

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Damoderdas Tapidas v. Dayabhai Tapidas and Karsondas Dayabhai, from the High Court of Judicature at Bombay; delivered the 1st April 1898.*

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Present :

LORD HOBHOUSE.

LORD MACNAGHTEN.

SIR RICHARD COUCH.

[*Delivered by Sir Richard Couch.*]

The suit in this appeal was brought to obtain a judicial construction of the will of Tapidas Varajdas a Hindu inhabitant of Bombay, who died on the 31st March 1886, leaving a widow Navivahoo and two sons, the Respondent Dayabhai and the Appellant Damoderdas, and two daughters. Dayabhai had then two sons living; Damoderdas had two infant sons who died before the date of the will. The widow Navivahoo died on the 12th August 1887.

The will is dated the 26th of May 1885 and is a long document in Gujerati, divided into numbered paragraphs. The 8th 13th and 18th are the only parts of it which it is necessary to refer to in this appeal.

The suit was brought by Dayabhai against Damoderdas and Karsondas, one of the sons of Dayabhai, and the plaint, after stating the making of the will and the death of the testator, stated that the residue of his estate, except the house and land at Surat, had

been divided and was then being enjoyed in severalty by the Plaintiff and the First Defendant, the house and land at Surat being enjoyed by them jointly. In the written statement of Damoderdas the facts thus set forth in the plaint were admitted, and it was contended that he and Dayabhai took an absolute estate as tenants in common in the house mentioned in Clause 8 and in the residue of the testator's estates under Clauses 13 and 18. Karsondas in his written statement contended that he was absolutely entitled to the houses and the residue of the property referred to in Clauses 8, 13 and 18 after the deaths of Dayabhai and Damoderdas.

The original Court and the Appellate Court have both held that Damoderdas and Dayabhai took a life interest only in the houses as tenants in common, and that the ulterior interests therein, not being validly disposed of, fell into the residue. On the argument of the appeal before their Lordships this was not disputed and the contention related only to the construction of Clauses 13 and 18. Section 82 of "The Indian Succession Act 1865" enacts that where property is bequeathed to any person he is entitled to the whole interest of the testator therein unless it appears from the will that only a restricted interest was intended for him. This Section is by Section 2 of "The Hindu Wills Act 1870" made to apply to wills made by any Hindu in the town of Bombay and their Lordships have some doubt whether in the 8th clause it sufficiently appears that the sons were to take only an estate for life. It is however in the view which their Lordships take of Clauses 13 and 18 unnecessary to determine it.

In the 13th clause the testator after referring to the business carried on in the name of Shah

Tapidas Varajdas and Company in which he had two shares and Damoderdas one share and his intention to make Dayabhai a partner says that in the event of his decease the sons remaining joint shall carry on the business their shares being half and half and the commission is to be received by them in equal shares "But if my son Bhai Damoderdas should not make Dayabhai a partner in accordance with what is written above and should not annually give him an equal moiety out of the commission money of the Alliance Cotton Manufacturing Company Limited that may be received annually then out of my property of all descriptions and moneys he shall first give Bhai Dayabhai Rs. 2,00,001 namely two lakhs and one." Then he says "Afterwards on what is mentioned in this will being given to all as to the whole of the property which may remain over my sons may divide and take the whole" and then follow the words which have been held by the High Court to give to the sons only a life estate in a half share of the residue. It appears to their Lordships that the latter part of the clause beginning "Afterwards" is intended to apply to the case of Dayabhai not becoming a partner in the business and receiving from Damoderdas the rupees 2,00,001. According to the plaint and the admissions in the written statements the whole of the residue of the estate except the house and land at Surat has been divided between the sons and is now enjoyed in severalty by them. There is no statement or any ground in the plaint or written statements for supposing that Dayabhai has received the two lakhs and one rupee. Clause 13 therefore does not appear to their Lordships to be applicable in the circumstances which have arisen and it may also be observed that what has been said about Section 82 of the Succession Act

with reference to the 8th clause is applicable to Clause 13. It may be doubted whether the words which follow the direction that the sons may divide and take the whole of the residue in equal shares are so clear as to show that only a restricted interest was intended to be given to them. In their Lordships' opinion Clause 18 is that which is now applicable to the residue and there is no difficulty in its construction. It gives the residue to the sons in equal shares absolutely except in the case of the subsequent birth of a son or a daughter. Their Lordships cannot agree with the Appellate Court in thinking that the two clauses must be read together and reconciled and must be treated, not as antagonistic, but as mutually explanatory of each other. They are intended to provide for different circumstances. They will humbly advise Her Majesty to reverse the Decree of the High Court, except the order therein as to the costs of the suit, and to declare that Damoderdas and Dayabhai each took an absolute interest in a half share of the residuary estate of the testator. The costs of this appeal of both parties to be taxed as between solicitor and client will be paid out of the property of the testator.

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