PRIVY COUNCIL.

P. C.*
1885
March 6.

SHOOKMOY CHANDRA DAS (DEFENDANT) AND ANOTHER *v.* MONOHARRI DASSI (PLAINTIFF).

[On appeal from the High Court at Fort William in Bengal.]

Hindu Law—Will—Construction of will—Perpetuity—Void disposition of profits only of an estate during an indefinite period—Accumulations—Account as among members of family.

The Hindu law does not allow such a disposition of property as would have been made by a testator whose intention was to give to his descendants the profits only of his estate for their benefit, and for the maintenance of religious services, but not to dispose of the estate itself.

The testator directed that his estate should remain intact, providing for religious services to be kept up by his family from the profits of the estate, his will being that "his heirs, sons, sons' sons, great grandsons, and so on in succession should be entitled to enjoy such profits." There were clauses for the accumulation of the profits of a certain portion of the estate, and forbidding alienation.

Held, that according to the true construction of the will taken altogether, the testator's intention was not to pass the estate. This was confirmed by the clauses against alienation, and for the accumulation, as long as the family should remain joint, of a certain share of the profits; another portion being assigned for the religious services. This was not a case in which a testator, having expressed an intention that his estate should pass, had added a clause against alienation, in which case the latter clause would have been merely void.

Held, accordingly, that this bequest was invalid.

An account of the profits of the estate, from the date of the death of the testator, having been ordered by the decree of the Court below, in favour of the inheritor of a share at whose instance the bequest was held invalid; *held*, that this did not mean that inquiry should be made into the different payments by the manager for the time being, or monies taken out by the members of the family, but that it should be ascertained to what portion of the savings of the family, or of the accumulations made, such sharer would be entitled; and that this order was accordingly correct.

APPEAL from a decree (21st June 1881) of the High Court (1) reversing a decree (24th September 1878) of the Subordinate Judge of Dacca.

* *Present:* LORD BLACKBURN, SIR B. PEACOCK, SIR R. P. COLLIER, SIR R. COUCH, AND SIR A. HOBHOUSE.

(1) I. L. R. 7 Calc., 269.

The questions raised on this appeal related to the construction of a will, dated 17th Baisakh 1260 (28th April 1853) executed by one Krishna Pershad Das, who died on the 24th May following. The will having been made before the passing of the Hindu Will's Act XXI of 1870, neither that Act, nor any of the sections of the Indian Succession Act, 1865, incorporated in it, were applicable to the point now in dispute, which was whether a disposition of the profits of his estate made by the testator, without disposing of the estate itself, was not invalid, as, if allowed, creating a perpetuity.

The material paragraphs of the will are set forth in the report of the case heard on appeal by the High Court (1), and they are accordingly omitted here. The provisions of the will more briefly stated were the following:—

The will directed that the testator's estate should remain intact, and that the profits should be applied in the first place towards performing the periodical ceremonies and worship of his ancestral deities. It also provided that his houses, zemindaries, and immoveable property, and also his business, mercantile and banking, and the capital stock thereof, should remain intact, "as at present," and that his heirs, sons' sons, and great grandsons, in succession, should be entitled to the profits thereof. No one was to be competent to alienate by sale, or gift, the immovable property, to close any business, to misappropriate the capital stock thereof, or to divide the same.

The will also provided that, after the testator's death, his eldest son, Sriman Shookmoy Chandra Das should act as *kurta*, or manager, for the preservation of the estate, and as *shebait* to the deities, and that he should as *karmadhyakha* (manager of business), prepare and keep accounts of profits of the estates, and of the business, mercantile and banking, and of the rents of houses; but not alienate the testator's immoveable property then in existence, by sale, gift, or otherwise, or misappropriate, or waste the capital stock of his business. Having made provision for the revenue to be paid, collection charges, and repairs of houses, the will provided that, of the surplus profits, six-sixteenths

(1) I. L. R. 7 Calc., 270.

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should be applied in part towards the worship of the ancestral deities, and as to the residue, towards the maintenance of all the members of the family and religious rites, the ten annas share remaining being carried to the credit of the estate.

In case of disputes between the eldest son and the testator's third wife, the mother of the testator's minor children, the will directed that the 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 should be 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. So long as the family remained joint, the expenses of the *Debsheva* and of the maintenance of the family were to be defrayed out of the six annas share.

The will provided that in case of separation the shares of the sons were to be placed to their respective credits every year, each son to be entitled on attaining full age.

The testator then provided that in case of separation the sons should be at liberty to take their shares of the moveable property absolutely (but not of the immoveable property or of the capital stock of the business, or of the articles in use for the ancestral deities), according to the conditions laid down for the division of the ten annas share of the profits. The will then provided for the maintenance of the testator's 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 the sons should reside in the ancestral dwelling house which was given to them in equal shares with the gardens, but that none of them should have any power of alienation, the will directed that if any of the heirs died without male issue, the widow of such heir should receive maintenance only, and that a daughter's son (grandson by a daughter), should get nothing, such share going over to the surviving sons. Lastly, it was directed that the eldest son, sons' sons, grandsons, and other heirs in succession, should perform the duties of *kurta* and *shebait*.

The testator in his lifetime married three wives. By his first wife he had no son. By his second he had one son, the appellant

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Shookmoy Chandra Das. By his third, and only surviving wife, Pria Dassi, he had three sons born before the date of his will, named respectively Harri Charan Das, now deceased, Gaur Harri Das (the second appellant), and Anand Harri Das. A fourth son, born after his death, lived only a few days.

This suit was brought by the widow of Anand Harri Das, also now deceased, against the above named Shookmoy Chandra Das, Gour Harri Das, and Pria Dassi, to obtain the share in the estate, moveable and immoveable, (which would have come to her husband had his father died intestate,) alleging the invalidity of the will. The defendants maintained the validity of the will.

The Subordinate Judge of Dacca, Baboo Gangacharan Sircar, made a decree in favor of the plaintiff as to the immoveables belonging to the testator. He was of opinion that the disposition made by Krishna Pershad related only to the proceeds and profits of the estate, and not to the *corpus*, in respect of which he had made no bequest. The testator had attempted to create an estate, whereby all his immoveable property, and *karbar*, would remain in his family in the male line, without power of alienation; but this attempt failed, the law not sanctioning perpetuity, nor allowing estates to remain in abeyance after the death of an owner. The following decree was made: "That the plaintiff as heiress of her husband do get possession of one-fifth of all the immoveable properties claimed by her" (with certain exceptions specified in the decree), "and of one-fifth of the capital of the existing *karbar*, the amount of which capital is to be ascertained in execution of decree. It is also ordered that the plaintiff is entitled to get from the defendants an adjustment of accounts of the profits and proceeds of the estate, consisting of houses, landed property, and several *karbars* which existed from the time of her father-in-law's death up to the death of her husband, and from the date of the death of the latter up to the institution of this suit. That the accounts be taken in execution of decree, and that the plaintiff is to have one-fifth of the net profits, which will be found at the adjustment of accounts. The plaintiff to pay one-fifth of the expenses necessary for the worship; but this not, without her consent, to exceed one-fifth of the profits of a six-anna share of the

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profits of the entire estate.' The plaintiffs' claim to the moveable property dismissed with costs. Plaintiffs' costs in proportion to claim decreed to be paid by the defendants."

A Divisional Bench of the High Court (McDONELL and FIELD, JJ.) maintained so much of this decree as directed an account of the profits of the immoveable estate, and the business profits, and gave one-fifth thereof, and of the immoveable estate to the plaintiff.

The judgment of the High Court, after giving an abstract of the will, stated the rule that where there is a general intention ascertainable from a will to create a valid estate, coupled with an intention to deprive such estate of its legal incidents, effect is to be given to the general intention to create such valid estate, but the other intention is to be disregarded and must fail. Here, however, it was impossible to gather from the will a general intention on the part of the testator to create a valid estate in any person who could take it consistently with law, there being no intention to dispose of the *corpus* of the estate in the lands. To this intention, which was to tie up the *corpus*, effect could not be given. The case of *Sonatun Bysack* v. *Juggut Soondree Dossee* (1) where there was an express grant of the *corpus*, nominally to the family deity, but in effect (as the Judicial Committee held) for the benefit of the sons, in other words, an effectual gift of the estate itself, was distinguishable from the present. Here there was not only no express grant of the *corpus*, but to presume such a grant would be opposed to the intention of the testator, as indicated by the whole will.

It was held, accordingly, that the intention of the testator in disposing of the profits of the six-anna share was to give the profits only to his male descendants; in effect, a void bequest. Also, that the disposition of the ten-anna 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 others the gift was void, for the same reason as the gift of the six-anna share. The disposition, however, of the family dwelling-houses and gardens (save as regarded the prohibition of alienation),

(1) 8 Moore's I. A., 66.

was good; and also the testator's moveable property was sufficiently disposed of.

The judgment of the High Court, delivered by *Field*, J., is reported at length in the 7th Volume of the Ind. Law Rep., Calcutta series, at page 274.

On this appeal,

Mr. *T. H. Cowie* and Mr. *R. V. Doyne* argued that it should have been held that the gift by the testator to his sons, of the profits of the estate, should have been construed as a gift of the *corpus*, not invalidated by the clause against alienation, the latter clause being treated as void and inoperative, and other incidental provisions in the will being also regarded as of no effect. The Courts below had incorrectly taken the expressions of the will in reference to future interests in the estate, not as in themselves merely void, but as involving the invalidity of the principal object aimed at by the testator. This object was, in effect, the enjoyment of his estate by his sons and descendants, with a charge for the maintenance of the worship of the household deities. The application of the true rule of construction would have given effect to the testator's intention. The rule was stated in the judgment in *Jotendromohun Tagore* v. *Ganendromohan Tagore* (1), and might be expressed thus, *viz.*, that if the words in a will conferred an estate actually inheritable, the language, though it might add invalid injunctions, would be read as conferring an estate inheritable as the law directed. If a gift were made, as it had been made here, with words restricting the right of transfer, the restriction should be treated as void, and the gift should receive effect. The testator intended that the estate should vest in the manager who was to take possession, and the will also provided for the eventual separation of the family. There was, in short, as complete a disposal of the *corpus* as there was in *Sonatun Bysack* v. *Juggut Soondree Dossee* (1), and the creation of a perpetuity might be prevented without the entire disallowance of the gift. In the case cited, the gift to the *thakur* had been treated as a gift to the family, subject to the charge for religious services.

(1) L. R., Ind. Ap. Sup. Vol., 47; 9 B. L. R., 377.
(2) 8 Moore's I. A., 66.

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[Sir B. PEACOCK, referring to the absence of a stated period within which the separation of the family would take place, or was contemplated by the will, asked whether it was contended that there was anything to show when the ten annas share, the proceeds of which were, by the will, to be accumulated, would cease to be so.]

It is submitted that the clause for accumulation would only be itself held invalid, and would not invalidate the general disposition of property made by the will. As giving the inheritance to the testator's sons, and excluding the plaintiff from a right to inherit, leaving her the right to maintenance, the will might be supported. The account decreed was hardly consistent with the rights of the members of a joint family, and the costs of the appeal below should not have been awarded against the appellants personally. The development of the law, on the subject of bequests such as the present, was shown in the following cases, referred to in the order of their dates :—

Soorjeemoney Dossee v. *Denobundo Mullick*, 1857, (1); *Sonatun Bysack* v. *Juggut Soondree Dossee*, 1859, (2); *Soorjeemoney Dossee* v. *Denobundo Mullick*, 1862, (3); *Kumara Asima Krishna Deb* v. *Kumara Krishna Deb*, 1868, (4); *Krishnamarani Dasi* v. *Ananda Krishna Bose*, 1869, (5); *Aushutosh Dutt* v. *Doorgachurn Chatterjee* (6); *Jotendromohun Tagore* v. *Ganendromohun Tagore* (7).

As to the provision in the event of the death of an heir without male issue, reference was made to *Tarakeswar Roy* v. *Kumar Shoshi Shikareswar* (8). And with regard to gifts to a class, *Leake* v. *Robinson* (9); *The Duke of Marlborough* v. *Lord Godolphin* (10); *Ramlal Mookerjee* v. *The Secretary of State for India* (11).

(1) 6 Moore's I. A. 526.
(2) 8 Moore's I. A. 66.
(3) 9 Moore's I. A. 123.
(4) 2 B. L. R., O. C., 11.
(5) 4 B. L. R., O. C., 231.
(6) I. L. R. 5 Calc., 438; L. R. 6 Ind. Ap., 182.
(7) L. R. Ind. Ap., Sup. Vol. 47; 9 B. L. R., 377.
(8) I. L. R., 9 Calc., 958; L. R. 10 Ind. Ap., 51.
(9) 2 Mer., 363.
(10) 2 Ves. Sen., 61.
(11) I. L. R., 7 Calc., 304.

Mr. *J. F. Leith, Q.C.*, and Mr. *J. T. Woodroffe*, for the respondent, were not called upon.

Their Lordships' judgment was delivered by

SIR R. COUCH.—The suit which is the subject of this appeal was brought to recover a part of the estate of one Krishna Pershad Das, who died on the 24th May 1853. Upon his death he left a third wife, the defendant Srimati Pria Dassi, Shookmoy Chandra Das, his eldest son by a former wife the present appellant, and three minor sons, Harri Charan, Gaur Harri, and Anand Harri. Another son was born shortly after his death, but as this son only lived for a few days, it is not necessary to take any further notice of him. It is only material with regard to the shares into which the estate would be divided. Anand Harri, one of the sons, married the present plaintiff, and died in 1873 without leaving children, leaving the plaintiff his heir-at-law. Thereupon the plaintiff brought the suit, seeking to recover the share of the estate of Krishna Pershad Das, her father-in-law, which she alleged had belonged to her husband Anand Harri. The question as to whether she is entitled to recover or not depends upon whether Krishna Pershad Das left a valid will of his property. If he did, she would not be entitled to recover in the way she claimed. The property would be subject to the will, and she would take such rights, if any, as the will would give her.

The District Judge who tried the suit gave a decree in favour of the plaintiff; that she was entitled to recover the share claimed, and that she was also entitled to the account which she asked for in her plaint. The High Court have confirmed that decree.

The first material paragraph in the will (taking the translation which was adopted by the High Court) is the sixth, in which the testator says: "My estate shall remain intact, and "from the profits thereof there shall be performed the worship, "the periodical festivals and 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, talooks, "and other immoveable properties, and my business of various "descriptions, and the capital stock thereof, shall always remain

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"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 misap- "propriate 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."

The question is, what was the intention of the testator in this provision of his will? He says distinctly, "my estate shall remain intact," and then he proceeds to say, as regards the enjoyment of the property, the estate remaining intact, my heirs, sons &c., "shall be entitled to enjoy the profits thereof." These words appear to their Lordships to indicate that he was not going to give away the estate, but that all he intended was to give the enjoyment of the profits to the persons mentioned in the will. His object appears to have been to create a perpetuity as regards the estate, and to limit, for an indefinite period, the enjoyment of the profits of it, which would not be allowed by Hindu law. It is true if the bequest had been of rents and profits, and it appeared that it was the intention of the testator to pass the estate, those words would be sufficient to do it; but what their Lordships have to do is to find the intention, looking at the whole of the provisions of the will; and they gather from those words that it was not his intention to pass the estate. The provision afterwards against alienation further confirms this. It is not a case where the testator has expressed an intention to pass the estate and has added a clause against alienation, in which case the clause against alienation would be void, but the provision here against alienation is confirmatory of the other part of the will.

When we come to the subsequent clauses, they further confirm this view of his intention. Having said that the profits are to be enjoyed, he, in the subsequent paragraphs, provides for what he considers and intends to be the mode of the enjoyment; and it is very material to notice that in the eighth paragraph he assigns a six annas portion for the family worship of the idols, and also for the maintenance of the family whilst they continue joint, leaving a ten annas share which, as long as the family remained joint, would not be, as he supposed, expended at all.

What he does with that is to provide that it shall simply accumulate. He does not dispose of it in any way, but as long as the family remains joint it accumulates; again confirming the view that his intention was that the estate itself should not be disposed of.

Then he goes on to provide for the way in which the profits shall be enjoyed in the event of disagreement among the members of the family and their separating; but the whole of these provisions appear to their Lordships to be consistent with and to support the view that the intention was that the estate itself should not be disposed of, and that there was no gift of the estate, but simply a gift with reference to the enjoyment of the profits.

The whole question really resolves itself into what was the intention of the testator to be gathered from the will? Their Lordships think that this was his intention, and that is the construction which must be put upon the will. This is the view which has been taken by both the lower Courts. The Subordinate Judge, a Hindu gentleman, quite acquainted with the customs of Hindu families, considered that that was the intention, and that being contrary to Hindu law, the will was an invalid will, and that the plaintiff was entitled to recover the share of the property which would belong to her husband, supposing the property not to be disposed of by the will.

There remains another question, and that is with regard to the account which has been ordered. The Subordinate Judge says, in reference to the 16th issue, which was the issue raised as to the accounts: "I have to observe that it is not denied that no portion of the profits of the estate which have accrued to the estate since the death of Krishna Harri, and which have remained in the hands of the manager the defendant No. 1, was given to Anand Harri, and that no account was ever rendered to him. Under such a circumstance I am clearly of opinion that the plaintiff, as the heiress of her husband, is entitled to an adjustment of accounts of the profits and proceeds of the estate from the date of her father-in-law's death to that of her husband's death, and from the date of her husband's death to the date of the suit, and to the amount of money which will

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be found due to her share under this adjustment of accounts. The account shall be taken in the execution case."

This is the same account as was ordered to be taken in a similar case of *Soorjeemoney Dossee* v. *Denobundo Mullick* (1). It is not intended that the different payments by the manager, or moneys taken out by the members of the family, should be inquired into, but it is to ascertain what portion of the savings of the family, or the accumulations which have been made, the plaintiff would be entitled to. It has been suggested that there may be settled accounts, and that there ought to be some provision to prevent the opening of settled accounts. The Subordinate Judge says very distinctly that no accounts have been rendered to Anand Harri, and in the face of such a finding as that their Lordships think it would not be proper to insert in the decree any such provision.

Their Lordships will therefore humbly advise Her Majesty to affirm the decree of the High Court, and to dismiss this appeal, the appellants paying the costs thereof.

Appeal dismissed.

Solicitor for the appellants: Mr. *T. L. Wilson.*

Solicitors for the respondent: Messrs. *Watkins & Lattey.*

APPELLATE CIVIL

Before Mr. Justice Field and Mr. Justice Beverley.

IN THE MATTER OF THE PETITION OF SOSHI BHUSAN CHAND.

SOSHI BHUSAN CHAND *v.* GRISH CHUNDER TALUQDAR.*

1885 January 27.

Limitation (Act XV of 1877), Sch. II, Art. 171B.—Civil Procedure Code (Act XIV of 1882), ss. 3, 368, 582—Respondent, Death of—Practice—Substitution.

Having regard to s. 3 of Act XIV of 1882, it is clear that the word "Code", in Sch. II, Art. 171*B* of Act XV of 1877, applies to the present Code of Civil Procedure, Act XIV of 1882; and that, therefore, the word "defendant" in s. 368 of that Code when read with s. 582 must be held to include "respondent."

THE appeal in this suit was filed on the 19th November 1883, and on the 14th March, after the notice of appeal had been

* Civil Rule No. 175 of 1885, in Reg. App. 237 of 1883.

(1) 9 Moore's I. A. 123.