Before Mr. Justice McDonell and Mr. Justice Field.

SHOOKMOY CHUNDER DASS AND ANOTHER (DEFENDANTS) *v.* MONOHARI DASSI AND ANOTHER (PLAINTIFFS).* 1881 *Feby.* 19.

Hindu Law—Will—Estate Tail—Accumulation.

A Hindu by his will directed that his estate should remain intact, and that the profits should be applied, in the first place, towards performing religious duties; and he provided that his immoveable property, business, and the capital stock thereof should also remain intact, and that his heirs, sons' sons, and great grandsons in succession, should be entitled to the profits, no person having any right of alienation.

The testator then provided that his eldest son should act as manager and shevait, and prepare accounts; and that he should have no power of alienation. He then made provisions for the payment of Government revenue, and declared that of the surplus profits six-sixteenths should be applied, in part, towards the worship of his ancestral deities, and the residue towards the maintenance of all the members of the family, and religious ceremonies, the remaining ten-sixteenths to be carried to the credit of his estate. In case of disputes between his eldest son and the testator's third wife, the mother of the testator's minor children, the testator directed that his eldest son should receive five-sixteenths of the ten annas share; if another son should be born of the testator's third wife, the remaining eleven-sixteenths was to go to her sons. If no son was born, then the eldest son was to take five and-a-half-sixteenths, and the sons of the third wife the remaining ten and-a-half-sixteenths, absolutely, as long as the family remained joint; the expenses of the *debsheva* and maintenance of the family were to be defrayed from the six annas share. In case of separation, the shares of the sons were to be placed to their respective credits every year, each son on attaining majority to be entitled to his share.

The testator then provided, that in case of separation, his sons (with the exception of the landed properties and capital stock of the business, and the articles used by the idols) should be at liberty to take the moveable property absolutely, according to the conditions laid down for the division of the ten annas share of the profits. He then provided for the maintenance of his third wife and minor sons out of the six annas share, each son on attaining majority to be entitled to his share under the will absolutely. After providing that his sons should live in his ancestral dwellinghouse, but that none of them should have any power of alienation, the testator directed that, if any

* Appeal from Original Decree, No. 127 of 1879, preferred against the decree of Baboo Gunga Churn Sircar, Subordinate Judge of Dacca, dated the 24th September 1878.

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of his heirs died without male issue, the widow of such heir should receive maintenance only, and that his grandson by a daughter should get nothing, but his share should go over to the surviving sons. The testator finally directed that his eldest son, sons' grandsons, and other heirs in succession *should perform the duties of kurta and shevait.*

In a suit by the widow of one of the testator's sons by his third wife, seeking to recover such a share of the testator's property as she would have been entitled to in the case of intestacy,—

Held, that the intention of the testator, in disposing of the profits of the six annas share, was not an intention to create a valid estate in the *corpus* in favor of any individual, but to tie up such *corpus* and to give the profits only to his male descendants; or in other words, to create a sort of estate in tail male in the profits, and that the bequest was void.

Held also, that the disposition of the ten annas share of the profits was void, there being in one event a direction to accumulate for ever without a disposition of the profits; and in the other event, the gift was void for the same reasons as the gift of the six annas share.

Held further, that the disposition of the family dwellinghouse, save in so far as it prohibited alienation, was good, and that there was a sufficient disposition of the moveable property.

THIS was a suit by a Hindu lady to recover, by right of inheritance from her husband, a four-anna share in the estate of her father-in-law, one Kristo Prosad Das, who had died leaving a will, dated the 17th Bysack 1260 (28th April 1853), the material provisions of which were as follows:

"Para. 6.—My estate shall remain intact, and from the profits thereof there shall be performed the worship, the periodical festivals, and the ceremonies of my ancestral deities, idols, and chakras, according to my turn as they have hitherto been performed. As regards the enjoyment of the profits, I do hereby provide that my houses, zemindaries, taluks, and other immoveable properties, and my businesses of various descriptions, and the capital stock thereof, shall always remain intact, as at present, and my heirs, sons, sons' sons, and great grandsons, and so on in succession, shall be entitled to enjoy the profits thereof. No one shall be competent to alienate by sale or gift the immoveable property, to close any business, to misappropriate the capital stock thereof, or to divide the same. If any one succeeds in doing so or will do so, it shall be disallowed by the authorities.

"Para. 7.—After my death, my eldest son, Sreeman Shookmoy

Chunder Das, shall, as provided by this will, act as kurta (manager) for the preservation and management of my entire estate, as shevait to the deities, idols, and chakras in my turn; and shall as kurta manage and perform the affairs and duties, as they are now performed by me, from the profits of my estates, commercial transactions, mercantile and banking businesses, zemindaries and taluks, and the rents and profits of my houses; and as such *karmadhyakha* (manager of business), he shall prepare accounts as they are now prepared in my time, year after year, shall keep one set with himself and shall make over another set to the mother and guardian of the minors. But he shall always be devoid of power to alienate my immoveable properties, which are now in existence, by sale, gift or otherwise, or to misappropriate or waste the capital stock of my business. If he do so, such act shall be null and void; and the person who acts in contravention (of these provisions) shall be deprived of his right and interest (under this will).

"Para. 8.—Whichever of my sons shall, after my death, act as *samarakshak* (protector) and *karmadhyakha* (business manager) of the estate for the time being according to the terms of this will, shall duly and at the proper times pay the Government revenue from the profits of the landed properties belonging to the estate, and shall thus protect the estate. If any immoveable property shall be lost through the negligence of the manager and otherwise than by divine visitation and circumstances over which there is no control, the liability to make good such loss shall rest with the manager. After discharging the public revenue, the collection charges and the cost of repairs of the houses from the profits of the immoveable properties, and of the trading business, six-sixteenths (six annas) of the entire surplus balance shall be applied, year after year, in part towards the performance of the worship and periodical festivals of my ancestral deities, idols, and chakras in the proper turn; and the residue thereof towards the maintenance of all the members of the family and the performance of religious rites and ceremonies; and the remaining ten-sixteenths (ten annas) shall be carried to the credit of my estate. If disagreement and discord eventually take place between him (the said Shookmoy Chunder)

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and the mother of the minors, and they want to live in separate mess, then the said six-sixteenths (six annas share) being regarded as a whole (or sixteen-sixteenths), my eldest son Sreeman Shookmoy Chunder Das, in consideration of his having in my lifetime increased the wealth by his labor and exertions in managing the trading business, shall receive five-sixteenths of such whole (or sixteen-sixteenths, *i.e.*, five-sixteenths of ten-sixteenths) in the following case,—that to say, if a son is born to my last married wife of her present conception; and the sons of my last married wife shall receive the remaining eleven-sixteenths (or eleven annas) in equal shares. If the issue of the present conception of my last married wife is not a male child, or if being a male child he dies unmarried, then my eldest son Shookmoy Chunder Das shall, for the reasons abovementioned, receive five and-a-half-sixteenths, and the other sons ten and-a-half-sixteenths in equal shares, and they, in their respective rights, shall be competent to enjoy and make gift of such profits.

"Para. 9.—As long as my last married wife and the sons born of her womb, and my eldest son, the said Shookmoy Chunder Das, shall live in concord with one another, the expenses of the *debsheva*, &c., and of the maintenance and daily and periodical rites and ceremonies of all the members of the family, shall be defrayed from the six annas share of the profits aforesaid. If, however, after all they disagree and fall out with each other and separate in mess, then the sums of money that may fall to the respective shares of the different sons, under the terms of the will, shall be placed to their respective credits in the accounts of every year. Any of the sharers shall, upon attainment of majority, be competent to take and receive, upon his receipt, from the manager, the money placed at his credit, whenever he may wish to do so. If the manager fraudulently refuses to pay the same, he and his right to receive the profits shall be liable to make good the sharer's claim with interest on the amount in deposit to his credit (such interest to run) from the date of demand, and the manager shall have no right of objection thereto.

"Para. 10.—The several objects to which the six annas share has been appropriated are likely to be effectuated in the same manner (as before) so long as concord and harmony exist. If,

however, my last married wife or her sons, do not agree with Shookmoy Chunder Das, or his wife and son, and if there arise (in consequence) a necessity for separation, they shall be at liberty to separate; and, with the exception of the landed properties and capital stock of the trading business now belonging to my estate, and the articles used by the idols, to divide and take, to appropriate, and to convey by gift, sale or otherwise the other moveable properties, subject to the conditions, provisions, and shares laid down in the eighth paragraph preceding, for the division of the ten annas share of the profits. Out of the six annas share set aside for the expenses of the *debsheva*, &c., my last married wife shall, during the minority of her sons, receive from the manager rupees twelve per month for the maintenance of herself and the minors, and the balance shall remain in the hands of the manager, who shall meet from it the expenses of the yearly, periodical, and daily rites and ceremonies. Any one of my sons by my last married wife who attains majority shall, from the date of his so attaining majority, cease to receive for his maintenance his proportionate share of the said twelve rupees; and shall be entitled to his proper share (under this will), and shall enjoy and appropriate the same, and the surplus balance of the said six annas share which remains after defraying the worship, the duties, and periodical and daily festivals and ceremonies, shall be received by my sons born of my two wives, in equal shares, without any difference in their proportionate shares.

"Para. 11.—All my sons shall reside in and occupy my ancestral dwelling and the dwellinghouse and gardens constructed and laid out by myself. No one of them shall be competent to demolish the same, or alienate them by sale or gift. All my sons will be entitled to hold and enjoy the same in equal shares.

"Para. 12.—If any one of my heirs dies without male issue, his widow shall receive maintenance only, and his grandson by a daughter (if any) shall get nothing. The profits of his share shall be received in equal shares by the surviving sons; she shall remain in the family dwellinghouse as long as she lives, and on her death, the surviving sons shall receive the same in equal shares for their residence.

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"Para. 15.—After the death of Sreeman Shookmoy Chunder Das, by the will of God, my eldest surviving heir for the time being shall discharge and perform all the duties aforesaid as protector and manager of the entire estate, as kurta and shevait, according to the provisions of the seventh paragraph. And this direction shall hold good in respect of the sons, grandsons, and other heirs in succession."

Kristo Prosad Das had been married three times. By his first wife he had no son. By his second wife he had one son, Shookmoy Chunder Das. By his third wife he had three sons, Hari Charan Das, who died unmarried, Gourhari Das, and Anand Hari Das. At the date of his will his wife was *enceinte*, and subsequently gave birth to a son, who died an infant.

Kristo Prosad Das died on the 12th Joisto 1260 (24th May 1853). The present suit was instituted by S. M. Monohari Dassia, the widow of Anand Hari Das, who died in Phalgoon 1279 (February 1873), against Shookmoy Chunder Das, Gourhari Das, and S. M. Pria Dassia, the widow of the testator.

The Subordinate Judge held, that the testator had attempted to create an estate unknown to the Hindu law, and that the will was invalid; and he gave the plaintiff a decree.

From this decision the defendants appealed to the High Court.

Mr. *Evans* and Baboo *Durga Mohun Doss*, Baboo *Rashbehary Ghose*, Baboo *Aukhil Chunder Sen*, and Baboo *Lall Mohun Doss* for the appellants.

Mr. *Branson* and Baboo *Hurry Mohun Chuckerbutty* and Baboo *Opendronath Mitter* for the respondents.

The judgment of the Court (FIELD and MCDONELL, JJ.) was delivered by

FIELD, J.—The most important questions to be decided in this case are concerned with the construction to be put upon the will, dated 17th Bysack 1260 (corresponding with the 28th April 1853), made by the late Kristo Prosad Das.

It may be well to observe that this will was made before the

passing of the Hindu Wills Act of 1870, and that, therefore, the provisions of this Act, and the provisions of the Succession Act incorporated therein by reference, have no direct application to the will with which we have to deal in the present case.

The testator Kristo Prosad Das was thrice married, as he states in the 4th paragraph of the will. By his first wife he had no male offspring. By his second wife he had a son Shookmoy Chunder Das, the defendant No. 1. By his third wife, Sreemutty Pria Dassia, he had three sons born before the date of the will, *viz.*, Hari Charan Das, Gourhari Das, and Anand Hari Das; and his wife was on that date pregnant, and, according to the finding of the Subordinate Judge, was subsequently delivered of a posthumous son, who was born alive, and died a short time after his birth. It may here be observed that although an objection has been taken to the finding of the Subordinate Judge on this point, such objection has not been argued or pressed before us by the learned Counsel who represented the respondents.

Hari Charan died after the testator's death and before the institution of the present suit. Gourhari Das is the defendant No. 3, and the plaintiff is the widow of Anand Hari Das, the third son by the third wife.

The will, after setting forth the family relations of the testator, and the manner in which he had acquired his property, contains the following paragraphs, which we have had carefully translated, the translation to be found at page 84 and following pages of the paper-book being admittedly incorrect in many essential particulars.

(His Lordship then stated the provisions of the will as above and continued):

The plaintiff, as the widow of Anand Hari Das, has brought this suit to recover the share of the property to which she, as Anand's widow, would be entitled if Kristo Prosad Das had died intestate; and her main contention is, that the provisions of the will are void, and that effect cannot be given to them so as to deprive her of the share to which she is entitled in the family property.

The Subordinate Judge has given her a decree, which is to

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be found at page 166 of the paper-book. Substantially he comes to the conclusion that the testator has made no devise or bequest of the *corpus* of his property; that he has attempted to create an estate which is invalid under the Hindu law; that, therefore, the general intention of the will fails, and the property must descend, according to Hindu law, in the same manner as it would descend if Kristo Prosad had died intestate.

In order to deal with the questions which have been argued before us, it will be useful to summarize the provisions and limitations contained in the will. They are—

1*st*. The *corpus* of the estate,—that is, the houses, zemindari, taluks, and capital employed in the business,—is to remain intact. There is to be no alienation and no partition. This direction is repeated more than once in the will.

2*nd*. The moveables may be partitioned and alienated if Shookmoy and the widow cannot live together amicably.

3*rd*. There is a general direction that the testator's sons, grandsons, great grandsons, and so on, are to enjoy the profits of the estate; but this general direction is controlled by the directions which follow as to the mode of enjoyment.

4*th*. The eldest son Shookmoy Chunder Das is to act as manager and shevait without power of alienation and without power to withdraw the capital invested in business. He is to keep regular accounts. On Shookmoy's death the eldest male heir for the time being is to succeed to the position of manager and shevait.

5*th*. In respect of the manner in which the profits are to be dealt with, the Government revenue, collection charges, and costs of repairs of houses are to be first defrayed therefrom, after which the profits are to be divided into two portions—a six-anna portion and a ten-anna portion.

6*th*. The six-anna portion is to be devoted to the worship of the idols and the maintenance of the family. The testator expressly declares that this portion will be sufficient for these objects (see para. 10). If the members cannot manage to live together in harmony during the minority of Sreemutty Pria Dassia's children, she is to receive out of this six-anna portion twelve rupees per mensem for the support of herself and her children. Each

son, after attaining majority, is to get his share under the other provisions of the will, and his maintenance is no longer to be defrayed from the monthly allowance of twelve rupees. The balance of the six annas share, after defraying the expenses of worship, is to be divided equally between all the sons. It may be observed here, that there is no express provision as to the accumulation of this balance during the minority of the children.

7th. The ten annas portion of the profits is to be credited to the estate; or, in other words, to be accumulated so long as Shookmoy and Pria Dassia live in harmony.

8th. If Shookmoy and Sreemutty Pria Dassia cannot live together in harmony, then the ten annas share of the profits is to be divided, Shookmoy getting five-sixteenths, if a fourth son be born of Pria Dassia, which event the Subordinate Judge finds to have taken place. The sons of Sreemutty Pria Dassia are to receive the remainder of the ten annas portion of the profits in equal shares. In the case of the minors, their shares are to be accumulated till majority, and then paid to them on demand. An absolute power of disposal is given to the sons over the profits so divided amongst them.

9th. The dwellinghouses, ancestral and constructed by the testator, and his gardens are given to all the sons in equal shares without power of alienation.

10th. The share of an heir (son) dying without male issue is to go to the sons (male heirs) existing at the time of his death.

In construing the provisions of this will, we must follow the usual rule, that is, endeavour to collect the testator's intention from the language used by him, and then consider whether such intention is within the testator's power, limited as it must be by the general policy of the law (8 Moore's Ind. App., 80). In order to discover that intention, we must also follow the rule laid down by their Lordships of the Privy Council in the *Tagore case* (1), where they say that "the true mode of construing a will is to consider it as expressing in all its parts, whether consistent with law or not, the intention of the testator, and to determine upon a reading of the whole will, whether, assuming the limitations therein mentioned to take effect, an interest claimed

(1) 9 B. L. R., 409.

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under it was intended under the circumstances to be conferred." It will be convenient to consider the intention of the testator, *first*, as to the six annas share of the profits; *secondly*, as to the ten annas share of the profits; *thirdly*, as to the dwellinghouses and gardens; and *fourthly*, as to the moveable property.

First, then, with regard to the six annas share of the profits, the testator directs in the 8th paragraph of the will, that such share shall be applied to defray the cost of worship of the idols and the expenses of the maintenance and clothing and ceremonies of the entire family. It has been contended on the authority of the case of *Chundermoni Dassee* v. *Moti Lall Mullick* (1), that this disposition of the six annas share of the profits is wholly void. In that case the testator directed that certain lands should be held by his executors on trust to apply the rents and profits, *first*, in the celebration of certain poojas and in performing the worship of the family idols and other religious festivals; and *secondly*, for the maintenance of the five younger sons, their wives, sons, and male descendants, and female descendants till marriage. It was held, that the real object of the testator was to establish a permanent endowment to the testator's descendants, and that the perpetual trusts for this purpose were void. We think that the argument founded on this case will probably be sufficiently answered by the case of *Ashutosh Dutt* v. *Doorga Churn Chatterjee* (2), where, in a somewhat similar case to the present, it was held, that a direction that the surplus, after meeting the cost of religious acts and ceremonies, should be devoted to the support of the family, amounted to a good bequest of the surplus to the members of the joint family for their own use and benefit. It appears to us, however, that the present case is not so exactly similar to either of the cases just quoted that it can be decided upon the authority of either of them. In the present case there is no gift of the *corpus* of the real estate. The intention of the testator clearly was, that such *corpus* was never to be alienated or partitioned; and in order to carry out this intention, he has directed the management of the property to be vested in his

(1) 5 C. L. R., 496. (2) L. R., 6 Ind. Ap., 182; S. C., 5 C. L. R., 296.

eldest son him surviving, and after him in the eldest male descendant for the time being,—that is, in a perpetual series of managers or trustees. Mr. Evans has contended, that the gift of the six annas share of the profits is a good gift of the *corpus* according to the cases to be found at Theobald on Wills, p. 243; see also s. 159 of the Indian Succession Act, X of 1865. In the case of *Mannox* v. *Greener* (1), Sir R. Malins, V. C., said, that there was no distinction between giving the income of the land and the rents and profits of the land, and that a gift of the income of land unrestricted is simply a gift of the fee-simple of the land. Can it be said that, in the present case, there is an unrestricted gift of the six annas share of the profits? Can it be held that a gift of these profits was intended to be a gift of the real estate itself, when the intention of the testator to be gathered from the whole will clearly was, that there should be no gift of the real estate, that the real estate should remain unalienable and unpartitioned in the hands of a perpetual series of managers? It appears to us, that there can be only one answer to this question; and that the answer must be in the negative.

It is settled law that a private person cannot, by gift or will, create a new estate, or make property inheritable otherwise than the law directs: *Jatindra Mohan Tagore* v. *Ganendra Mohan Tagore* (2), *Kumara Asima Krishna Deb* v. *Kumara Kumara Krishna Deb* (3), *Sonatun Bysack* v. *S. M. Juggutsoondree Dossee* (4). If then there be a good gift of an estate, and there be also a prohibition against alienation or partition, the gift will be good and the prohibition will be void: *Jatindra Mohan Tagore* v. *Ganendra Mohan Tagore* (5), *S. M. Krishnaramani Dasi* v. *Ananda Krishna Bose* (6), *Kumara Asima Krishna Deb* v. *Kumara Kumara Krishna Deb* (3). When there is a good gift with an invalid restriction, the gift will be good, the restriction void. Where there is a general intention to create a valid estate and a particular intention to deprive such estate of its legal incidents,

(1) L. R., 14 Eq., 462.
(2) 9 B. L. R., 394.
(3) 2 B. L. R., O. C., 26, 27.
(4) 8 Moore's I. A., 66.
(5) 9 B. L. R., 404.
(6) 4 B. L. R., O. C., 231.

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effect will be given to the general intention, and the particular intention will be disregarded. Is it possible to say that in the present case we can gather from the will a general intention on the part of the testator to create a valid estate in the real property in favor of any person or persons who could take such estate according to the Hindu law? It appears to us, that it is impossible to gather any such intention from the will. The general intention which is obtainable from the whole instrument, is clearly not an intention to create a valid estate in the *corpus* in favor of any individual, but to tie up such *corpus*, and to give the profits only to the male descendants of the testator; or, in other words, to create, in the profits merely, a sort of estate in tail male. It is clear that to this general intention effect cannot be given according to the principles laid down in the decided cases. We think, therefore, that the principle of *Mannox* v. *Greener* (1) cannot be applied to the present case.

There are other considerations upon which it appears to us that the bequest of the six annas share of the profits must fail. The testator directs that the surplus of this six annas share, after defraying the expenses of worship, is to be divided equally between the sons of both his wives. In another part of the will he directs that the minor sons are to get their shares only on attaining majority. As to what is to be done with the minor's share of the profits in the meantime, there is no clear direction. As to what is to be done with this six annas share of the profits after the death of the sons, there is no express direction—no direction at all, unless we can come to the conclusion that the general provisions of paragraphs six and twelve apply. As to paragraph twelve, it has been contended by Mr. Evans that this paragraph contemplates the failure of sons of the testator's son, and not an indefinite failure of male issue; and he relies upon the case of *Sreemutty Soorjeemoney Dossey* v. *Denoobundoo Mullick* (2). In all probability it would be proper to put the construction so contended for upon this paragraph of the will, inasmuch as, although the testator uses the word "heirs" in the first sentence, he directs that the share of the profits of his deceased heir shall be divided equally among his

(1) L. R., 14 Eq., 462. (2) 9 Moore's I. A., 123.

"sons," not "heirs," who will be then alive. But it is not in our view, material to decide this question, inasmuch as, according to the construction which we think must be put upon the whole will, the general intention of the testator fails. The general direction contained in paragraph six is clearly intended to create an estate in tail male. Such an estate would, we think, be void by Hindu law. In the case of *Sonatun Bysack* v. *Sreemutty Juggut Soondree Dossee* (1), Sir James Colvile, who delivered the judgment of the Supreme Court, said:—"We cannot see that the testator has made any distinction between his grandsons, his great grandsons, or the remoter descendants comprised in the terms '*et cætera* heirs.' All are to inherit their ancestor's share according to the shasters, or Hindu law, modified only by the exclusion of the females or the descendants of females; therefore the object which he has in view is to create for his own property, as long as he has any descendants in the strict male line, a new course of descent. That object is, we think, beyond the scope of the testamentary power recognized by law, and must therefore fail." Their Lordships of the Privy Council did not expressly overrule this dictum, and, in the view which they took of the case, it was unnecessary to find specially upon this point; but the *Tagore case* (2) is an authority that the creation by a Hindu of an estate of inheritance in tail male is void. It has been argued that the present case is similar to, and ought to be governed by, that of *Sonatun Bysack* v. *Sreemutty Juggut Soondree Dossee* (1), but it appears to us that there is one essential difference between the two cases. In that case there was an express grant of the *corpus* to the idol; and the Privy Council held, that the effect of this was to grant the property effectually for the benefit of the sons. In the present case, not only is there no express grant of the *corpus*, but, as has been already pointed out, the presumption of such a grant is opposed to the general intention of the testator to be gathered from the whole of the provisions of the will.

Upon the best consideration that we have been able to give to the matter, it appears to us that the disposition of the six annas

(1) 8 Moore's I. A., 80. (2) 9 B. L. R., 377.

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share of the profits is void, and that as regards such share the testator must be deemed to have died intestate.

Then as regards the ten annas share of the profits, the case is still stronger. Two events appear to be here contemplated,—*first*, the event of the family continuing joint; and *second*, the event of the family becoming divided. In the former case the ten annas share of the profits is to be credited to the estate; in other words, is to be accumulated, and apparently for ever. It is scarcely necessary to say that any such direction for accumulation without a disposition of the beneficial interest is void: *Kumara Asima Krishna Deb* v. *Kumara Kumára Krishna Deb* (1) and *S. M. Krishnaramani Dasi* v. *Ananda Krishna Bose* (2).

Then, in the second event,—that is, in the case of the eldest son and the third wife and her sons not being able to agree,—the profits are to be divided in the shares directed in the eighth paragraph of the will. There is no grant of the *corpus*, no disposition of the beneficial interest, and the remarks already made with reference to the six annas share of the profits apply here with still greater force. In any case it will be observed that the disposition of the ten annas share of the profits is made to depend, not upon the will of the testator, but on the subsequent acts of the legatees. It appears to us that, as regards the ten annas share of the profits of the real estate also, the testator must be taken to have died intestate.

Thirdly.—As to the dwellinghouses and gardens, we think the eleventh paragraph of the will contains a valid disposition. The general intention of the testator here, was to give this portion of the property in equal shares to all his sons, and to this general intention effect must be given. We have also a particular intention prohibiting transfer by sale or gift. This particular intention is opposed to the policy of the law, and must, therefore, be disregarded. The result is, that so far as these portions of the property are concerned, the will does not interfere with the plaintiff's rights by Hindu law.

Fourthly.—With respect to the moveable property, there is no express gift in the will, but there is a direction in the tenth

(1) 2 B. L. R., O. C., 41. (2) 4 B. L. R., O. C., 277.

paragraph, that, in the event of separation, the moveable property shall be partitioned according to the shares mentioned in paragraph eight as applicable to the ten annas share of the profits.

We think that, although there is no gift of the moveables in so many words, we may reasonably gather from these provisions an intention on the part of the testator to give the moveables to his sons in the shares above specified, and that this case comes within one of the general rules of construction, namely, that effect should be given to a general prevailing intention, however imperfectly and obscurely indicated, if discoverable by a fair and liberal construction of the language of the will, and if allowed by law.

The result will be, that the decree of the Subordinate Judge will be modified in respect of the moveables only, and as to the rest of the property will be confirmed.

It remains to deal with the question of accounts, and it appears to us, that we ought not to interfere with the direction given in this respect by the Court of first instance. The will itself directs the managing member to keep accounts; and if these directions have been followed, there ought to be no difficulty in accounting for the profits since the death of the testator.

It may be well to observe that, as to the *factum* of the will, we entertain no doubt that the will was duly executed by the testator. Some arguments were addressed to us to impugn the genuineness of the will; but we think that there can be no reasonable doubt as to the will having been executed by the testator, regard being had to the direct testimony and to the internal evidence supplied by the instrument itself.

Decree modified.