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**(1925) 04 BOM CK 0012**

**In the Bombay High Court**

**Case No :** O.C.J. Suit No. 109 of 1924 and Suit No. 48 of 1924 (O.S.)

Balabhai Raghunath Agaskar

APPELLANT

Vs

Motabhai Babaji Rane

RESPONDENT

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**Date of Decision :** 15-04-1925

**Acts Referred:**

**Citation :** AIR 1925 Bom 473 : (1925) 27 BOMLR 906

**Hon'ble Judges :** Norman Macleod, J;Coyajee, J

**Bench :** Division Bench

**Final Decision :** Allowed

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## Judgement

Coyajee, J.—The questions in this appeal arise upon the proper construction of a deed of trust executed on May 1, 1889, by a Hindu gentleman, Janardan Wassoodev. The table set out at p. 53 of the paper-book shows the relationship of the persons interested in these questions. The settlor's descendants who were in existence at the date of the said deed were : his son Raghunath; his two daughters Krishnabai and Pootlabai; five sons of Raghunath; six sons of Krishnabai; Anandrao son of his predeceased daughter; and Sonabai, the daughter of Pootlabai.

2. The settlor died in the year 1894. Krishnabai died in 1897, all her six sons surviving her; but three of them died between 1912 and 1919. Pootlabai died in February 1898 leaving Sonabai who is a party to these proceedings. Anandrao died in August 1898 leaving a son Venkat. On Venkat's death in 1921, it was held in certain proceedings, to which it is unnecessary to refer in detail, that as he was not in existence at the date of the said trust deed, there was a resulting trust in favour of the settlor's heirs as regards the one-fourth share allotted to Anandrao's branch.

3. The Originating Summons which has given rise to this appeal was taken out by the two plaintiffs who are members of Raghunath's branch; they are supported by other members of the same branch Their contention as set out in paragraph

10 of the plaint is

that the gift of the one-fourth share of the rents and income of the male heirs of Krishnabai is invalid in law and on the death of the said Kriahnabai there was a resulting trust in respect of the said one-fourth share and the name reverts to the heirs of the settlor, and the plaintiffs with the other heirs have in the events that have happened become entitled to the same in their own right Similarly the gift of the said one-fourth share of the rents and income to the male heirs of Raghunath is also invalid and on the death of the said Raghunath the plaintiffs with the other heirs of the settlor have become entitled thereto in their own right. The plaintiffs and the either heirs have thus become entitled to three-fourth shares of the said rents and income in their own right.

4. As regards the one-fourth share of the rents and income allotted to Pootlabai, the learned trial Judge has held that on Sonabai's death there will be a resulting trust in favour of the settlor's heirs; and the matter ends there.

5. The main contest relates to the one-fourth share of the income allotted to Krishnabai and on her death to her "male heirs."

6. Before May 1, 1889, Jauardan, the settlor, had distributed five Immovable properties and also his jewellery among some of his children and grand-children, leaving him in possession of three landed properties, a number of shares in certain public companies, and one Port Trust Bond, The deed in question recites that Janardan was desirous of making "the settlement hereinafter appearing," and proceeds:-

It is witnessst that in pursuance of the said desire and in consideration of the natural love and affection which the said Janardan Wasoodev beareth to his children and grand children hereinafter mentioned, he the said Janardan Wasoodev doth by these presents assign transfer and set over unto the said trustees All that the property and effects...upon the trusts following.

7. Provision is made as regards rents, dividends and profits of the said properties, except the Breach Candy Road house which is set apart for residence.

8. The trusts so far as they are now material are as follows :-

Upon trust to pay the rents dividends and profits arising from the said premises after deducting monthly the sum of Rs. 25 for the payment of taxes and repairs, to the said Janardan Wasoodev or permit him to receive the same during his life and after his decease upon trust out of the said rents dividends and profits to pay one-fourth part of the net amount to Raghunath Janardan son of the said Janardan Wasoodev during his life and from and after the decease of the said Raghunath Jenardan in trust to pay the same to all the male heirs of the said Raghunath Janardan 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.

9. The learned trial Judge held that "the male heirs of Krishnabai, and the heirs of Raghunath are each entitled absolutely to the one-fourth share assigned to Krishnabai and Raghunath respectively" and that "the persons entitled to the corpus of the one fourth share assigned to Krishnabai are the surviving sons of Krishnabai and the heirs of her deceased sons."

10. The plaintiffs and defendants Nos. 4 to 6 (members of Raghunath branch) have appealed. They contend that the dispositions after the respective deaths of Krishnabai and Raghunath are void for reasons which briefly stated are, that: (1) The "male heirs" of Krishnabai cannot be determined until she died, and they may happen to be persons not in existence at the date of the settlement; (2) the settlor, if he had intended to make a gift in favour of her "sons", would have said so; her alone would not necessarily be her "male heirs" moreover, none of her sons might survive her, and therefore they do not answer to the description of her "male heirs"; (3) the settlor's intention clearly was to confine the inheritance to males; the gift is therefore void as excluding female heirs and thus excluding the legal course of inheritance : and (4) the deed makes no reference to the corpus and leaves it undisposed of, the settlor's intention being not to pass the estate itself but to limit the enjoyment of the rents and profits for an indefinite period; this would not be allowed by Hindu law.

11. The learned trial Judge observes :-

I think that the gift to " the male heirs " of Krishnabai is a gift to such of her sons as were in existence at the date of the deed and such as might survive Krishnabai... I think it is impossible to escape the conclusion that the settlor did not intend to leave any interest in the properties comprised in the deed undisposed of. On the other hand, there is upon the face of the deed sufficient indication of intention on the part of the settlor that the heirs of Krishnabai should take an absolute interest in the one-fourth share assigned.

12. The question is-What was the intention of the settlor ? His intention is to be sought in his words. The deed is written in the English language; the settlor was himself a lawyer; but, it must be confessed, the instrument is not very easy to construe. In the case of Raghunath and of Krishnabai, he uses the words, his and her "male heirs". In the case of Pootlabai's daughter Sonabai the gift is to her "children". In Anandrao's case it is to his "male children."

13. Who, then, were intended to take the estate as Krishnabai's male heirs ? The parties being Hindus, the donees must be in existence, either in fact or in contemplation of law, at the date of the settlement. In this case there is an uncertainty as to the existence of Krishnabai's male heirs at the material time. It was quite possible that none of her sons who were in existence at the date of the deed might survive Krishnabai and a wholly different person or a totally different set of persons answering to that description, "her male heirs," might come into being after that date. If by Krishnabai's male heirs the settlor meant her sons

who were then in existence, he has-it must be allowed-used singularly inapt words to convey that meaning. The settlor, no doubt, was actuated by "the natural love and affection" which he bore "to his children and grandchildren hereafter mentioned"; but that circumstance does not justify the substitution of "Krishnabai's sons" for "Krishnabai's male heirs." The words "grandchildren hereafter mentioned" have their application, for the gifts to Sonabai and Anandrao were gifts to the settlor's "grandchildren." The learned Judge observes that "there is upon the face of the deed sufficient indication of intention on the part of the settlor that the heirs of Krishnabai should take an absolute interest in the one-fourth share assigned to Krishnabai." He, therefore, holds !"that the surviving sons of Krishnabai and the heirs of her deceased sons are entitled as between them to the one-fourth share assigned to Krishnabai absolutely." The settlor, however, speaks not of heirs but of her male heirs, and thereby shows an intention to confine the inheritance to males, to the entire exclusion of female heirs; and the disposition is void as "excluding the legal course of inheritance: " (1883) L.R. 10 I.A. 51 (Privy Council) .

14. Reading the deed as a whole, it seems to me, that the disposition is also void on the other contention raised by the appellants, namely, that the object of the settlor was to create a perpetuity as regards these properties. The estate itself is not disposed of. The trustees are empowered to sell the properties "except the family house in Breach Candy Road," to invest the monies arising from such sale in securities in the manner directed. "And it is hereby declared that the annual income arising from such securities shall from time to time go and be payable to the person or persona who under the trusts aforesaid would have been entitled to the annual rents and profits arising from the land premises and shares before referred to in case the same had remained unsold." The house at Breach Candy Road is to supply a residence to the different members of the family, and in some cases to their "heirs," but its ultimate destination is not to be found in the deed, although the settlor goes into such minute details as the following : "All glass and wooden furniture in the hall and the glass moons and globes in the said dwelling house at Breach Candy Road shall be used by all the occupants of the house jointly and in case of anything being broken shall be replaced by the person causing the damage." In my opinion, the object of the settlor was to create a perpetuity as regards the whole of the trust estate and to limit for an indefinite period the enjoyment of the rents and profits of the estate.

15. I arrive at the same conclusion with regard to the trusts in favour of Raghunath's "male heirs."

16. The result is that the trusts after the deaths of Raghunath and Krishnabai are invalid.

17. As regards the house on Breach Candy Road there is a separate trust. The right to live in specified portions of it is given to various persons. The provisions in that behalf which need to be considered are those in favour of; (1) Raghunath and his "heirs"; (2) "Pootlabai and her children; (3) Anandrao and his

"children" : and (4) Krishnabai and -"after her death her male heirs." Anandrao's branch need no longer be considered. As to the rest the opinion of the learned trial Judge in this: "The male heirs of Krishnabai and the heirs of Raghunath and Sonabai are entitled to residence in the portions...set apart for them respectively, Sonabai's right of residence being only for her life...The question as to whether there is a resulting trust in favour of the heirs of the settlor after Sonabai's death in respect of the portions now occupied by her to be considered after the death of Sonabai." Krishnabai died in 1897, and Raghunath in 1908. There being no disposition of the house, their right of residence was, in my opinion, only a personal right. Whether so long as they were alive they were entitled to live there accompanied by their own children is a question which it is no longer necessary to consider; probably they were. But on their death, the portions which were respectively assigned to them for residence reverted to the settlor's heirs. On a proper construction of the deed I agree with the trial Judge that Sonabai, the daughter of Pootlabai, is entitled to reside in that portion of the buildings which is expressly allotted to Pootlabai and her children. But the right is personal: and on Sonabai's death that portion of the property will revert to the heirs of the settlor.

18. The appellants to be held entitled to possession of the family house subject to the right of residence of Sonabai. The trust will have to continue until Sonabai's death. Appellants are entitled to three-fourths absolutely and to the remaining one-fourth on Sonabai's death.

19. All costs out of the fund. Trustees' costs to be taxed as between attorney and client. Two counsel certified.