way of the appellant by the judgments of the court from which this appeal has proceeded. In the Court of Appeal one at least of the judges was thoroughly acquainted with the language in which this will is drawn, and he took the view that the actual words used in clause 3 suggesting how the property should be left after the death of the testator's widow were in themselves inadequate to do anything more than to express a wish and did not create an obligation. Their Lordships have not dealt with that part of the case, because in their opinion the matter is better decided upon the principle to which reference has already been made, viz.: even assuming it was intended to create a trust and the words were sufficient for that purpose the subject matter on which the trust is to operate is by the 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.

In the Privy Council.

BHAIDAS SHIVDAS

v.

BAI GULAB AND ANOTHER.

DELIVERED BY LORD BUCKMASTER.

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