Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Bai Motivahoo v. *Bai Mamoobai and another, from the High Court of Judicature at Bombay; delivered 20th March* 1897.

Present:

LORD WATSON.
LORD HOBHOUSE.
LORD DAVEY.
SIR RICHARD COUCH.

[*Delivered by Sir Richard Couch.*]

The question in this appeal arises in a suit brought by the Respondent Mamoobai against the Appellant and Dossa Moorarji and Khimji Lukhmidas the other Respondent for the administration of the estate of Jaitha Ludhani a Hindu merchant of Bombay and for the construction of his will. He died in November 1869; the will is dated the 18th of October 1869, and by it the Defendants are appointed his executors and executrix. Having in the previous clauses directed Rs. 35,000 to be expended on his funeral ceremonies, and given various legacies, the testator in the seventh and eighth clauses says:—

"7. Agreeably to what is written above the whole of the "money which I have resolved to be paid or expended on "account of the 'legacies' and for the expenses of my funeral "ceremonies for 12 months and on account of the Sadavarat "(a religious institution) and for other Dharam (religious or "charitable) purposes according to the above particulars is to be "paid out of my funds in ready cash but whatever my (landed) "'estate' that is immovable property there is, is not to be "touched by my Vakils (executor or representative) or "Vakilatan (executrix or representative) for these purposes,

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" but after my death shall have taken place a 'trust deed' is " to be made as soon as practicable of my garden dwelling- " house, rope-walk warehouses (or godowns) houses stables " lands and whatever other immovable property that is " (landed) 'estate' there is belonging to me in the island of " Bombay and the whole is to be invested in a 'trust.' As " to the 'trustees' thereof my two Vakils and Vakilatan and " in conjunction with them my friend Set Thakar Khatow " Makonji four persons jointly are duly to become 'trustees,' " and these 'trustees,' four in number, are to collect the income " of the whole property and, after deducting therefrom the " expenses connected therewith, money is to be paid out of " the net income, whatever it may amount to, for the personal " expenses of my wife Motivow and my daughter Mamoo, and " for the children of my daughter Mamoo after her death, " agreeably to the fourteenth and fifteenth clauses of this " 'will', and after paying the same whatever income may " remain is to be used for the purposes of my wife Motivow " and my daughter Mamoo and her children in such manner " as my 'trustees' think proper.

" 8. In the seventh clause mentioned above it is resolved to " invest the whole of my immovable property in 'trust' and " to collect the income thereof but the 'trustees' are not to " demand any rent for the place out of my property which " may be used as a residence for my family and should any " of the 'trustees' depart this life the surviving 'trustees' are " to appoint another 'trustee,' and after the death of my " daughter Mamoo should there be any children born of the " womb of my daughter the 'trust' is to stand valid during " the lifetime of such children. Afterwards the heirs of the " said children are duly to apportion and receive this property. " But should there be no children born of the womb of my " daughter Mamoo, then after the death of Mamoo and of " my wife Motivow, this 'trust' is to become void, and this " property is to be delivered to such persons as my daughter " Mamoo may direct it to be delivered by making her will."

The eighteenth clause relates to the movable property. After providing for the birth of a son or daughter of Mamoo it says :—

" According to these particulars (and) agreeably to what is " written above, my property is to be apportioned and dis- " tributed; and should no child be born of the womb of my " daughter Mamoo (which may God forbid), in that event, " on the death of my wife Motivow and of my daughter Bai " Mamoo taking place, my movable property is to be expended " on such good dharam (religious or charitable works) in my " name as may continue as long as the moon lasts; and should " it appear that anyone would prevent this property from " being given away for dharam (religious or charitable pur- " poses) by reason of the rules of the Sarkar, the same is to be

" given to such person as my daughter Mamoo may direct it " to be given by making her will."

The nineteenth clause relates to the jewels of the testator and his wife and is similar to the eighteenth.

After a reference to the Commissioner of the Court to take accounts and make inquiries, and his making his certificate and report, the suit was heard on the original side of the High Court by Mr. Justice Farran who on the 19th December 1891 made a decree declaring among other matters " that the gift contained in para. " eight of the said will to such person as the " Plaintiff Mamoobai may direct by her will is " valid but this Court cannot and doth not " determine upon whom the property referred to " in the said eighth clause will devolve in case " the Plaintiff Mamoobai shall die without " making or leaving a will." In his judgment the learned Judge says that to all intents and purposes there was an absolute gift to Mamoobai; that the persons to whom the property was given took it from her and not from the testator, that Mamoo became the owner. He refers to Theobald on Wills p. 352 and says that *Robinson* v. *Dungate*, 2 Vernon 180 and *Hixon* v. *Oliver*, 13 Ves. 108 were cases very like the present. Their Lordships are unable to agree with the learned Judge in holding that there was an absolute gift. The case in Vernon has been questioned by a great authority. (Sugden on Powers 109 8th ed. referring in a note to *Buckland* v. *Barton*, 2 H. Bl. 136 and *In re Mortlock's Trust*, 3 K. and J. 456.) And in *Hixon* v. *Oliver* the gift was to the testator's wife " to be disposed of as she " thinks proper to be paid after her death." It was not a power, but a disposition vesting the whole interest in the legatee but deferring the payment, and is distinguishable from the present case. Further, it is to be observed that the declaration

in the decree is not consistent with the judgment which seems to require a declaration that Mamoo was absolutely entitled. Motivahoo appealed against the decree and the appeal was heard before Sir Charles Sargent C.J. and Bayley J. who on the 15th March 1895 ordered the decree to be amended by inserting the words "in existence at "the date of the death of the said testator" in two clauses of the decree after the words "in "para. eight of the said will to such person," and confirmed the decree so amended. Their Lordships have not before them the reasons of the learned Judges for making this amendment. It is obviously made for the purpose of limiting the exercise of the power; but it is open to the objection that it inserts in the power words which are not in the will. Their Lordships propose to make a verbal variation in this part of the decree.

The question in the present appeal is whether such a power in the will of a Hindu is valid.

In *Sreemutty Soorjeemoney Dossee* v. *Denobundoo Mullick*, 9 Moo. I.A. 123, Lord Justice Knight Bruce, in delivering the judgment of this Board, said "whatever may have formerly been "considered the state of that (the Hindoo) law "as to the testamentary power of Hindoos over "their property, that power has long been "recognized and must be considered as com-"pletely established. This being so, we are to "say whether there is anything against public "convenience, anything generally mischievous "or anything against the general principles of "Hindoo law, in allowing a testator to give "property whether by way of remainder or by "way of executory bequest (to borrow terms "from the law of England) upon an event which "is to happen, if at all, immediately on the close "of a life in being. Their Lordships think that "there is not; that there would be great general "inconvenience and public mischief in denying

" such a power; and that it is their duty to " advise Her Majesty that such a power does " exist." It appears from the report cited (p. 129) that this had also been held by the Supreme Court at Calcutta. In the previous part of the judgment of the Board, the gift over had been held to be on a failure of male issue of any of the testator's five sons at the time of the death of that son. The property was first given to the sons as a joint Hindu family absolutely, and the question whether the first estate could be only an estate for life did not arise. Before this judgment it had been held by this Board (8 Moo. I.A. 85) that the extent of the power of testamentary disposition by Hindus must be regulated by the Hindu law, and subsequently, in the judgment in *Beer Pertab Sahee* v. *Rajender Pertab Sahee*, 12 Moo. I.A. 1 it is said (p. 37) " It is too late to contend that because the " ancient Hindoo treaties make no mention of " wills, a Hindoo cannot make a testamentary " disposition of his property. Decided cases, too " numerous to be now questioned, have de- " termined that the testamentary power exists, " and may be exercised, at least within the " limits which the law prescribes to alienation " by gift *inter vivos*."

The leading case on Hindu wills is the Tagore case, 9 Bengal Law Rep. 377 and L.R. Ind. App., Sup. Vol. 47. It is unnecessary to refer to the particulars of the will in that case. Two rules applicable to the will now under consideration are laid down in the judgment of the Committee; one is " that a person capable of taking under a " will must be such a person as could take a gift " *inter vivos* and therefore must either in fact " or in contemplation of law be in existence " at the death of the testator " p. 70). The other is that the first taker under the will may take for his lifetime (pp. 66, 80). And it is said

(p. 69) " The analogous law in this case is to be " found in that applicable to gifts and even if " wills are not universally to be regarded in all " respects as gifts to take effect upon death, they " are generally so to be regarded *as to the* " *property which they can transfer and the* " *persons to whom it can be transferred.*" These appear to their Lordships to be the limits of the analogy between wills and gifts *inter vivos* which have been recognized. They are not aware of any authority in support of Mr. Mayne's contention, as they understood it, that in the present case there would not be such a transfer of possession to the person who would take by virtue of the power as is necessary to enable it to be validly exercised. It appears to them to follow, from the first taker being allowed to have only a life-interest, that his possession is sufficient to complete the executory bequest which follows the gift for life. The result of the decisions is that, according to settled law, if the testator here had himself designated the person who was to take the property in the event of Mamoo dying childless, the bequest would be good. The remaining question is whether his substituting Mamoo and giving her power to designate the person by her will is contrary to any principle of Hindu law. There is an analogy to it in the law of adoption. A man may by will authorize his widow to adopt a son to him, to do what he had power to do himself, and although there is here a strong religious obligation, their Lordships think that the law as to adoption shows that such a power as that now in question is not contrary to any principle of Hindu law. Further, they think that the reasons which have led to a testamentary power becoming part of the Hindu law are applicable to this power, and that it is their duty to hold it to be valid. But whilst saying this they think they ought also to say

that in their opinion the English law of powers is not fit to be applied generally to Hindu wills. Their Lordships will humbly advise Her Majesty to affirm the decree of the Appellate Court with a merely verbal variation for the purpose of more clearly expressing the evident intention of the High Court. That variation is as follows. Instead of the declaration contained in the decree relating to paragraph 8 of the will and of the declaration relating to the testamentary power given to the Plaintiff Mamoobai by paragraph 18 of the will insert a declaration that the gifts contained in these paragraphs respectively to such persons as Mamoobai may direct by making her will are valid gifts so far as the same may be directed to be delivered to persons who were in existence either actually or in contemplation of law at the death of the testator Jaitha Ludhani and not further or otherwise but that this Court cannot and doth not determine upon whom the property subject to such powers respectively will devolve if and so far as such powers are not validly exercised. The Courts below have ordered that the costs of all parties as between solicitor and client should be paid out of the estate of the testator and their Lordships make a like order as to the costs of this appeal.