PRIVY COUNCIL.

P. C.*
1939

June 9, 12, 13;
July 7.

BHUPENDRA MOHAN RAY

v.

PURNA SHASHI DEBI.

[On Appeal from the High Court at Calcutta.]

Hindu Law—*Power to adapt—Will—Construction—Gift over.*

A Hindu, by the following clauses in his will, empowered his widow to adopt a son and made a gift over to charities in the event of no adoption being made :—

Cl. 2. If no son be born to me of my loins or if such a son dies after birth, my wife Srimati Purna Shashi Debi will be permitted.....to take five sons successively.....and that adopted son will be the owner of the estate and will be, on attaining majority, entitled to take the estate from the hands of the executors.

Cl. 3. Within ten years after my death my aforesaid wife, in accordance with the provision mentioned in paragraph 2, will take a son in adoption from amongst the sons of my three full brothers or from amongst those of my step-brother. If it be impossible to take in adoption a son from amongst the sons of any one of them, then, after the expiry of ten years and within the next two years, she will take, at her own choice, a son in adoption from amongst the sons of my other agnatic relatives..... She will take the first son in adoption within twelve years.....

Cl. 7. If perchance no son be taken in adoption, or if the son taken in adoption die sonless, then the executors or any of them or, in the event of their disagreement, the Collector of Dacca will establish at my own native village, Rawail, the place of my residence, a school or a charitable dispensary named after me and will spend the whole amount of surplus of my estate for its maintenance.

The testator died on January 11, 1915. His widow purported to adopt a son of one of his brothers on August 13, 1926. He died shortly after the adoption. It was not impossible for her to have adopted a son of one of the testator's brothers within ten years of his death.

In a suit instituted by the widow on January 28, 1928, against the executors of the will claiming possession of the estate as heiress of the adopted son and contending that the gift over was void as repugnant to the absolute gift to the adopted son in cl. 2 of the will,

held that the power to adopt was expressly limited by cl. 3 of the will. It was a power to adopt within ten years of the testator's death. The adoption was invalid, as it was not impossible for the respondent to have taken in adoption one of the sons of the testator's brothers or step-brother within that time.

**Present* : Lord Romer, Sir George Rankin and Mr. M. R. Jayakar.

The gift over was not invalid, but it was a contingent gift and would not carry the income accruing before the gift vested and the widow was entitled to the surplus income accruing to the estate during the ten years succeeding the testator's death, after making such payments as were directed to be made by the will.

Mutasaddi Lal v. *Kundan Lal* (1) and *Sitabai* v. *Bapu Anna Patil* (2) referred to.

APPEAL (No. 67 of 1937) from a decree of the High Court (May 20, 1935) which reversed a decree of the Subordinate Judge of Dacca (June 17, 1932).

The material facts are stated in the judgment of the Judicial Committee.

Pringle for the appellants. I submit there has been no valid adoption in accordance with the power and there cannot be one now, as the twelve years' limit imposed by the will has expired. The power to adopt given in the will must be strictly followed. A nephew was to be taken within ten years if possible and there was here no impossibility in the way of compliance with that direction. This case differs from *Mutasaddi Lal* v. *Kundan Lal* (1). In that case it was held on the construction of the will that a definite time was not fixed within which the adoption was to be made. In *Sitabai* v. *Bapu Anna Patil* (2) there was a limitation on the choice of a boy and it was held that that was binding. There can be no presumption in the face of the clear words of the will, *Bhagwat Koer* v. *Dhanukdhari Prashad Singh* (3).

Secondly, even if the adoption is valid, the widow would not come in as heiress. There is a gift over and the event contemplated in cl. 7 of the will, in which the gift over would take effect, has happened. The adopted son died childless. The difficult question here is that of the estate remaining in abeyance

(1) (1906) I. L. R. 28 All. 377 ; L. R. 33 I. A. 55.
(2) (1920) I. L. R. 47 Cal. 1012 ; L. R. 47 I. A. 202.
(3) (1919) I. L. R. 47 Cal. 466 ; L. R. 46 I.A. 259.

1939

Bhupendra Mohan Ray v. *Purna Shashi Debi.*

after the first adoption. The will does not contemplate that in the event of the first son adopted dying childless the estate should vest in the widow till a second adoption is made. When by a will a widow is empowered to make successive adoptions, the estate does not vest till the power is exhausted: *Bhupendra Krishna Ghose* v. *Amarendra Nath Dey* (1). The power, which is a limited power under the will, is now exhausted and the gift over takes effect.

I. M. Parikh for the first respondent. There is no disposition in the will till the adoption takes place. There being no disposition, the widow takes as heiress. The taking out of probate does not vest the beneficial interest in the executors. Until adoption, the widow is entitled to the whole of the income. On adoption and till his death, the adopted son would be entitled to the income. On the adopted son's death, childless, the widow would take as his heir subject to being divested on making a second adoption. If the adoption here is invalid, the estate would go to the widow. The gift over to charity would fail because there is no valid prior estate created. There must be a prior gift to support a gift over. Succession in Hindu law is never in abeyance. Mayne's Hindu Law (9th ed.) paras. 499 and 600; (10th ed.) paras. 484 and 605. The gift over is also bad because the widow takes a beneficial interest in the estate and not merely the income [Reference was made to *Jatindra Mohan Tagore* v. *Ganendra Mohan Tagore* (2)]. Under cl. 3 of the will the period for adoption of a nephew is limited to ten years. "Other agnatic relations" would exclude the nephews. The power to adopt other agnatic relations is given subject to its being impossible to adopt a nephew. The law of inheritance cannot be altered by a will. If the adoption here is good, it divests the widow. On the death of the adopted son she takes as his heir. She would be divested on making a

(1) (1915) I. L. R. 43 Cal. 432; L. R. 43 I. A. 12.
(2) (1872) 9 B. L. R. 377; L. R. I. A. Sup. 47.

second adoption. If the first adoption is good, she can, I submit, make a second adoption even after 12 years.

The other respondents were not represented.

Pringle, in reply. Where the beneficial interest is one in *futuro*, the income follows the principal. Indian Succession Act, s. 350. The doctrine of abeyance in Mayne (10th ed.) in para. 605 is restricted to intestate succession.

The judgment of their Lordships was delivered by LORD ROMER. This is an appeal from a decree of the High Court of Judicature at Fort William in Bengal dated May 20, 1935, reversing the judgment and decree of the First Additional Subordinate Judge of Dacca dated June 17, 1932, whereby he had dismissed with costs a suit brought by the respondent Srimati Purna Shashi Debi (hereinafter called the respondent) against the appellants and others.

The respondent is the widow of one Bhabendra Mohan Ray (hereinafter called the testator) who died on January 11, 1915, having made his will on the day preceding his death. He left a daughter surviving him but no son. He also left him surviving his three brothers (who are the appellants) and a step-brother one Rajendra Mohan Ray.

Inasmuch as the questions to be determined upon this appeal are concerned with the proper construction and effect of the will the material portions of it must be set out in full. They are as follows:—

2. If no son be born to me of my loins or if such a son dies after birth my wife Srimati Purna Shashi Debi will be permitted, for the purpose of performing the *srâdh*, funeral rites and for offering water and funeral cakes to my ancestors, to take five sons successively (one on the death of the other) and that adopted son will be the owner of the estate and will be, on attaining majority, entitled to take the estate from the hands of the executors; and I grant her permission to take son in adoption as aforesaid. Before I gave her oral permission to take son in adoption in that manner.

1939

Bhupendra Mohan Ray v. *Purna Shashi Debi.*

3. Within ten years after my death my aforesaid wife, in accordance with the provision mentioned in para. 2, will take a son in adoption from amongst the sons of my three full brothers or from amongst those of my step-brother Srijut Rajendra Mohan Ray. If it be impossible to take in adoption a son from amongst the sons of any one of them, then, after the expiry of ten years and within the next two years, she will take, at her own choice, a son in adoption from amongst the sons of my other agnatic relatives. In the absence of that or if that is not possible, she will take a son in adoption from one of my own *gotra* or from a different *gotra*. She will take the first son in adoption within twelve years as aforesaid. If the said son dies sonless, she will be entitled to take a second son in adoption even after the said period of twelve years. My aforesaid wife will be entitled to adopt five sons in succession, one on the death of the other, in the aforesaid manner.

4. My full brothers, mentioned in para. 1, are my well-wishers and faithful objects of my love ; and I have been living with them in *ejmâli* and in the same mess. My two elder brothers have been properly looking after and managing the estate even during my life-time. Accordingly, I appoint my full brothers, Srijut Bhupendra Mohan Ray, Srijut Prithwindra Mohan Ray and Sriman Hiranya Mohan Ray, executors to the estate, after my death till my son or my adopted son or, if they die during their minority, till their sons attain majority. They will together, or in the event of the death, inability or absence of the one, the others will manage and look after the estate. For the welfare or for the necessity of the estate they will be able to settle permanently, or in *patni* or in *ijârâ* the whole or any portion of my immovable property. They shall not be able to do any act detrimental to the estate, or to transfer or encumber the same. The executors will perform the religious rites and duties of my ancestors and other festivities, according to their consideration and the custom of my family, the expenses of which will be borne by the estate left by me. They will maintain my mother, wife, daughter and others mentioned in para. 5, and pay their monthly allowance from the estate left by me. The executors and their representatives will be bound to act according to the provisions of the will of my deceased father Sudhendu Mohan Ray. Nobody will be able at any time to demand or take any accounts of income and expenditure from the executors.

5. My mother Srijukta Hara Kamini Debi, of whom I was born, will be entitled to maintenance out of my estate according to share, in accordance with my father's will, and a sum not exceeding Rs. 2,000 should be spent out of my estate for her *srâdh* ceremony. My wife, Srimati Purna Shashi Debi, will be under the care of my executors and under the care of my son or adopted son when he would attain majority. She will be entitled to maintenance and all expenses for religious rites, pilgrimage, *etc.*, out of the estate according to the circumstances of the estate and directions of the executors. If my aforesaid wife be not on good terms with them, she will be entitled to a monthly maintenance allowance at the rate of Rs. 20 during her life and to a sum of Rs. 1,000 at a time out of my estate for the expenses of her pilgrimage, and she will further be entitled to live in a proper house in my residential homestead. My only daughter Srimati Bina Pani Debi is at present minor and unmarried. All the expenses of her marriage will have to be paid out of my estate in accordance with the custom of my family, and my estate will bear the cost of her maintenance till her marriage. If she lives at her husband's house after her marriage, she will receive Rs. 5 per month during her life out of my estate, and if she lives at my own house she will be entitled to maintenance out of my estate. If she be not on good terms with my heirs or successors-in-interest and if she wants to live in my own village, then my heirs and successors-in-interest should be bound to give her separate lands and houses according to the circumstances of the

estate, and she will be entitled to a monthly allowance of Rs. 20 during her life-time on account of her maintenance out of my estate ; and she will be entitled to get proper sum of money out of my estate on the said accounts. If any other daughter is born to me, then she also will be entitled to maintenance, monthly allowance, marriage expenses, homestead and houses, *etc.*, just like the aforesaid Srimati Bina Pani.

6. My three brothers executors will together or two of them or one of them will take the probate of this will and will administer and manage the estate left by me till my son or grandson attain majority, being vested with all the responsibilities and power as mentioned in this will and by paying off all the debts.

7. If there be no son born of my loin, or if such a son die sonless after birth, or if perchance, no son be taken in adoption, or if the son taken in adoption die sonless, then the executors or any of them or, in the event of their disagreement, the Collector of Dacca will establish at my own native village, Rawail, the place of my residence, a school or a charitable dispensary named after me and will spend the whole amount of surplus of my estate for its maintenance. To the above effect, being in full possession of my senses and in tranquil state of mind, I execute to-day this will, being in Calcutta at 19, Hara Chandra Mallik Lane. Finis. Dated 26th Pous, 1321 B.S.

As already stated the testator died on January 11, 1915. Ten years then passed without the respondent taking any steps to adopt any one of the sons of the testator's brothers or step-brother. This was in no way due to any difficulty in finding such a son. It seems to have been a deliberate omission on her part. The learned Subordinate Judge has examined the evidence about this in some detail and has summed it up in these words :—

So there is not only no evidence that the plaintiff even made any genuine endeavour to take any of her husband's brothers' sons in adoption within ten years and failed, but there is evidence in the contrary direction that defendants Nos. 1 and 2 (*i.e.*, two of the appellants) offered their sons for adoption to the plaintiff but she did not adopt.

On August 13, 1926, however, the respondent purported to adopt an infant son of one of the appellants. That the adoption took place in fact is not now in dispute. The only question about it is whether it was a valid adoption seeing that it was not made within ten years of the testator's death. On November 24, 1926, the adopted son died sonless.

It was in these circumstances that the respondent instituted the present suit on January 20, 1928,

1939

Bhupendra Mohan Ray v. *Purna Shashi Debi.*

claiming that the appellants as executors of her husband's will should put her in possession of the properties to which she was entitled at his death. She also claimed to have an account taken of the income of such properties. Her contention was that the adopted son had become by virtue of the express words in cl. 2 of the will "the owner of the estate," and that upon his death she became entitled to the estate as his heiress. As to cl. 7 of the will, which contains a gift over in favour of charitable purposes in the event (amongst others) of the son taken in adoption dying sonless, she contended that the gift over was void on the ground that it was repugnant to the absolute gift to the adopted son contained in cl. 2. This was, of course, on the assumption that the adoption was valid. If that assumption proved to be ill-founded, she claimed to be entitled to the properties as heiress of her husband, alleging that the gift over in the event of no son being taken in adoption was void on the grounds of remoteness and uncertainty.

The suit came on for hearing before the Additional Subordinate Judge at Dacca on June 17, 1932. He held that the adoption was invalid as not having been made within the ten years limited by the will. He thought in view of certain authorities, to which their Lordships will refer later, that the power to adopt given to the respondent was one that had to be strictly followed. He held further that the gift over in cl. 7, in the event which had happened of no son having been taken in adoption, was valid in every respect. The result, as already stated, was that the respondent's suit was dismissed with costs.

The respondent then appealed to the High Court. The appeal was successful. It was held that the adoption was valid. Mitter J., in whose judgment Rau J. concurred, agreed with the Subordinate Judge that under the Bengal School of Hindu law an authority to adopt given by a husband to his widow

must be strictly followed. "No one," he said, "would quarrel with this proposition of law." But he thought that according to the true construction of the testator's will the authority given to the widow to adopt a son of one of his four brothers could be exercised at any time within twelve years from the testator's death. He said :—

> In our opinion, on a reasonable construction of the will, even on a literal construction of it, the proper way to read it is to hold that there was no prohibition with reference to the taking in adoption of the nephews of her husband beyond the period of ten years and within twelve years of the testator's death and by the adoption of the nephew within twelve years the wishes of the testator were complied with.

And a little later he said :—

> We have to see on the authorities whether there is an intention within the four corners of the will as expressing that the nephews are to be excluded beyond the period of ten years. As we have already said that seems to us to be an unreasonable construction to put upon the will.

The adoption having been in their opinion validly made and the adopted son having died sonless, it necessarily followed that the respondent had power at any time thereafter to take four more sons in adoption successively. In order, therefore, to determine whether the gift over contained in cl. 7 of the will had taken effect by reason of the son taken in adoption having died sonless, it might be necessary to wait until the death of the respondent. What then was to happen in the meantime to the testator's estate which had vested in the son whose adoption had been held to be good? This question was answered by the High Court in the respondent's favour. They held that the estate had vested in her as heiress of the adopted son and that she was entitled forthwith to be put into possession of it and to administer it. They consider that any other conclusion would be inconsistent with the Hindu law that the succession to an estate can never remain in abeyance.

It is, in their Lordships' opinion, established law that in such a case as the present the authority to adopt given by a husband to his widow must be

1939

Bhupendra Mohan Ray v. *Purna Shashi Debi.*

strictly followed. In the case of *Mutasaddi Lal* v. *Kundan Lal* (1) the law upon the subject was stated by the Privy Council to be as follows:—

> All the schools of Hindu law recognise the right of the widow to adopt a son to her husband with the assent of her Lord. It is equally well established that this assent may be given either orally or in writing; that, when given, it must be strictly pursued; that she cannot be compelled to act upon it unless and until she chooses to do so; and that, in the absence of express direction to the contrary, there is no limit to the time within which she may exercise the power conferred upon her.

Much to the same effect was said by Lord Buckmaster when delivering the judgment of the Privy Council in *Sitabai* v. *Bapu Anna Patil* (2):—

> According to the Bombay School of law the duty of a Hindu widow to obey her husband's command compels her to act upon any mandatory direction that he may give by will as to the way in which her power of adoption should be exercised.

Their Lordships so far are in complete agreement with the High Court. But with all respect to that Court their Lordships are unable to agree that in making the adoption of her husband's nephew more than eleven years after his death the respondent was acting in strict conformity with the authority given to her by the will. It is true that the will does not in terms state that an adoption of one of the sons of her husband's brothers or step-brother after the expiration of ten years from his death should be void. That, however, is not the point. The question is not what the will says shall be void but what is the power of adopting such a son that is given to the reaspondent. In their Lordships' opinion the answer to this question is plain. It is the power set forth in the first paragraph of cl. 3 of the will, *viz.*, a power to adopt within ten years after the testator's death. Their Lordships are unable to find anything in the will either preceding or succeding this paragraph that can be regarded as in any way enlarging this power.

(1) (1906) I. L. R. 28 All. 377 (380); L. R. 33 I. A. 55 (57).
(2) (1920) I. L. R. 47 Cal. 1012 (1018); L. R. 47 I. A. 202 (205).

The power is expressly limited and in accordance with the authorities and in accordance with the general principles applicable to powers the express limitation must be strictly observed.

For these reasons their Lordships agree with the decision of the Subordinate Judge that the adoption was invalid.

They also agree with him that the gift over contained in cl. 7 of the will in the case of no son being taken in adoption was valid in the events which happened and took effect upon the expiration of ten years from the death of the testator. Their Lordships express no opinion upon the question whether, if there had been a valid adoption, the gift over in the event of "the son taken in adoption" dying sonless would or would not have failed for remoteness. For the gift over in the event of no son being taken in adoption is clearly severable from the gift over in the other event just mentioned and necessarily would take effect, if it took effect at all, at the latest upon the expiration of the period of twelve years from the death of the testator or the earlier death of his widow. In the events that happened it took effect upon the expiration of ten years from the testator's death inasmuch as it was not impossible for the respondent within that time to take in adoption one of the sons of his brothers or step-brother.

It was, however, contended on behalf of the respondent that even so the gift over was invalid on the ground that between the death of the testator and the expiration of the ten years the succession to the estate would be in abeyance and that this was contrary to Hindu law. Their Lordships do not desire in any way to question this principle of the Hindu law of succession. But it has no conceivable application to the present case. Upon the death of the testator any interest in his estate not effectually disposed of by his will would vest at once in the respondent as his heiress. There could not, therefore, be any

1939

Bhupendra Mohan Ray v. *Purna Shashi Debi.*

abeyance of the succession. If the surplus income from his estate after making the provisions detailed in cls. 4 and 5 of the will has not been effectually disposed of, the right to receive such surplus income vested in the respondent. In truth it was not so disposed of. For the gift over of the residuary estate of the testator in favour of the charitable purposes mentioned in cl. 7 of the will was a contingent gift and would not therefore carry the income accruing before the gift vested. In these circumstances the respondent is entitled to have an account taken of that income and to be paid what shall be found due upon taking that account, and her suit ought not to have been dismissed altogether. It ought, however, to be stated in justice to the learned Subordinate Judge that this aspect of the matter does not appear to have been called to his attention.

In their Lordships opinion the right course to take in all the circumstances is to discharge the decree of the Subordinate Judge and also the decree of the High Court except in so far as it directs payment of the court-fees out of the estate; to direct that an account be taken of the surplus income of the testator's estate accruing during the ten years immediately succeding the death of the testator; and to direct payment by the appellants to the respondent of what shall be found due on taking such account. Their Lordships will humbly advise His Majesty accordingly.

Their Lordships think that this is a proper case for directing that the costs of the appellants and the respondent both in the Courts below and of this appeal should be raised and paid by the appellants out of the estate of the testator.

Solicitors for appellants: *A. J. Hunter & Co.*

Solicitors for first respondent: *Stanley Johnson & Allen.*

C. S.