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Hasan, C.J. and Nanavutty, J.

in *Fazal Ilahi* v. *Prag Narain* (1), and in *Bhagwan Das* v. *Gurdayal* (2). The facts of those cases, however, are different from the facts of the present case. In those cases the arbitration had begun and therefore the court had power under paragraphs 5 and 19 of Schedule II of the Code of Civil Procedure to appoint a fresh arbitrator in place of the one who subsequently declined to act. We are, however, very doubtful as to the correctness of the reasoning of the learned Judges who decided those two cases, and we prefer to follow the conclusion arrived at by the learned Judges of the Madras High Court in the ruling reported in *Muthyala Narainappa* v. *Muthyala Ramachandrappa* (3).

For the reasons given above, and after giving this matter our best consideration, we are of opinion that the decision arrived at by the learned Subordinate Judge is right. The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

FULL BENCH

Before Mr. Justice Bisheshwar Nath Srivastava, Mr. Justice E. M. Nanavutty and Mr. Justice H. G. Smith

GIRJESH DATT AND OTHERS (DEFENDANTS-APPELLANTS) *v.* DATA DIN AND OTHERS (PLAINTIFFS-RESPONDENTS)*

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Transfer of Property Act (IV of 1882), sections 13 and 16—Gift by female absolute owner to her brother's son's daughter—Deed of gift providing that if donee died issueless gifted property shall go to donee's father—Gift over to donee's father, validity of.

Where a female who was the absolute owner of her property executed a deed of gift in favour of the daughter of her brother's son giving her only a life interest and providing that if there be any male descendants of the donee on her death, whether born of son or daughter, he will be the absolute owner of the property, and if the donee may have only daughters, they

*First Civil Appeal No. 10 of 1932, against the decree of Babu Bhagwati Prasad, Subordinate Judge of Partabgarh, dated the 31st of October, 1931.

(1) (1922) I.L.R., 44 All., 523. (2) (1921) 19 A.L.J., 823.
(3) (1930) I.L.R., 54 Mad., 469.

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shall have no power of transfer, but if the donee may not have any issues, whether male or female, living at the time of her death, then the gifted property shall not in any way devolve upon her husband or his family, but it shall go to the donee's father, if he be then alive, and if he be not alive, then the person who may be living of the line of the donee's father at that time would get it, *held*, that having regard to the provisions of sections 13 and 16 of the Transfer of Property Act the gift over to the donee's father was void, it being dependent upon the failure of the prior interest in favour of the daughters. *Javerbai* v. *Kablibai* (1), distinguished.

The case was originally heard by a Bench consisting of SMITH and ALLSOP, JJ., who thinking the question involved to be of great importance, referred it to a Full Bench for decision. The referring order of the Bench is as follows:

SMITH and ALLSOP, JJ.:—This is an appeal from a decree passed by the Subordinate Judge of Partabgarh. The plaintiffs in the suit, which has given rise to the appeal, were Data Din, Sitla Din, Sheo Mangal and Bindeshuri Prasad. They brought the suit for possession of certain plots in the village of Purabdayum in the district of Partabgarh. Their contention was that Data Din had acquired underproprietary rights over the plots in suit by means of a deed of gift executed by Musammat Sugga. The other three plaintiffs came in in accordance with the terms of an agreement which had been executed by them and Data Din on the 7th of September, 1929, and had been registered on the 9th of September, 1929. Sitla Din, Sheo Mangal and Bindeshuri Prasad had agreed to bear the expenses of the suit, and, in consideration for this, Data Din had contracted with them that in the event of success they would get a part of the property in suit. The defendants originally were Girjesh Datt, Rajendra and Musammat Sugga aforesaid. Musammat Sugga put in a written statement in which she set up certain defences, but as she eventually admitted that she was not in possession of the property she was, at the request of the plaintiffs,

(1) (1891) I.L.R., 16 Bom., 492.

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removed from the array of defendants, and we are no longer concerned with any points which she raised.

Rajendra and Girjesh Datt are brothers. Girjesh Datt claimed that he had acquired the property in suit as the heir of his deceased wife, Musammat Ram Kali, but it was admitted that he had transferred half of the property to his brother Rajendra. It is common ground that the disputed property at one time belonged absolutely to Musammat Sugga, and that she transferred it by a deed of gift, dated the 15th of January, 1919, to Musammat Ram Kali. Now this Musammat Ram Kali was the daughter of the first plaintiff, Data Din, and the wife of the first defendant, Girjesh Datt. Data Din is the son of Bhagwan Din, the brother of Musammat Sugga. Musammat Sugga was married to one Prag Datt, and Girjesh Datt and Rajendra, defendants Nos. 1 and 2 respectively, are the great-grandsons of Chandra Shekhar, the brother of Prag Datt.

Smith and Allsop, JJ.

The questions in dispute between the parties arose out of the terms of the deed of gift executed by Musammat Sugga in favour of Musammat Ram Kali. The defendants contended that it was an absolute gift, and that consequently the property passed to Girjesh Datt on the death of Musammat Ram Kali, which admittedly occurred on the 14th of August, 1927. The plaintiffs' case, on the other hand, was that the gift to Musammat Ram Kali was a limited one, that is, a gift of a life interest only, and that under the terms of the gift the property passed on her death to the first plaintiff, her father. It was also contended on behalf of the defendants that even if the gift to Musammat Ram Kali was not an absolute gift, the plaintiffs could have no claim, because the gift over to the first plaintiff was void under the provisions of sections 13 and 16 of the Transfer of Property Act. This latter defence was based upon the fact that Musammat Sugga had set forth in the deed that the property should pass, on the death of Musammat Ram Kali, in the first place absolutely to any sons or grandsons of hers (Musammat Ram

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Kali's) who might be alive at the time of her death, secondly, if such sons and grandsons were not alive, that it should pass as as a life estate to any daughter or daughters of Musammat Ram Kali's who might be alive at the time of her death, and thirdly, that if no daughter or daughters were alive, it should pass absolutely to the first plaintiff. The contention urged on behalf of the defendants was that the gift of a life interest to the unborn daughters of Musammat Ram Kali was void under the provisions of section 13 of the Transfer of Property Act, and that the gift over to the first plaintiff was consequently void under section 16 of the same Act, because he was to take after or on the failure of the daughters.

The learned Subordinate Judge held that the gift conveyed to Musammat Ram Kali only a life interest, and that the gift over to the first plaintiff was not void because it was not dependent on the gift to the daughters but was an alternative and independent gift. He consequently decreed the claim.

Girjesh Datt and Rajendra instituted the appeal which is now under consideration, and later the names of Sheo Narain Lal, Ram Adhar and Ram Kirpal were on their application added to the array of appellants under the orders of this Court, dated the 11th of April, 1932, on the ground that Girjesh Datt and Rajendra had transferred a part of the property in suit to them after the passing of the decree by the Subordinate Judge.

The main questions which have been raised in arguments are:

(1) Whether the gift to Musammat Ram Kali was an absolute or not, and

(2) Whether the plaintiffs' case falls under the provisions of sections 13 and 16 of the Transfer of Property Act.

There has, however, been some argument on the subsidiary point whether the transfer by Data Din of part of the property to Sitla Din, Sheo Mangal and

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Bindeshuri Prasad was a valid transfer which the court can recognize. This point has not, however, been very strongly pressed. It makes little difference to the defendants-appellants whether the decree stands in the name of Data Din alone, or in the name of all the respondents. If the transfer by Data Din to the other respondents is to be questioned at all, it can be questioned only on the ground that it contravenes the rules against champerty, but there is no law against champerty in India. We have been referred to the case of *Rani Abadi Begam* v. *Mohammad Khalil Khan and others* (1), but in that case the transfer purported to be a sale, and it was held that on a proper construction it did not amount to a sale at all. There is no force in this subsidiary contention urged on behalf of the appellants.

There remain the two main points. The learned counsel for the appellants, in support of his argument that the gift to Musammat Ram Kali was an absolute gift, has relied on certain recitals in the earlier part of the deed. He contends that Musammat Ram Kali was the sole object of the donor's affections, that it was the donor's intention to transfer the property to her and to her alone, and that any subsequent limitations which may have been imposed were imposed only by way of direction and were not binding, because after the transfer of an absolute estate no limitation of any kind can be valid. The donor has stated in the gift that:

> "Musammat Ram Kali is the daughter of Data Din, the son of my real brother. She has lived with me since her birth, and I, the declarant, have supported, maintained and got her married . . . . I have given all my ornaments, clothing, residential house, etc. and other moveables to Ram Kali . . . Musammat Ram Kali has been living all along with me and obeys and renders all services to me . . . I and Musammat Ram Kali are very intimate with each other."

(1) (1930) I.L.R., 6 Luck., 282.

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The learned counsel for the appellants has relied upon these words to show that the donor was concerned only with making a gift to Musammat Ram Kali. These words, however, are not sufficient by themselves to justify the conclusion that Musammat Sugga intended to make an absolute gift. The deed must be read as a whole. Another passage upon which reliance is placed by the appellants is this, according to the translator, namely,

> "I do hereby make an absolute gift of the said properties in favour of the said Musammat Ram Kali with all the rights, interests, external and internal, and all the zamindari cesses which I, the declarant, have and which I own."

It is contended that this passage can only mean that an absolute interest is conveyed to Musammat Ram Kali. The words, however, which have been translated as "absolute gift" are *hibba khalis*, which would more properly be "a pure gift." On behalf of the respondents it is contended that this expression is intended to differentiate this particular gift from a *hiba-bil-ewaz*. This may or may not have been the intention of the person who drafted the deed, but, in any case, it is by no means clear that *hiba khalis* means an absolute gift, and consequently the argument put forward by the appellants' learned counsel loses much of its force.

Another passage upon which reliance is placed by the appellants is this, namely,

> "I, the declarant, having gifted all the rights and powers, present and future, in the gifted property which I, the declarant, have or which shall accrue to me in future, without exception of anything, (*bila kam o kas*), in favour of the said Musammat Ram Kali, relinquish and forgo my possession and ownerships."

It is urged that this is a very strong expression of intention, and that it can only mean that there are no limitations upon the gift. This passage, however, cannot be taken in isolation. The donor goes on to say

that Musammat Ram Kali shall have no right to transfer the property in any way and

> "If on her death there be any male descendants, whether born of son or daughter, he will be the absolute owner of the property, and if Musammat Ram Kali may have only daughters they shall have no power of transfer. If, God forbid, there may not be any issue of Musammat Ram Kali, whether male or female, living at the time of her death, the gifted property shall not in any way devolve upon her husband or his family, but it shall got to Data Din, the father of Musammat Ram Kali, if he be then alive, and if Data Din be not alive, then the persons who may be living of the line of Data Din at that time would get it."

This passage makes it perfectly clear that Musammat Sugga did not intend that Musammat Ram Kali should have more than a life interest in the property, although she was to have full enjoyment of it during her life. As pointed out by the learned Subordinate Judge, it is usual for Hindu ladies to get only a life interest. Musammat Sugga was anxious that the property should pass to the descendants of Musammat Ram Kali, and it is also clear that she was determined that the property should not, in any event, pass to Musammat Ram Kali's husband or to any members of his family. The donor has described herself in the deed as *malik-i-mustakil* that is, "absolute owner", and she also says that Ram Kali's male descendants shall be *malik-i-mustakil,* but she nowhere uses these words in respect of Musammat Ram Kali. In our opinion the conclusion to be drawn from the deed as a whole must inevitably be that the gift to Musammat Ram Kali was not an absolute gift, but a gift only of a life interest.

We come now to the second question. Section 13 of the Transfer of Property Act runs as follows:

> "Where, on a transfer of property, an interest therein is created for the benefit of a person not in existence at the date of the transfer, subject to a

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prior interest created by the same transfer, the interest created for the benefit of such person shall not take effect, unless it extends to the whole of the remaining interest of the transferor in the property."

Smith and Allsop, JJ.

It is clear that the gift over in favour of the sons or grandsons of Musammat Ram Kali was not in any sense void, as it was a transfer of an absolute interest, but, on the other hand, the gift over to the daughters of Musammat Ram Kali, who were not born at the time of the transfer, was void because the transfer of the interest to them was subject to the prior interest created by the same transfer in favour of Musammat Ram Kali, and it was a transfer which did not extend to the whole of the remaining interest of the transferor in the property, since it was intended merely to be a life interest, and there was a remainder which would go on the death of the daughters to some third person. It has not been argued before us that the transfer to the daughters of Musammat Ram Kali was intended to be other than a transfer of a limited interest. Section 16 of the Transfer of Property Act, in so far as it is relevant to this appeal says.

> "Where, by reason of any of the rules contained in section 13 . . . and interest created for the benefit of a person . . . fails in regard to such person . . . any interest created in the same transaction and intended to take effect after or upon failure of such prior interest also fails."

The learned counsel for the appellants argued that the interest created for the benefit of Data Din was intended to take effect upon failure of the prior interests created for the benefit of the daughters, that the interest for his benefit was created in the same transaction as the interest for the benefit of the daughters, namely in the general settlement of the property evidenced by the deed of gift, and that consequently, as the interest for the benefit of the daughters failed by reason of the rule contained in section 13 of the Transfer of Property Act,

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the interest created for the benefit of Data Din also failed. The respondents, on the other hand, rely upon the principle that the rule set forth in section 16 of the Transfer of Property Act does not apply if the subsequent interest is not dependent upon the prior interest. This is the principle upon which the learned Subordinate Judge acted. There can be no doubt that this principle was applied in limitation of the general rule of English law, that a grant to an unborn child of an unborn child was void as being upon too remote a contingency, and that a grant which was intended to take effect after a void grant was itself void. *Monypenny* v. *Dering* (1) and *Evers* v. *Challis* (2). There are also Indian cases arising under the law of succession in which the principle has been given effect to or recognized, namely, *Brajanath Dey Sirkar* v. *S. M. Anandamayi Dasi* (3), *Tarokessur Roy* v. *Soshi Shikhuressur Roy* (4) and *Javerbai* v. *Kablibai* (5). In the last mentioned case at page 497, there is the following passage:

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> "As to the devise over in default of such male issue, if it be regarded as taking effect after the failure or determination of the previous invalid gift, it would be doubtless itself void under the ruling in the *Tagore Case*. But here the devise over, in default of male issue of Jamnadas is an alternative gift, to take effect on an event to be determined at the death of the survivor of the tenants for life, which excludes the gift to the male issue of Jamnadas from taking effect. The circumstances are the same as in *Kumar Tarakeshwar Roy* v. *Kumar Soshi Shikhareshwar* (6), with regard to the gift over of the shares of the nephews who died without leaving a male child, the Privy Council having held that the gift to the sons and grandsons of this nephew was void, and that each nephew took only a life estate. No objection can,

(1) (1852) 42 E.R., Ch., 826 (836).
(2) (1859) 11 E.R., H.L., 212.
(3) 8 B.L.R., 208.
(4) (1883) I.L.R., 9 Calc., 952.
(5) (1891) I.L.R., 16 Bom., 492.
(6) (1883) L.R., 10 I.A., 51.

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therefore, in our opinion, be taken on the above ground, to the devise in default of male issue."

The case referred to above in *Kumar Tarakeshwar Roy* v. *Kumar Soshi Shikhareshwar* (1), is, of course, the same as that reported in *Tarokessur Roy* v. *Soshi Shikhuressur Roy* (2).

If it is accepted that the principle with which we have been dealing is one which should be applied to the facts of this case, it may well be argued that the gift to Data Din was not intended to follow upon the gift to a daughter or to the daughters of Musammat Ram Kali, and that there were, in fact, three alternative contingent grants independent of each other, namely,

(1) a grant to Musammat Ram Kali for life, with remainder to her sons and grandsons, dependent upon the contingency that there was a son or a grandson or sons or grandsons alive at the time of her death,

(2) a grant to Musammat Ram Kali for life, with remainder to her daughters for life, dependent upon the contingency that there were no sons or grandsons alive at Musammat Ram Kali's death but that there was a daughter or daughters alive at that time, and

(3) a grant to Musammat Ram Kali for life, with remainder to Data Din, dependent upon the contingency that there were no sons or grandsons or daughters alive at the time of Musammat Ram Kali's death.

If we are to accept the principle to which we have referred above, and if the true construction of the deed is that there were three alternative gifts or grants, it would appear that the plaintiffs-respondents should succeed, and that the appeal should be dismissed. We have, however, to apply the law as set forth in sections 13 and 16 of the Transfer of Property Act, and we must take into consideration the argument advanced by the appellants that the application of the words of the

(1) (1883) L.R., 10 I.A., 51. (2) (1883) I.L.R., 9 Cal., 952.

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sections to the facts of this case leads to the inevitable conclusion that the grant or gift to Data Din is void. It seems to us, if we accept this argument, that we must hold that it was the intention of the Legislature to abrogate the rule that an alternative and independent grant is not void merely because a prior grant is void on the principle of remoteness.

Smith and Allsop, JJ.

The question which has arisen in this appeal is one of considerable difficulty and of great importance. We consequently think that we should make a reference under the provisions of section 14(1) of the Oudh Courts Act to a Full Bench of the Court. The reference we make is whether, in the circumstances set forth in our order, the gift over to Data Din under the deed executed by Musammat Sugga in favour of Musammat Ram Kali is void, having regard to the possessions of sections 13 and 16 of the Transfer of Property Act.

Messrs. *A. P. Sen* and *S. C. Das*, for the appellants.

Messrs. *R. K. Srivastava* and *S. N. Srivastava*, for the respondents.

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SRIVASTAVA, NANAVUTTY and SMITH, JJ.:—The question referred by the Division Bench for decision to the Full Bench is as follows:

> "Whether, in the circumstances set forth in our order, the gift over to Data Din under the deed executed by Musammat Sugga in favour of Musammat Ram Kali is void having regard to the provisions of sections 13 and 16 of the Transfer of Property Act."

The circumstances which have given rise to this reference are briefly these:

One Musammat Sugga was the absolute owner of the property in suit. On the 15th of January, 1919, she executed a deed of gift transferring the property in the first place to Musammat Ram Kali, the daughter of Data Din, who was a son of her real brother. Musammat Ram Kali remained in possession during her life. On her death a dispute arose between Data Din, plaintiff No. 1, the father, and Girjesh Datt, defendant No. 1,

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the husband, of Ram Kali. Data Din transferred some of his interest to the three other plaintiffs, who joined him in instituting the suit, Girjesh Datt also transferred half of the property to his brother Rajendra Datt, defendant No. 2.

Srivastava, Nanavutti, and Smith, JJ.

The plaintiffs' case was that the gift in favour of Musammat Ram Kali was of a life interest only, and that under the terms of the gift, the property passed on her death to her father Data Din. The defendants on the other hand contended that Musammat Ram Kali was an absolute owner of the property transferred to her under the gift, and therefore the property on her death devolved on her husband, defendant No. 1. They also contended in the alternative that if the gift in favour of Musammat Ram Kali was not absolute, even then the gift over in favour of Data Din was void by reason of the provisions of sections 13 and 16 of the Transfer of Property Act.

The trial court held that the gift conveyed to Musammat Ram Kali only a life interest, and that the gift over to Data Din was not void under section 16 because it was an alternative and independent gift. On appeal the Division Bench also came to the conclusion that the gift to Musammat Ram Kali was not an absolute gift but a gift only of a life interest. As regards the question of the validity of the gift over to Data Din, the Division Bench, being of opinon that the question was one of considerable difficulty and of great importance, have referred it to a Full Bench.

The relevant portion of the deed of gift relating to the gift over runs as follows:

> "If on her (Ram Kali's) death there be any male descendants, whether born of son or daughter, he will be the absolute owner of the property, and if Musammat Ram Kali may have only daughters, they shall have no power of transfer. If, God forbid, there may not be any issue of Musammat Ram Kali, whether male or female, living at the time of her death, the gifted property shall not in any way

devolve upon her husband or his family, but it shall go to Data Din, father of Musammat Ram Kali, if he be then alive, and if Data Din be not alive, then the person who may be living of the line of Data Din at that time would get it."

Srivastava, Nanavutty and Smith, JJ.

Admittedly Musammat Ram Kali had no children at the time when the gift was made in her favour and she died issueless. The gifts therefore in favour of her male or female descendants were in favour of unborn persons. These gifts were also clearly subject to the prior interest created by the same transfer in favour of Ram Kali. Section 13 of the Transfer of Property Act requires that such a transfer in order to be valid must extend to the whole of the remaining interest of the transferor in the property. As the gift over in favour of the sons or grandsons of Musammat Ram Kali related to the absolute interest, it was clearly valid. It seems equally clear that the gift over to the daughters was void because the transfer in their favour related merely to a limited interest. This was conceded by the plaintiffs' counsel in the trial court and was not seriously disputed in this Court. It was only faintly contended before us that the interest referred to in section 13 is an interest similar to that contemplated by section 20, which can become vested on the birth of the person not then living. The argument proceeded that as the interest created in favour of the daughters was dependent on the double contingency of their being born and also of there not being male descendants, such an interest did not fall within the terms of section 13. We are unable to accede to this contention. Section 13 provides that the transfer for the benefit of unborn persons, if made subject to a prior interest, must extend to the whole of the remainder. Section 20 on the other hand provides that in the absence of a contrary intention, an interest created for the benefit of an unborn person vests as soon as the person is born. We are unable to see any direct connection between these two sections. The only thing common in the two sections is that they both lay down

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certain rules in regard to transfers in favour of unborn persons.

Thus the transfer in favour of the daughters being invalid under section 13, the question arises as regards the effect of it on the ulterior disposition in favour of Data Din. Section 16 of the Transfer of Property runs as follows:

> "Where, by reason of any of the rules contained in sections 13 and 14, an interest created for the benefit of a person or of a class of persons fails in regard to such person or the whole of such class, any interest created in the same transaction and intended to take effect after or upon failure of such prior interest also fails."

If we analyse the section it will be seen that three conditions are necessary for its application. (1) There should be an interest created for the benefit of a person or a class of persons which must fail by reason of the rules contained in sections 13 and 14, (2) there should be another interest created in the same transaction, and, (3) the other interest must be intended to take effect after or upon failure of the prior interest. We have already held that the interest created for the benefit of the daughters fails by reason of section 13 of the Transfer of Property Act. It is also clear that the interest created in favour of Data Din is an interest created in the same transaction. There can therefore be no doubt about the first two conditions being satisfied. The only question is whether the interest created in favour of Data Din was one intended to take effect after or upon failure of the prior interest created in favour of the daughters. It is agreed by both parties and is also clear from the terms of the will that the gift in favour of Data Din was not intended to take effect after the gift in favour of the daughters. The intention of the donor clearly was that Data Din should get the property only in case the gift in favour of the male descendants and the daughters of Ram Kali failed. The case therefore

seems to be fully covered by the words "upon failure of such prior interest."

Reliance has been placed upon the decision of the Bombay High Court in *Javerbai* v. *Kablibai* (1) in support of the contention that the gift in favour of Data Din could not be void, because it was in the nature of an alternative gift. It was held in this case that the devise over in default of male issue was an alternative gift to take effect on an event to be determined at the death of the survivor of the tenants for life, and consequently was not open to objection. We are of opinion that this case can be no guide for the interpretation of the provisions of section 16 of the Transfer of Property Act. In this case the devise in favour of the male issue was held to be void under the rule in the *Tagore case* as it was a gift to a person or persons not in being at the death of the testator. There was no question about the gift having failed by reason of the rule contained in section 13, and section 16 therefore had no application.

We have to interpret and give effect to the statutory provision contained in section 16 of the Transfer of Property Act. If the taking effect of the subsequent interest is dependent upon the failure of a prior interest which satisfied the other requirements of the section, we fail to see any escape from the rule laid down therein that such subsequent interest must also fail. As we have held that the other requirements of the section are satisfied, and we are further of opinion that the gift in favour of Data Din was dependent upon the failure of the prior interest in favour of the daughters, the result is that the gift in favour of Data Din must also fail.

The question referred to the Full Bench is accordingly answered in the affirmative.

(1) (1891) I.L.R., 16 Bom., 492.