Privy Council Appeal No. 90 of 1926.

Madhavrao Ganpatrao Desai and others - - - - *Appellants*

v.

Balabhai Raghunath Agaskar, since deceased, 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 29TH NOVEMBER, 1927.

Present at the Hearing :

LORD BUCKMASTER.
LORD CARSON.
LORD DARLING.
LORD WARRINGTON OF CLYFFE.
SIR LANCELOT SANDERSON.

[*Delivered by* LORD BUCKMASTER.]

On May 1st, 1889, Janardhan Wassoodev, a Hindu dwelling in Bombay, in consideration of the natural love and affection which he bore "to his children and grandchildren," made a voluntary settlement in their favour of property chiefly consisting of real estate. The children named as beneficiaries were four, Krishnabai, Pootlabai, Raghunath and Kashibai, all of whom were married and had children living at the date of the deed, while Raghunath had both children and grandchildren. The settlement took the form of a conveyance of property to trustees upon trust to pay the income, after deducting Rs. 25 per month for taxes and repairs, to the settlor for life and after his death; then upon certain trusts expressed in the following words :—

> "Upon trust out of the said rents dividends and profits to pay one-fourth part of the net amount to Raghunath Janardhan son of the said Janardhan Wasoodev during his life and from and after the decease of the said Raghunath Janardhan in trust to pay the same to all the male heirs of the said Raghunath Janardhan share and share alike and as to one-quarter of the said rents dividends and profits upon trust to pay the same to my daughter Krishnabai wife of Ganpatrao Moroji Zaoba during her life for her sole and separate use and after her death in trust for the male heirs

> of the said Krishnabai share and share alike. And as to another quarter of the said rents dividends and profits upon trust to pay the same to my daughter Pootlabai wife of Nanabhoy Gunpatrao during her life for her sole and separate use and after her death in trust for her child Sonabai wife of Gunpatrao Khunderao and after the decease of the said Sonabai in trust for all or such one or more of the children of the said Sonabai wife of Gunpatrao Khunderao in such share and at such times as the said Sonabai shall by deed or will appoint.'"

Then follow provisions, in relation to Sonabai's share "if there shall be no child of the said Sonabai," in favour of his grandson Anandrao for life and after his death in trust for "the male children" of Anandrao, with trusts over in the event of there being no child of Anandrao, and an ultimate provision in favour of "the right heirs of my son Raghunath." On July 14th, 1894, the settlor died. His daughter Krishnabai died in 1897, leaving six sons, all of whom were living at the date of the settlement. It was in relation to her share that the present dispute arose, the heirs of the settlor contending that the limitations in favour of her male heirs after her death were contrary to Hindu law and void, and that in consequence there was a resulting trust in favour of the settlor. The learned Judge in the Court of first instance decided against this contention, but his judgment was reversed by the High Court of Bombay in its appellate jurisdiction, and hence this appeal.

The appellants are three of the children of Krishnabai, and the respondents are the three other children and the heirs of the original settlor.

It is to be noted that there are different words used in settling the share of Raghunath and Krishnabai on the one hand and the daughters Pootlabai and Sonabai on the other, but this variation of language does not give much assistance in determining the true meaning of the gift in favour of Krishnabai and her male heirs, which is the sole subject of the present consideration. The difficulty is in part caused by the settlor having introduced into his settlement words which have a technical meaning in English law but which they do not possess application in Hindu law. The use of the words "right heirs" in the ultimate limitation of the share given to Sonabai illustrates this difficulty. The phrase "right heirs" has a distinct meaning in English law and there refers to the heirs at common law as opposed to the heirs by special local customs, but it has no such special significance in Bombay.

In settling the true construction of this deed, therefore, unless there is a special reason afforded by the deed itself to the contrary, the technical meaning given to words in English law must be disregarded. So also must rules like the well-known rule in *Shelley's* case, based here upon feudal customs that have had no existence in Bombay. Further, it is to be remembered that a gift to a class of which no member existed at the date of the deed would be bad, and so also a definite attempt to create what in

England would be regarded as an estate tail (see *Tagore* v. *Tagore*, I.A. Supp., Vol. p. 47). The main part of the respondents' argument depends upon this last consideration. They assert that this was the true meaning of the gift—to the male heirs of Krishnabai after Krishnabai's death—and that it consequently failed. They further argue that the words themselves connote a descendable quality of estate with which it was the intention of the settlor to impress the property either in the gift to Krishnabai or to the male heirs. Their Lordships are unable to accept this view, which is permeated by the suggestion that the words when used in a Bombay settlement are primarily words of inheritance denoting the character of an estate. They do not think that the male heirs of Krishnabai took by inheritance from her. They are of opinion that the estate that Krishnabai took was defined and limited by her life interest, and that it was not by descent from her but by virtue of a wholly independent gift that her male heirs were beneficiaries under the deed. These male heirs being in fact living at the date of the deed, no difficulty arises.

The learned Judges in the High Court on appeal, however, took the view that the settlor in speaking of male heirs showed an intention to confine the inheritance to males to the entire exclusion of female heirs, and that consequently the limitation was bad. This conclusion, however, assumes that the words are words of inheritance and not of gift, and with this their Lordships are unable to agree.

It is also pointed out that, as none of Krishnabai's sons might have survived her, a different set of persons would have come into existence as her male heirs at her death, but this presents no difficulty if any such persons were living at the date of the deed; if they were not, the gift would fail.

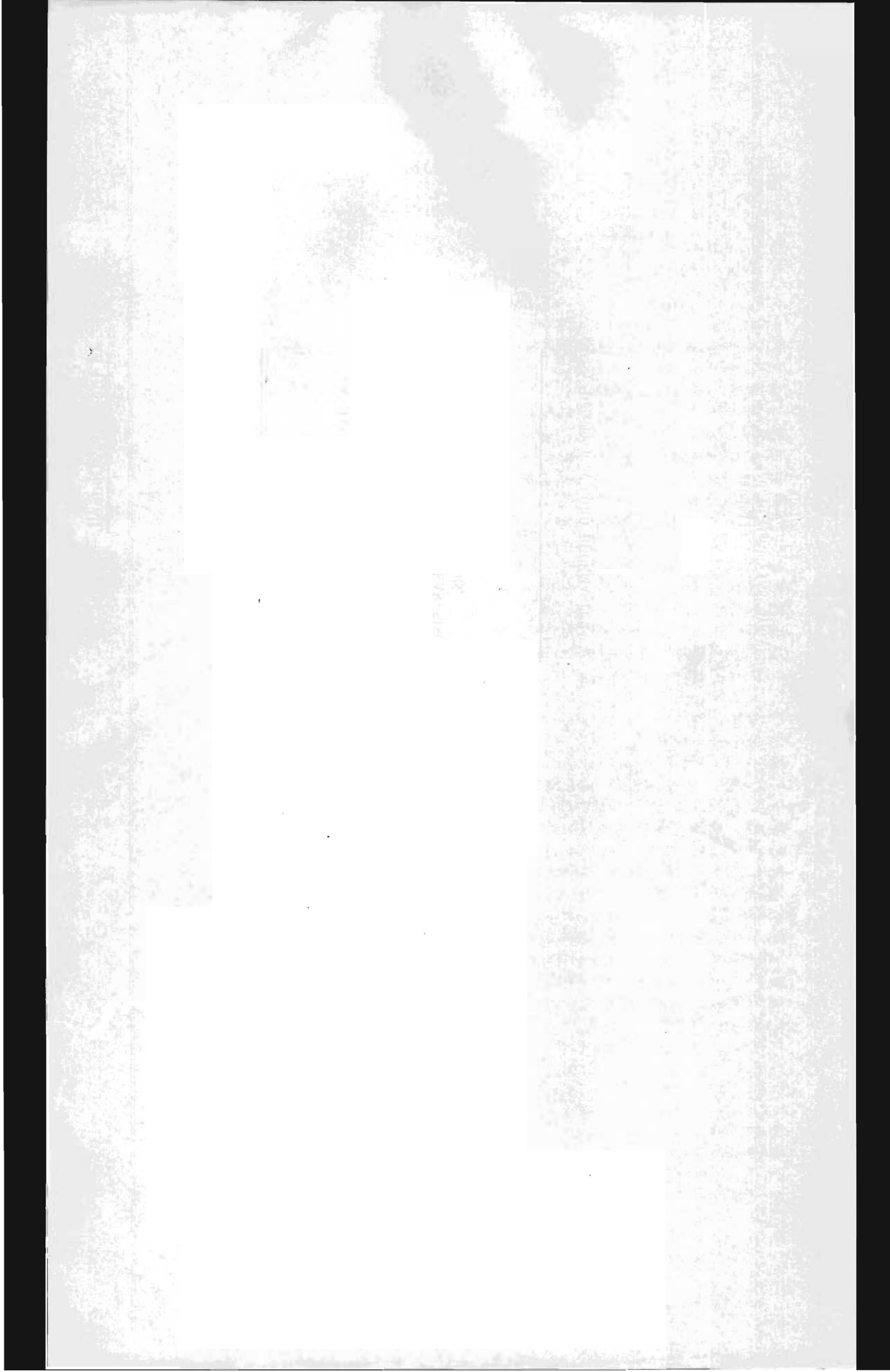
Their Lordships are of opinion that the true interpretation is that the persons who answer the description of male heirs at the date of Krishnabai's death were the persons in whose favour an independent gift was made, but that by operation of the Hindu law there would be excluded from that class people who were not living when the deed was executed. There is nothing whatever in the words of the grant to show that the estate so conferred was anything but an absolute estate upon such persons. For there is nothing to suggest, on the one hand, that such estate was limited to their life or, on the other, that any line of descent was marked out after their death. It is true that the gift is in the form of a gift of income, but it is a gift unlimited in point of time, and if there be no restriction in the gift and no limitations beyond the actual beneficiaries at Krishnabai's death such a gift carries the whole estate.

It is, however, argued, and this view found favour with the Court of Appeal, that the subsequent gift of the dwelling-house shows that there was a contrary intention and that the occupation of this house was to continue for an indefinite period. But the

gift of this house and its elaborate partition is, in their Lordships' opinion, only a means of providing how the people who had already been created beneficiaries in respect of the other settled estate should be at liberty to enjoy the property, and so far as Krishnabai's male heirs are concerned they are definitely entitled to occupy the share allotted to them and this is all that was decided by the learned Judge of first instance.

For these reasons their Lordships think that the judgment of the Appeal Court was wrong and should be reversed and the judgment of the Judge of first instance restored.

They will therefore humbly advise His Majesty that this appeal ought to be allowed with costs here and in the Court of Appeal.



In the Privy Council.

MADHAVRAO GANPATRAO DESAI AND OTHERS

v.

BALABHAI RAGHUNATH AGASKAR, SINCE DECEASED, AND OTHERS.

DELIVERED BY LORD BUCKMASTER.

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