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the goods were entrusted to them, and were being carried by them in the course of their business when the misappropriation took place. The principle of law enunciated by the House of Lords in the case of *Lloyd* v. *Grace, Smith & Co.* (1), is in accordance with the law as enacted in section 238 of the Indian Contract Act. As stated above there is nothing in that section to show that in order to render the principal liable the fraud must be committed for the benefit of the principal.

For these reasons, we are of opinion, that the decree of the lower Appellate Court must be set aside and that of the Court of first instance restored with costs here and in the lower Appellate Court.

G. S. *Appeal allowed.*

(1) [1912] A. C. 716.

## APPELLATE CIVIL.

*Before Mookerjee and Chotzner JJ.*

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*Aug.* 14

JATINDRA MOHAN MANDAL

*v.*

GHANASHYAM CHOWDHURY.*

*Hindu Law—Annuity—Grant to an unborn person, if enforceable in law —Ekrarnama—Will—Perpetuities, doctrine of.*

Where a Hindu left an annuity to his daughter for her life, and then to her son absolutely by an ekrarnama, and confirmed it by a will :

*Held*, that on principle as well as on the authorities, the annuity payable out of the estate to the daughter and after her death to her son was operative in law, even though the son might be born after the death of the testator ; a grant of this description did not violate the rule against remoteness.

* Appeal from Appellate Decree, No. 891 of 1920, against the decree of Satish Chandra Basu, Additional Subordinate Judge of Maldah, dated Feb. 10, 1920, reversing the decree of Kiran Chandra Mitter, Munsif of Maldah, dated Sep. 30, 1918.

A grant of this character is a right of property, and as it is an incorporeal right, the test of validity in each case is whether, under the circumstances, the donor has sufficiently indicated an intention that the transfer should take effect as a corrody and with that intention has done all that is practicable by way of transferring such indicia of property as may be in existence.

*Balvantrav* v. *Purshotam* (1) referred to.

SECOND APPEAL by Jatindra Mohan Mandal and Surendra Mohan Mandal, the plaintiffs.

This appeal arose out of a suit for recovery of an annuity. One Radha Kanta Chowdhury left several children, including two sons, Ghanashyam and Madan Gopal, the defendants, and a daughter named Kamini Sundari. He granted an annuity of Rs. 12-8 per month to Kamini Sundari for her life, and then to her son absolutely by a registered ekrarnama. He made his last will in which the ekrarnama in favour of Kamini Sundari was recited, and directed that his estate was to be divided into two shares, three annas in favour of Ghanashyam, who was an adopted son, and thirteen annas in favour of Madan Gopal, and further directed that the annuity of Kamini Sundari was to be paid out of the estate. Radha Kanta then died. Kamini Sundari received the annuity during her life time. She had, however, two sons born to her after the death of her father. On the death of Kamini Sundari, her two sons, namely, the plaintiffs, claimed the annuity on the basis of the ekrarnama and the will and sued the sons of Radha Kanta for the payment of the annuity. The Munsif decreed the suit, but the Subordinate Judge, on appeal, dismissed it on the ground that the annuity was not enforceable in law.

*Babu Braja Lal Chakravarty* and *Babu Jatindra Mohan Chowdhury*, for the appellants.

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*Babu Mahendra Nath Roy* and *Babu Atul Chandra Gupta*, for the respondents.

MOOKERJEE J. This is an appeal by the plaintiffs in a suit for recovery of money claimed as annuity against the first defendant, one of the representatives of the estate of their maternal grandfather. The Court of first instance decreed the suit. Upon appeal, the Subordinate Judge has reversed that decision on the ground that the claim was not enforceable in law.

Radhakanta Chowdhury, the maternal grandfather of the plaintiffs, took three wives in succession. By his first wife, Achalmani, he had no issue, and on the 5th December, 1890, he took the first defendant Ghanashyam as his adopted son. By his second wife, Jadabmani, he had two daughters, Syama Sundari and Kamini Sundari; the plaintiffs are the two sons of Kamini Sundari. By his third wife Manmohini, he had a daughter Brojogopini, and a son Madan Gopal who was born in 1876, and is the second defendant in this litigation. On the 19th February, 1872, he executed in favour of Kamini Sundari an ekrarnama, duly attested and registered, which recited that by a previous testamentary disposition made on the 3rd May, 1871, he had provided a monthly grant of Rs. 10 for her maintenance for life after his death, and that as the amount was insufficient, he desired to increase it by Rs. 2-8 a month. The ekrarnama then proceeded as follows:

"I promise by this ekrarnama that from this date I will go on paying you the aforesaid Rs. 12-8 per month during your lifetime. If, at the time of your death any son of yours be alive, then he, being entitled to this allowance in absolute right, will be endowed with the power of gift and sale. But if you die sonless during the lifetime of your husband, then

your husband will get the aforesaid allowance during his lifetime. Excepting a son, no daughter of yours will be entitled to the allowance. I, and on my demise, my heirs, sons, grandsons and others in succession, that is, those persons who will in succession come into possession of my moveable and immoveable properties, will abide by the said provisions of this ekrarnama. If I or my successors do not abide by the provisions of this ekrarnama, then you (or they) will get the allowance by establishment of the said right through Court. And after the expiry of the term of this ekrarnama, myself during my life or my successor on my demise will get the allowance mentioned in this ekrar. Further, on payment of the allowance, month by month, I shall obtain a receipt signed by your husband during his lifetime. After the death of your husband, I (or they) shall obtain receipts signed by yourself. Further, if you relinquish the allowance mentioned in this ekrarnama without the consent of your husband, then the right of your son will not be destroyed, and from that time, though you be living, the said right will vest in your husband for his life."

On the 2nd July, 1877, shortly after the birth of his son, Radhakanta Chowdhury revoked the will of the 3rd May, 1871, and made a fresh testamentary disposition. This will recited the ekrarnama in favour of Kamini Sundari as also a similar ekrarnama in favour of Syama Sundari, and directed that the allowances fixed thereby would be received from his natural or adopted son according to the terms of the respective ekrar. The will made similar provision for annuity in favour of the daughter Brojogopini and her possible son, and added that a similar allowance would be paid, if any other daughter were born to her as also to her son. The estate was divided between the adopted son and the natural born son, the former to

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take a three annas share and the latter thirteen annas share. The adopted son was appointed executor and was directed to carry out the provisions of the will from the estate in his hands. On the death of the testator, the adopted son took out probate on the 6th August 1879. The annuity mentioned appears to have been paid to Kamini Sundari during her lifetime, and since her death, which took place in 1905, it has been realised by her sons by suit. Brojogopini also recovered the sums due to her as annuity by suits instituted from time to time. The present action was commenced by the sons of Kamini Sundari on the 15th December, 1917, for recovery of arrears due for a period of nine years and eleven months from 1907 to 1917. The defendant urged that the claim was not enforceable. The Courts below have disagreed upon the question of the legality of the claim. The Subordinate Judge, reversing the decision of the primary Court, has held that as the plaintiffs, the sons of Kamini Sundari, were born after the death of their maternal grandfather, the grant of an annuity in their favour was really a gift to unborn persons, and was consequently void under the rule recognised by the Judicial Committee in *Tagore* v. *Tagore* (1). This view has been assailed by the appellants as erroneous in law.

Annuities of this character were familiar to Hindu jurists and do not constitute by any means a novel conception in Hindu jurisprudence. Mr. Justice Muttusami Ayyar pointed out in the case of *Chalamanna* v. *Subbamma* (2), that a solemn and binding promise in this form, equivalent to a declaration of trust, was not unknown to the Hindu law. Jimutavahana states that corrody signifies what is fixed by a promise

(1) (1872) L. R. I. A. Sup Vol. 47; 9 B L. R. 377; 18 W. R 359.

(2) (1883) I. L. R. 7 Mad. 23.

in this form: "I will give that in every month of Kartik". (Dayabhaga, Chap. II, para. 13). Sreekrishna comments on this passage that corrody or nibandha signifies "anything which has been promised, deliverable annually or monthly or at any other fixed periods". A reference to Chap. II, para. 9, shows that a corrody, according to the text of Yajnavalkya, (Book II, 121), is placed in the same category as other classes of property, namely, land and chattels. Raghunandan quotes this verse of Yajnavalkya in his Dayatattwa, Chapter II, para. 20 (ed. Golapchandra Sarkar, text p. 6, translation p. 12) and cites from the author of the Kalpataru the definition "a corrody is what is granted by the king and the like receivable periodically from a mine or similar fund". To the same effect are the comments of Vijnaneswara in the Mitakshara, Chap. I, sec. 5, para. 4: "a corrody, so many leaves receivable from a plantation of betel-pepper or so many nuts from an orchard of areca"; see also the elucidation by the authors of the Subodhini and the Balambhatti (Mitakshara by Setlur, p. 646); and the explanation of nibandha taken from the Dipacalica in Jagannath's Digest, tr. Colebrooke, 1798, Vol. II, p. 278; see also *Balvantrav* v. *Purshotam* (1), where the principal texts are set out in the judgment of Westropp, C. J. The substance of the matter is that a grant of this character is a right of property, and as it is an incorporeal right, the test of validity in each case is whether, under the circumstances, the donor has sufficiently indicated an intention that the transfer should take effect as a corrody, and with that intention has done all that is practicable by way of transferring such indicia of property as may be in existence. In the case mentioned, a Hindu executed in 1845, a document

(1) (1872) 9 Bom. H. C. R. 99.

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called a sanad, attested by witnesses, whereby he agreed to pay to his sister, and, after her death, to her daughter, Rs. 10 per annum from the produce of an estate inherited by him from his maternal grandmother. It was ruled by Turner, C. J. and Muttusami Ayyar, J. that the grantor, who had full power over his share, intended to create a charge on the produce of the estate he had inherited, and that the charge would be supported under the Hindu law as a corrody and under the English law as a settlement.

In such circumstances, there is no room for the application of the rule enunciated in *Tagore* v. *Tagore* (1), as to the invalidity of a gift to an unborn person. That rule, it is well known, has its limitations. The decisions in *Nafar Chandra Kundu* v. *Ratnamala* (2) and *Dineshchandra* v. *Birajkamini* (3), laid stress upon an important passage in the judgment of the Judicial Committee where Mr. Justice Willes observed as follows:

"Their Lordships, adopting and acting upon the clear general principle of Hindu law that a donee must be in existence, desire not to express any opinion as to certain exceptional cases of provisions by way of contract or of conditional gift on marriages or other family provisions for which authority may be found in Hindu law. A passage indicative of such authority, may be found in the text of Vyasa and the comments thereon by Jagannath in his Digest (translated by Colebrooke, Book II, Chapter IV, section 2, paragraph 30. Reference may also be made to paragraphs 49 to 52 which treat of valid irrevocable gift)."

(1) (1872) L. R. I. A. Sup. Vol. 47.
(2) (1910) 13 C. L. J. 85; 15 C. W. N. 66.
(3) (1911) I. L. R. 39 Calc. 87; 14 C. L. J. 20; 15 C. W. N. 945.

In the two cases mentioned, a bequest to a would-be daughter-in-law was sustained, though the bequest, when made, might possibly have to take effect in favour of a girl who might be born after the death of the testator. On the authority of the decisions in *Nafar* v. *Ratnamala* (1) and *Dinesh* v. *Biraj* (2), a bequest for the marriage expenses of great grandsons and great-grand-daughters of the testator, who were born long after his death, was upheld without question in *Upendra* v. *Purendra* (3).

The passage from the judgment of the Judicial Commitee in *Tagore* v. *Tagore* (4) mentioned above was again relied upon in the case of *Rajah of Ramnad* v. *Sundara* (5), where an annuity in favour of a junior member of a family and his descendants from generation to generation was upheld as not obnoxious to any rule of Hindu or English law against perpetuities. This view was fortified by reference to the decisions of the Judicial Committee in *Narayana* v. *Madhawa* (6), *Ahmad Hossein* v. *Nihaluddin* (7), *Karim* v. *Heinrichs* (8), *Azizunnissa* v. *Tassadduk Hussain* (9). The decision of the Judicial Committee in *Chandichurn* v. *Sidheswari* (10) was distinguished on the ground that the grant in that case imposed a restraint upon alienation contrary to the principles of Hindu law; the grant was either a present assignment to persons not yet in existence, subject to a suspensive condition which might prevent its taking

(1) (1910) 13 C. L. J. 85; 15 C. W. N. 66.
(2) (1911) I. L. R. 39 Calc 87; 14 C. L. J. 20; 15 C. W. N. 945.
(3) (1915) 21 C. W. N. 280.
(4) (1872) L. R. I. A. Sup. Vol. 47.
(5) (1914) 27 M. L. J. 694.
(6) (1892) L. R. 20 I. A. 9; I. L. R. 16 Mad. 268.
(7) (1883) I. L. R. 9 Calc. 945; 13 C. L. R. 330.
(8) (1911) I. L. R. 25 Bom. 563.
(9) (1901) L. R. 28 I. A. 65; I. L. R. 23 All. 324.
(10) (1888) L. R. 15 I. A. 149 I. L. R. 16 Calc. 71.

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effect at all or for generations to come, or else the grant was in essence a covenant running with the estate and binding its possessor to give the villages to those persons in the event specified. The Judicial Committee held that in either view the grant prevented the owner from alienating his estate discharged of such future interest. No such results follow from recognising the present gift, which moreover is not in favour of strangers but of members of the family. The decision of the Madras High Court in *Rajah of Ramnad* v. *Sundara* (1) has been affirmed by the Judicial Committee, *Raja of Ramnad* v. *Sundara* (2).

In answer to the contention that the grant was a creation of a kind of perpetuity which the law did not allow or an attempt to create a permanent relation which was impossible of creation, Lord Phillimore observed that whatever might be said if the agreement lay in covenant, seeing that it lay in charge, there was no difficulty in making it perpetual, as long as there were lineal or collateral heirs. It is worthy of note that it was conceded in course of argument that the contention of the appellant could not prevail, if the decision in *Balvantrav* v. *Purshotam* (3), was applicable. There can be no doubt that, in the case before us, the annuity was directed to be paid out of the estate of the testator, and this shows an intention to create a charge thereon; *see* the decision of the Judicial Committee in *Khajeh Solehman* v. *Nawab Sir Salimullah* (4) which reversed the decision in *Khajeh Habibullah* v. *Khajeh Solemon* (5). Viscount Cave stated there that the view taken by the Board was in accordance with the decisions in *Nawab*

(1) (1914) 27 M. L. J. 694.
(2) (1918) L. R. 46 I. A. 64; I. L. R. 42 Mad. 581; 29 C. L. J. 551.
(3) (1872) 9 Bom. H. C. R. 99.
(4) (1922) L. R. 49 I. A. 153.
(5) (1919) 30 C. L. J. 102.

*Umjad Ally* v. *Mohumdee* (1), *Lakshmi* v. *Madhawa* (2), *Khwaja Muhammad* v. *Husaini* (3), and *Raja of Ramnad* v. *Sundara* (4). We are consequently of opinion that on principle as well as on the authorities, the annuity payable out of the estate (and consequently charged thereon) to the daughter and after her death to her son, was operative in law, even though the son might be born after the death of the testator; a grant of this description does not violate the rule against remoteness.

In the view we take, it is not necessary for us to consider whether the principle of inapplicability of the doctrine of perpetuities to purely personal covenants recognised by the House of Lords in *Walsh* v. *Secretary of State for India* (5) and *Witham* v. *Vane* (6) governs the case before us. Nor need we examine the applicability of the principle that such an annuity is in the nature of a personal estate, but may be made descendible in the same manner as real estate, and that in case of non-payment, but not otherwise, relief may be sought by administration of the estate of the deceased settlor when provision may be made for it out of the assets of the deceased: *Re Hargreaves* (7), *Turner* v. *Turner* (8), *Wallaston* v. *Wallaston* (9).

The result is that this appeal is allowed, the decree of the Subordinate Judge set aside, and that of the Court of first instance restored, with costs here and in the lower Appellate Court.

CHOTZNER J. concurred.

B. M. S. *Appeal allowed.*

(1) (1867) 11 Moo. I. A. 517, 548.
(2) (1892) L. R. 20 I. A. 9.
(3) (1910) L. R. 37 I. A. 152.
(4) (1918) L. R. 46 I. A. 64.
(5) (1863) 10 H. L. C. 367.
(6) (1883) Challis on Real Property, 3rd Ed., App. V. 440.
(7) (1890) 44 Ch. D. 236.
(8) (1783) 1 Brown C. C. 316; 2 Amb. 776.
(9) (1877) 7 Ch. D. 58.