[4 Mad. 124.]

APPELLATE CIVIL.

The 4th August, 1881.

PRESENT:

MR. JUSTICE INNES AND MR. JUSTICE KINDERSLEY.

Kolla Subramaniam Chetti.....(Plaintiff), Appellant

and

Thellanayakulu Subramaniam Chetti and others.....(Defendants), Respondents.*

Hindu Law—Will—Gift of estate subject to a widow's vested interest—Curtailed enjoyment.

V S, a Hindu died in 1858, leaving a will whereby he appointed G and S his executors to conduct his affairs as directed in the will. After payment of debts, legacies, &c., G and S were directed to manage the residue of estate and not to sell it during the lifetime of L, the junior wife of V S, to whom a monthly payment for life was to be made by them; after the death of L, G and S were directed to [125] divide the property that remained in equal shares between them and to continue to enjoy the same in equal shares. L survived both G and S, who died in 1875 and 1879 respectively.

Held—in a suit brought in 1879 by the divided nephew of V S against L and the representatives of G. and S. to have his right to the estate of the testator, upon the death of L, declared and for an account—that there was no intestacy, and that the gift to G and S did not fail by reason of their deaths in the life time of L, but that G and S took a vested interest on the death of V S.

Per KINDERSLEY, J.—*Semble*: The suit was barred by Limitation as the widows of V S had not been in possession of the estate as Hindu widows but had enjoyed merely their allowance under the will.

THE facts and arguments in this case sufficiently appear in the following judgments of the Court (INNES and KINDERSLEY, JJ.).

Ramachandrayyar for Appellant.

Mr. *Spring Branson* for Respondents.

Innes, J.—It appears to me that the decree of the learned Judge is right and should be affirmed.

The testator was divided in estate from his brother, the father of plaintiff. He died in December 1858, leaving a will in which he appointed two persons, *Thellanayakulu Gunnaya Chetti* and *Thellanayakulu Sami Chetti*, to be his executors "to conduct my affairs in the same manner as is hereinafter specified." He directs them to collect all sums due to him, to pay all his debts, to expend 500 rupees on his funeral ceremonies, to pay 7 rupees monthly, during her lifetime, to his elder wife, who has abandoned her religion and lived apart from him for the last thirty years, and to defary her funeral expenses; to pay his younger wife 14 rupees a month during her life, to pay certain legacies to servants, to collect rents and profits, sell portions of landed property and clear mortgages and repair houses, and so hold the property during the lifetime of the younger wife. After her death, they were directed to divide what remained in equal shares and continue to enjoy the same in equal shares.

* Appeal No. 38 of 1880 from the decree of the High Court on the Original Side, dated 29th September 1880.

The ultimate object of the testator was clearly to make a gift of the property to the two so-called executors, but to provide sufficient funds from it, during the lifetime of his younger wife, to pay her 14 rupees a month, and to charge the property during the life of his elder wife with 7 rupees a month.

Accooding to the rule laid down by Lord ELDON in King *v.* Denison [1 Ves. & B., 272 ; *see* Story (Equity Juris.), Section 1245] the estate was devised to them, not *for* but *subject* to a **[126]** particular purpose. They were not, therefore, mere trustees, but devisees of an estate subject to a charge. The testator vests the property in the executors, but assumes to postpone their beneficial interest in it until his younger wife's death. Intermediately they are only to have the management of it, and, presumably, to accumulate the income other than that required for the purposes prescribed.

They have died and the younger wife survives, and it is contended that the bequest has lapsed on the ground that it was not to take effect until the death of the younger wife.

It would not be to give effect to the obvious intention of the testator if it were held that, by the death of the executors prior to the event on which they were to enter upon complete enjoyment of the property, the bequest lapsed and their descendants did not benefit by it. But it is contended that this must have resulted because there was to be no beneficial enjoyment by the executors, and, therefore, no gift to them until the event happened.

But looking at the case apart from the character which the executors in part sustain of trustees, the gift, on the analogy of English law, would certainly have vested in interest. There is a distinction, as pointed out in *Watson's* Compendium of Equity, vol. II, p. 1099, " between cases where the event is uncertain in which the gift is to take effect and those in which it is certain, though future. In cases of the latter description, where the payment or enjoyment is postponed by reason of circumstances connected with the estate or for the convenience of the estates, as it has been termed, for instance, where there are prior life or other estates or interests, the ulterior interest to take effect after them will be vested. Thus under a gift by a testator to A at the decease of testator's wife, A's interest vests at the testator's death. Blamire *v.* Geldart " (16 Vesey jr., 314).

Then, is there any reason why the circumstance that the person who is ultimately to have the beneficial enjoyment of the bequest is intermediately in the position of a *mere* manager, should make any difference in the vesting in interest at the moment of the testator's death ?

If the testator had left the property to trustees other than the two legatees, and directed they should hold the property till the **[127]** death of Lakshammal (the younger widow), and that then these two legatees should take it, the bequest would have been valid and the interest would have vested in interest in the legatees from the moment of the testator's death. Does it then make a difference that the trustees and the legatees are the same persons ?

It is an axiom of all systems of law that to the existence of property there must be an owner in whom the property is vested. When property devolves by inheritance, on the death of the owner it vests at once in the heir. If it is devised by will, the testator must vest it effectually in some person by devise, otherwise there is an intestacy and the property goes to the heir. It may be effectually vested in trustees for the benefit of some other persons. On whom did the estate devolve under the will immediately on the death of this testator ? The estate did certainly not vest in the younger widow, who has merely an

allowance for life out of it. Still less can it be said to have vested in the elder widow, who had a still smaller allowance for life. If it was only vested in interest in the executors, assuming that their beneficial interest was postponed until the death of Lakshammal, in whom was the ownership to reside up to the death of Lakshammal? The executors were indeed directed to hold and manage the estate until that event, but the obvious intention is that they should have no power of disposal of it in the meantime. Nevertheless, the intention is, in other respects, clear that, with the restriction on their present enjoyment of the property, they should be the owners of it. I think, therefore, that, according to English law, the estate would become vested in the executors from the moment of the testator's death, and that the restriction on their present enjoyment of it would be simply a restriction inconsistent with and repugnant to the estate intended to be bequeathed, and as such would be ignored.

That this would also be the right view to take in the case of such a condition imposed on the devisee of property under a Hindu will is clear from several late decisions. It has been held that a will would be invalid which forbade alienations within the limits of the estate created, or prohibited partition by persons entitled to divide. That is, it would be invalid to that extent (see the cases upon this point collected in the notes to Section 356 of Mr. *Mayne's* Hindu Law). As to whether the executors were devisees or not, and whether the estate vested in them at the moment of the [128] testator's death, the rule in regard to a Hindu will is the same as that to be applied to an English will that the intention is to govern. As already observed, the intention appears very clear to devise the property to the executors, in whom I think it vested immediately on the testator's death.

I think therefore that there was no intestacy, and that, on the deaths of the executors, their interests devolved on their sons, and that the plaintiff's suit should be dismissed with costs.

Kindersley, J.—Kolla Sri Venkata Subbarayulu Chetti (hereinafter called the testator) died about the end of December 1858, a divided member of a Hindu family, and without issue. On the 21st of December 1858 he made his will, by which he appointed his brothers-in-law Gunnaya Chetty and Sami Chetti his executors, directing them to collect all debts due to his estate and to pay all debts due by him, selling so much of his landed property as might be necessary for that purpose; and, out of the rents and profits arising from the remaining property, to perform his obsequies at a cost of Rs. 500, to pay Rs. 50 each to two of his servants, and to pay an allowance of Rs. 7 a month to his elder widow and Rs. 14 a month to his junior widow. Any of the rents and profits which might remain after defraying those expenses were to be applied to the repair of the testator's houses. The jewels were left to the junior wife. Then the will continues in the following terms: "and that my executors should in this manner conduct my affairs during the lifetime of my younger wife named Kolla Lakshammal. Save and except the properties which shall be sold for the purpose of paying my debts, the remainder should not be sold during the lifetime of my said younger wife; and that after her death my brothers-in-law Thellanayakulu Gunnaya Chetti and Thellanayakulu Sami Chetti should divide the remaning property in equal shares between them, and continue to enjoy the same by themselves respectively." The remaining parts of the will are not material to the result of these proceedings. The senior widow of the testator appears to have died about a year after her husband. The junior widow survives and is the present fourth defendant. The two

executors are dead. *Gunnaya Chetti* died in June 1875 intestate, leaving the first three defendants his sons. These three defendants are also the nephews of the other executor, who died about the 13th June 1879, devising and bequeathing to [129] them all rights accruing to him under the will of the testator *Venctasubbarayalu Chetti*. But the executor's will may be left out of consideration, because the first three defendants are the legal representatives of both of the executors by Hindu Law.

The present suit has been brought by a divided nephew of the testator for a declaration of his right to succeed to the property of his uncle after the death of his widow, the fourth defendant, for a declaration that the will is inoperative against the plaintiff; that an account might be taken; and that, after paying 14 rupees a month to the fourth defendant for her maintenance, the residue of the rents and profits might be paid to the plaintiff.

The learned Judge who heard the cause found that the executors had a valid interest and dismissed the suit.

On appeal it was argued that the executors acquired no right in the property, because they did not survive the junior widow, the present fourth defendant, and that the plaintiff should succeed as the heir of the testator. It was also suggested that the suit was barred by the Act for the Limitation of suits. But to this it was replied that the executors were in possession as trustees for the widows.

I am inclined to think that the suit is barred; because, since the death of the testator in 1858, the widows have not been in possession of their full rights under Hindu Law, but only of such allowances as they received under the will. The case of *Saroda Soondury Doossee* v. *Doyamoyee Doossee* (I. L. R., 5 Cal., 938) is an authority for saying that, if the widow in her lifetime was debarred from bringing the suit, the reversioner on her death would also be debarred. But there are other reasons why the plaintiff's suit must fail. The testator was divided in interest from the plaintiff, and, having no issue, he was competent to make a will. And I am of opinion that under the will the executors upon the death of the testator took an interest in the property, which interest vested in them at that time, and was not contingent on their surviving the two widows. That interest has been inherited by the first three defendants. In the case of *Ganendra Mohan Tagore* v. *Upendra Mohan Tagore* (4 B. L. R., 103) to which we were referred, it was laid down that, in order to take a gift under the will of a Hindu, the donee must [130] be in existence at the time of the testator's death. In the present case, however, the executors who took an interest under the will were living at the time of the testator's death. The first three defendants are not donees under the will. They are the heirs of those who were so, and, subject to the trusts contained in the will, they appear to be entitled to retain possession of the property.

I am therefore of opinion that the suit was properly dismissed, and that this appeal ought to be dismissed with costs.

Attorneys for Respondents, Messrs. *Branson* and *Branson*
