APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

1889. Mar. 18, 19, 29.

MANJAMMA AND ANOTHER (DEFENDANTS NOS. 1 AND 2), APPELLANTS IN S.A. No. 1115 OF 1888,

v.

PADMANABHAYYA AND ANOTHER (PLAINTIFFS), RESPONDENTS,

KITTI (DEFENDANT No. 3), APPELLANT, IN S.A. No. 1158 OF 1888,

v.

PADMANABHAYYA AND OTHERS (PLAINTIFFS AND DEFENDANTS NOS. 1 AND 2), RESPONDENTS.*

* *Hindu law—Construction of settlement—Successive interests—Contingent gift to a class—Member of the class in existence on failure of prior interest—Rule in the Tagore case.*

A *karar* executed to the father of Sitarama, a minor grandson of the executant, after reciting that the executant had appointed Sitarama to perpetuate his family and had handed over certain property to the father, provided that the property should be delivered to Sitarama on his attaining majority and proceeded as follows :—

"If the said Sitarama shall have descendants, neither your male descendants nor "any one else shall have any interest in any of the property herein-mentioned. "If the said Sitarama happen to be without descendants, the male offspring of my "daughter, Kaveramma, your wife, shall enjoy the property equally, but no others "shall have any interest therein ; such is the *swatantra karar* executed with my "free will and pleasure."

Sitarama attained his majority but died without issue. His elder brother sued for possession of the property under the above clause :

Held, that since the plaintiff was a person capable of taking subject to the life interest, at the time when the gift was made, he was entitled to succeed.

Semble : If the gift to the plaintiff had failed the property would have reverted to the heirs of the settlor on Sitarama's death without issue. *Ram Lal Sett* v. *Kani Lal Sett* (I.L.R., 12 Cal., 663) followed.

SECOND APPEALS against the decrees of J. W. Best, District Judge of South Canara, in appeal suits Nos. 207 and 213 of 1887, modifying the decree of K. Krishna Rau, District Munsif of Udipi, in original suit No. 219 of 1886.

Suit to recover certain lands to which plaintiff No. 1 claimed

* Second Appeals Nos. 1115 and 1158 of 1888.

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title under an instrument, dated 25th October 1868, and described as a *swatantra karar*, filed in the suit as exhibit A; plaintiff No. 2 was a demisee of the land in question from plaintiff No. 1.

The relationship of plaintiff No. 1 and the defendants to Subraya, the executant of the *swatantra karar* (translated "deed conferring full rights or independent power") appears from the following genealogy:—

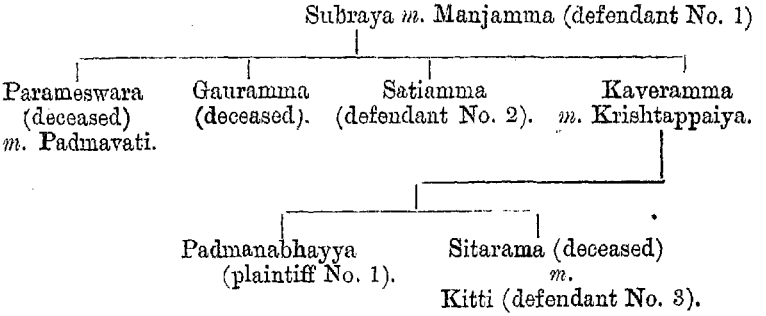

Exhibit A was as follows:—

"Swatantra karar executed on 25th October 1868 by (me) "Subraya, son of Parameswara, Sivalli Brahmin, residing at "Kannar Kudru Kasba village. Kouse Magani, Udipi Taluk, "to Krishnappaiya, my sister's son, and husband of my daughter, "Kaveramma, son of Puttiana Ramappaiya, residing at the said "Kannar Kudru, runs as follows:—

"My son, Parameswara, having died issueless, and, as I am an "old man having no other sons, I have appointed, with my free "will, Sitarama, one of your sons, now aged 7 years, in order to "improve (or continue) my household hereafter, and to perform "all the ceremonies that must take place for me in future, and "have this day made over the undermentioned property to you "with the appointment that until he (Sitarama) comes of age, "yourself, and after he attains majority, the said Sitarama shall "reside in my house carrying on all the charitable actions in my "household which I was hitherto doing, and enjoy the said land.

"Description of the movable and immovable properties made "over:— . . . . . .

"Thus land, buildings, cows, utensils, &c., movable and im- "movable property of the estimated value aggregating Rs. 597, "I have on this date given and put you in possession. You "shall, therefore, enjoy this real property, have the warg and "lavana registry of this real property entered in your name in

" the Circar until your said son, Sitarama, attains majority, pay " the Government assessment from the ensuing year 1869, and " from the produce of this land, pay annually 2 nijamudis of " paddy for Amirtapady offering at the shrine of Dhurga Para- " meswari Ammah of Kannar Kudru Mutt, and for Jagara Sama- " radane and Arthivadai puja, which take place there in the " months of Ashada Bahula, 12th and Simha months respectively, " as I have done hitherto. You shall also perform mahalia on " the 30th of Bahdrapada Bagula each year in my house from " the profits of this land and maintain me, my wife, and Padma- " vati, the widow of my deceased son Parameswara, so long as " we live and perform our obsequies after (our death), and also " properly maintain Satiamma, my daughter, who has been de- " pendent upon this my land for livelihood. You shall hence- " forward enjoy the said movable and immovable properties as " I have done hitherto until the said Sitarama comes of age, and " after the said Sitarama has attained majority, you should " deliver to him without any objection whatever the aforesaid " land, buildings and movables, and get the warg and lavana " entries of the real property transferred to his name in the " Circar. If the said Sitarama shall have descendants, neither " your other male descendants nor any one else shall have any " interest in any of the property hereinmentioned. If the said " Sitarama happen to be without descendants, the male offspring " of my daughter Kaveramma, your wife, shall enjoy (the pro- " perty) equally, but no others shall have any interest therein, " such is the swatantra karar executed with my free will and " pleasure."

Then follow boundaries.

Plaintiff No. 1 claimed possession on the ground that Sitarama having died without issue, the property devolved on him as sole surviving son of Kaveramma. Defendants Nos. 1 and 2 denied the right of plaintiff No. 1 to alienate the land or to dispossess them. For defendant No. 3 it was claimed that Sitarama had been full owner under exhibit A and had transmitted his right to her.

The District Munsif held that as between plaintiff No. 1 and defendant No. 3 the gift over on the death of Sitarama without issue was good; adding, however, " it is no doubt subject to the " charges of maintenance in favor of defendants Nos. 1 and 2 as

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"provided for in the document." He accordingly passed a decree for the plaintiff.

Against this decree defendant No. 3 preferred appeal No. 207 of 1887, and defendants Nos. 1 and 2 preferred appeal No. 213 of 1887 in the District Court, the plaintiff preferring certain objections against the decree which are not material for the purposes of this report.

The District Judge dismissed both appeals, and modified the decree of the District Munsif in accordance with the plaintiffs' objections.

Defendants Nos. 1 and 2 preferred second appeal No. 1115 of 1888, and defendant No. 3 second appeal No. 1158 of 1888.

Ramasami Mudaliar for appellant in second appeal No. 1115 of 1888.

The provisions of exhibit A cannot be upheld. Under them Sitarama, on coming of age, would have taken a life-estate, and there is a gift over to his descendants, if any, and failing them to the male offspring of his mother—gifts to an unascertained class and not to individuals. But the interest of Sitarama fails, the gift over being bad both for perpetuity, and also as being inconsistent with Hindu law, *Juttendro Mohun Tagore* v. *Ganendro Mohun Tagore*(1), *Soudamineey Dossee* v. *Jogesh Chunder Dutt*(2), *Pearks* v. *Moseley*(3).

See also Transfer of Property Act, sections 13, 14, 15 and Succession Act, section 102, which, under the Hindu Wills Act, would apply to a Hindu will.

[*Parker, J.*—Suppose it is conceded that the gift over to the descendants of Sitarama fails, does that prevent the plaintiff from taking] ?

Yes, under the rule in Transfer of Property Act, sections 14 and 15, which is applicable when there is no rule of Hindu law to bar its application. In applying this rule regard must be had to possible events. *Ram Lal Sett* v. *Kanai Lal Sett*(4). Here Kaveramma might have had a son many years after Subraya's death.

[*Parker, J.*, referred to *Sreenutty Soorjeemoney Dossee* v. *Denobundoo Mullick*(5).

(1) 9 B.L.R., 377; s.c. L.R., I.A., Sup., Vol. 133.
(2) I.L.R., 2 Cal., 262.
(3) L.R., 5 App. Ca., 714, 722-3.
(4) I.L.R., 12 Cal., 663.
(5) 9 M.I.A., 123.

Collins, C.J., referred to the judgment of Wilson, J., in *Ram Lal Sett* v. *Kanai Lal Sett*(1).]

The judgment of Knight Bruce, L.J., in the *Mullick case*(2), is in my favor, and *Ram Lal Sett* v. *Kanai Lal Sett*(1), does not govern this case, it does not carry the matter any further than *Rai Bishen Chand* v. *Mussumat Asmaida Koer*(3), which it follows, and which was decided on facts very different from those of the present appeal. See also *Srimati Bramamayi Dasi* v. *Jages Chandra Dutt*(4), and *Kherodemoney Dossee* v. *Doorgamoney Dossee*(5).

K. Narayana Rau for appellant in second appeal 1158 of 1888.

As soon as the property vested in Sitarama it became his absolutely, and his interest is not affected by the failure of the gift over. It was the intention of Subraya to perpetuate his family, and hence the gift to Sitarama. The property became the self-acquisition of Sitarama. It has not been proved that the plaintiff was alive at the time of the gift.

[*Collins, C.J.*—It seems to have been admitted that he was the elder brother.

Parker, J.—No question arises as to that if the gift over is operative.]

In either view he could not restrain alienations by Sitarama, who took the property absolutely, and on his death it passed to his wife as his heir—*Katama Natchiar* v. *Rajah of Shivagunga*(6), Mayne's Hindu Law, 4th edition, § 487.

Ramachandra Rau Saheb for respondents. Both appeals must fail if the gift over is valid. *Sondaminey Dossee* v. *Jogesh Chunder Dutt*(7) and *Kherodemoney Dossee* v. *Doorgamoney Dossee*(5) are not at variance with *Ram Lal Sett* v. *Kanai Lal Sett*(1), which is an authority applicable to the present circumstances. That case should be followed as it proceeds on the principle laid down by the Privy Council in *Rai Bishen Chand* v. *Mussumat Asmaida*(8).

The further facts of the case appear sufficiently for the purpose of this report from the judgment of the Court (Collins, C.J., and Parker, J.).

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(1) I.L.R., 12 Cal., 663.
(2) 9 M.I.A., 123.
(3) L.R., 11 I.A., 164; s.c. I.L.R., 6 All., 560.
(4) 8 B.L.R., 400.
(5) I.L.R., 4 Cal., 455.
(6) 9 M I.A., 539.
(7) I.L.R., 2 Cal., 262.
(8) I.L.R., 6 All., 560; s.c. L.R., 11 I.A., 164.

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JUDGMENT.—The original holder of the plaint property was one Subraya whose only son, Parameswara, predeceased him. On 25th October 1868 Subraya executed a deed called a *swatantra karar* in favor of Sitarama, his younger grandson by his daughter, Kaveramma. The deed is executed to Sitarama's father, Krishnappaiya (Sitarama himself being in 1868 a child of 7 years old), and after providing for the maintenance of Subraya's wife (first defendant), daughter (second defendant) and daughter-in-law Padmavati, enjoins Krishnappaiya to deliver over to Sitarama on his attaining majority the plaint properties. The deed then continues as follows:—

"If the said Sitarama shall have descendants, neither your "male descendants nor any one else shall have any interest in any "of the property hereinmentioned. If the said Sitarama happen "to be without descendants, the male offspring of my daughter "Kaveramma, your wife, shall enjoy the property equally, but no "others shall have any interest therein, such is the swatantra "karar executed with my free will and pleasure."

Sitarama attained majority, but died in 1885, without issue. The third defendant is his widow, and first plaintiff his elder brother who was therefore alive at the date of the swatantra karar in 1868. No other male children have been born to Kaveramma. The second plaintiff is merely a mulgeni tenant under the first plaintiff.

The question for decision is whether the first plaintiff is under the terms of the karar lawfully entitled to take the property on the death of Sitarama without issue. It was contended (1) that the gift over to first plaintiff was invalid as first plaintiff was only one of a class, and (2) that the property had absolutely vested in Sitarama, and that his widow was his heir to his separate property.

Both the Courts below have held that the gift over in first plaintiff's favor was valid and decreed the claim. Defendants Nos. 1 and 2 (widow and daughter of Subraya) appeal in second appeal No. 1115, and third defendant (widow of Sitarama) appeals in second appeal No. 1158 of 1888.

The first point is as to the nature of the interest taken by Sitarama. Having regard to the expression "no others shall have any interest therein" we are of opinion that Sitarama's estate was made defeasible in the event (which has occurred) of the failure of issue living at the time of his death (see *Bhoobun Mohini Debia*

v. *Hurrish Chunder Chowdhry*(1)). If therefore the gift over in the first plaintiff's favor is invalid, the property would revert to the heirs of the donor (defendants 1 and 2) and the third defendant's appeal (second appeal No. 1158 of 1888) must, therefore, be dismissed with costs.

The next point is whether the gift over to first plaintiff and any future male issue of his mother is wholly invalid even as regards first plaintiff himself who was alive at the date of the deed (October 25th, 1868). The learned pleader for the appellants relies upon the following cases:—*Srimati Bramamayi Dasi* v. *Jages Chandra Dutt*(2), *Juttendro Mohun Tagore* v. *Ganendro Mohun Tagore*(3), *Soudamincy Dossee* v. *Jogesh Chunder Dutt*(4), *Kherodemoney Dossee* v. *Doorgamoney Dossee*(5), and upon section 15 of the Transfer of Property Act and section 102 of the Indian Succession Act.

As against these we are referred to the more recent decision of the Privy Council in *Rai Bishen Chand* v. *Mussumat Asmaida Koer*(6), and the judgment of Wilson, J., concurred in by Garth, C.J., in *Ram Lal Sett* v. *Kanai Lal Sett*(7).

We do not think that the provisions of the Transfer of Property Act or of the Indian Succession Act will affect the case. In the first place these Acts do not affect any rule of Hindu law, and, secondly, the sections quoted only cause the interest created for the benefit of a class to fail entirely when such interest fails by reason of any of the rules contained in the two preceding sections (which are identical in the two Acts). The present case does not fall within either of those sections.

It may be conceded that the plaintiff's case must fail if the decisions in the earlier Calcutta cases are to be followed; but the question is how far they have been modified by later decisions, and especially by the Privy Council decision in *Rai Bishen Chand* v. *Mussumat Asmaida Koer*(6). That case differs from the present one in that there there was a present gift to a living designated individual capable of taking, followed by actions of a kind which even without a deed might have worked a transfer of property in India. Here on the other hand the gift was

(1) I.L.R., 4 Cal., 23; s.c. L.R., 5 I.A., 138. (2) 8 B.L.R., 400.
(3) 9 B.L.R., 377; s.c. L.R., I.A., Sup., Vol. 133. (4) I.L.R., 2 Cal., 262.
(5) I.L.R., 4 Cal., 455. (6) L.R. 11 I.A., 164; s.c. I.L.R., 6 All., 560.
(7) I.L.R., 12 Cal., 663.

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contingent to a class of persons to be ascertained at the death of Sitarama without issue (which might or might not occur)—a gift to such lawful male issue as might be living at the death without issue of Sitarama, who took only a life estate.

As pointed out by Wilson, J., in *Ram Lal Sett* v. *Kanai Lal Sett*(1) such a gift to a class would be valid under English law, and what we have to consider is, whether there is anything in Hindu law which would make such a gift inoperative either wholly or in part. The *Tagore case*(2) which is relied on by appellant's pleader is authority merely for the proposition that under the special rules of Hindu law the persons capable of taking under a will must be such as could take a gift, *inter vivos*, and must, therefore, either in fact or in contemplation of law be in existence at the death of the testator. This principle would not exclude the first plaintiff, who was in existence at the date of the gift. In *Sreemutty Soorjeemoney Dossee* v. *Denobundoo Mullick*(3) it was held by the Privy Council that there was nothing to prevent a Hindu testator devising self-acquired property upon an event which is to happen on the close of a life in being. This is exactly what has been done in the present case, except that the transfer was a gift and not a bequest. The donor gave the property absolutely on the death of Sitarama either to his issue, if any, or failing issue of Sitarama to his brothers, if any, in equal shares. Both in the *Tagore case* and in *Rai Bishen Chand* v. *Mussumat Asmaida Koer*(4), the Privy Council has laid down the principle that the real intention of the donor is to be ascertained and when ascertained is to be carried out to the extent which the law allows. It is not therefore necessary in our opinion to consider whether or not after-born brothers of the first plaintiff would have been excluded provided that first plaintiff himself was a person capable of taking subject to Sitarama's life-estate, at the time the gift was made. It appears to us that he was such a person and that the gift will therefore enure for his benefit even though the gift over to his possible brothers might have been inoperative.

We dismiss the second appeal No. 1115 of 1888 with costs.

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(1) I.L.R., 12 Cal., 679, 680.

(2) *Juttendro Mohun Tagore* v. *Ganendro Mohun Tagore* (L.R., I.A., Sup., Vol. 133; s.c. 9 B.L.R., 377). [See as to this case and the case next cited, *Kristoromoni Dasi* v. *Narendro Krishna* (in P.C.) I.L.R., 16 Cal., 383, Reporter's note.]

(3) 9 M.I.A., 123.

(4) L.R., 11 I.A., 164; s.c. I.L.R., 6 All., 560.