

## PRIVY COUNCIL.

*Before Lord Tomlin, Sir Lancelot Sanderson, Sir George Lowndes, and Sir Binod Mitter.*

MUSSAMMAT BOLO (DEFENDANT) Appellant

*versus*

MST. KOKLAN (PLAINTIFF) AND ORS. Respondents  
(and Cross-appeal).

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July 3.

On Appeal from the Court of the Judicial Commissioner North-West Frontier Province.

Privy Council Appeal No. 106 of 1929.

N.-W. F. P. Civil First Appeal No. 47-13 of 1928.

*Indian Limitation Act, IX of 1908, Sch. I, art. 120—Time from which period runs—“when the right to sue accrues”—Hindu Will—Construction—Gift to Widow—Exclusion of possible grandsons.*

For the purposes of the Indian Limitation Act, 1908, schedule I, article 120 “the right to sue accrues” only when the defendant has infringed, or at least has clearly and unequivocally threatened to infringe, the right asserted by the plaintiff in the suit.

A Hindu, who died in 1899 possessed of self-acquired property, provided by his will made in 1896 that his son, described as a minor aged two years, should be proprietor of half his property jointly with the son’s mother, and in case the minor son died before his mother, then the latter should be owner of the half share. The son died in 1918, survived by his mother, also by a widow and a son who died in 1927.

*Held* that the mother succeeded to the half share upon the death of her son, as that was the clearly expressed intention of the testator; the disinclination of a Hindu to curtail the rights of his male issue in favour of a widow was not a ground for construing the will as providing for the mother succeeding only if her son died in the lifetime of the testator or during his own minority.

*Held*, further, that the mother’s claim to the movables was not barred by article 120 as her right to succeed had not

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been challenged until within six years of the institution of the suit.

*Consolidated Appeal and cross-appeal (No. 106 of 1929), from a decree of the Court of the Judicial Commissioner, N.-W. F. P. (October 12, 1928), reversing a decree of the District Judge of Peshawar (January 31, 1928).*

The consolidated appeal arose out of a suit instituted in 1927 by the above named *Mst. Koklan* claiming that under the will of her husband, *Mul Chand*, who died in 1899, she was entitled upon the death in 1918 of her son *Tara Chand* to a half share in property disposed of by the will. The plaintiff prayed for a declaration and for partition. The first two defendants were in possession of the other half of the property as grandsons of *Mohan Lal* to whom it had been bequeathed by the will. They did not dispute the plaintiff's claim; and they were joined as *pro-forma* parties to the appeal. The third defendant, *Mst. Bolo*, the widow of *Tara Chand*, by her written statement contended, *inter alia*, that the plaintiff was entitled to no interest under her husband's will.

The material terms of the will, and the facts relevant to a question of limitation which arose, appear from the judgment of the Judicial Committee.

The District Judge of Peshawar dismissed the suit. In view of the importance which Hindus attach to perpetuation of their family in the male line, he was of opinion that the intention of the testator was that there should be a gift over to *Mst. Koklan* only in the event of his son dying during minority and without issue.

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Upon appeal by the plaintiff to the Court of the Judicial Commissioner the learned judges held that the effect of the will was to confer an absolute estate upon the testator's son in a quarter share, and a life estate upon the testator's widow in a quarter share, and that upon the son's death the plaintiff was entitled to his one-quarter share in the property. They made a decree for partition upon that basis.

DUNNE K. C. and J. NISSIM for the defendant, *Mst. Bolo*. The will should be construed according to the notion and wishes of Hindus, and should therefore be read as devising the half share to the testator's widow only if his son died during his minority without issue, or if he so died during the testator's life.

Reference was made to *Tagore v. Tagore* (1), *Mahomed Shumsool Hooda v. Shewukram* (2), *Hirabai v. Lakshuibai* (3), and N.-W. F. P. Regulation, VII of 1901, Section 27

Further, the plaintiff's claim to the movable property was barred by the Indian Limitation Act, 1908, Schedule I, Article 120, as the suit was not brought within six years of Tara Chand's death. Article 123 does not apply as there was no duty upon *Mst. Bolo* to distribute the property—nor does Article 127, as the claim was under the will.

DEGRUYTHER K. C. and DUBE for the plaintiff, *Mst. Koklan*. The will provides in clear terms that in case Tara Chand should die before his mother the latter should be owner of the son's half share. The ordinary wishes of a Hindu as to the devolution of his property cannot be invoked to alter that clearly ex-

(1) (1872) L. R. I. A. Supp. 47, 65. (2) (1874) L. R. 2 I. A. 7, 14, 15.  
(3) (1887) I. L. R. 11 Bom. 573.

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pressed provision. Even if article 120 applies to the claim to the movable property it was not barred, because the right of the plaintiff was not challenged before the suit in 1922. There is no "right to sue" within article 120, until the right asserted is infringed or challenged: *Jitendra Nath Ghose v. Manmohan Ghose* (1). A suit cannot be brought for a declaration of a right of which the plaintiff is in undisputed enjoyment: Specific Relief Act, 1877, Section 42. But it is submitted that the article applicable is either article 123 or article 127, and under either the claim was not barred.

DUNNE K. C. replied.

The judgment of their Lordships was delivered by—

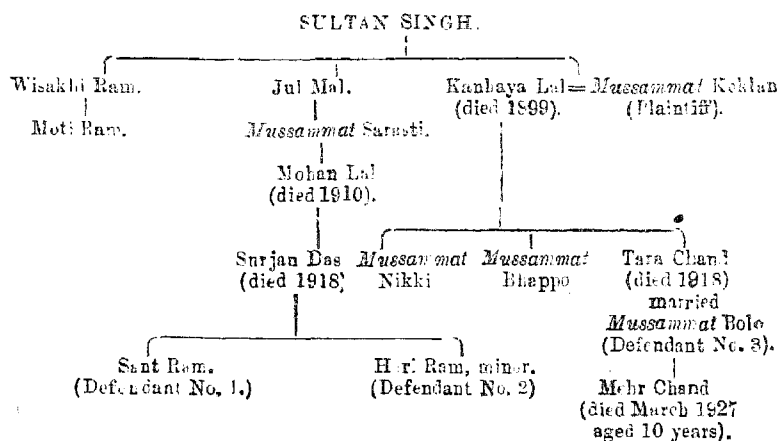
SIR BINOD MITTER\*—These are two consolidated appeals, one by the plaintiff, *Mst. Koklan*, and the other by the defendant, *Mst. Bolo*, from a judgment and decree, dated the 12th October, 1928, of the Court of the Judicial Commissioner, North-West Frontier Province, Peshawar, which reversed a judgment and decree, dated the 31st January, 1928, of the District Judge of Peshawar, and made a decree partly allowing the plaintiff's claim and partly dismissing it.

Kanhaya Lal executed his last will and testament on the 27th May 1896, and died in the year 1899, leaving surviving his sole widow the plaintiff, *Mst. Koklan*, his infant son Tara Chand, and his great

(1) (1930) L. R. 57 I. A. 214, 223.

\* The Rt. Hon'ble Sir Binod Mitter died in London on July 20. At a full meeting of the Judicial Committee on July 21, their Lordships referred to the great assistance which Sir Binod's wide knowledge had been to the Board in hearing appeals from India, and expressed their deep regret at his sudden death.

nephew Mohan Lal, as will appear from the following pedigree:—



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The properties left by Kanhaya Lal consisted of movables and immovables. They were self-acquired and were not ancestral.

Two questions are before their Lordships for their decision in this appeal.

(1) What is the interest of the plaintiff and the defendant *Mst. Bolo* in the property left by Kanhaya Lal?

(2) Is the claim of the plaintiff in this suit barred by limitation?

The important clause in the will is the 4th, and it runs as follows:

“If I die, my real son—Tara Chand, minor, aged 2 years, may be held and considered as proprietor of half of the whole property specified in the will, jointly with *Mst. Koklan*, his mother. If, God forbid, the mother of the said Tara Chand minor dies before him, then the said Tara Chand shall become the owner of the said half share and in case Tara Chand minor dies before his mother, then the latter shall be held and considered to be the owner of the

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said minor's half share in the entire property. *Mst.* Koklan shall act as guardian of the person and property of Tara Chand during his minority. It is further noted here that if Tara Chand is not present, *i.e.*, if he dies, then *Mst.* Koklan shall be competent in every respect to alienate the said half share in the property by way of Dharam Khata, etc. (*i.e.*, charitable purposes, etc.), but she shall have no power to alienate by gift or by other way any portion of the said property either to her parents or relations on her mother's side.

“As regards the remaining one-half share of the property noted in the will, it shall go to Mohan Lal, son of Narinjan Das, caste Arora (by profession a physician) of *Mohallah* Kocchi Khan *ilaqa* Dabgari gate, Tahsil Peshawar, who is the son of my brother's daughter, and after his death his children shall succeed to this half share of the property.”

Tara Chand died in 1918, leaving him surviving his sole widow *Mst.* Bolo and an infant son Mehr Chand. The question for decision is whether on Tara Chand's death his mother, *Mst.* Koklan, became entitled absolutely to a moiety of the estate left by Kanhaya Lal and, if not, then what on the construction of Kanhaya Lal's will is the interest of *Mst.* Koklan or of *Mst.* Bolo.

Counsel for *Mst.* Bolo submitted that the testator by the words “In case Tara Chand minor dies before his mother, then the latter shall be held and considered to be the owner of the said minor's half share in the entire property” intended that the interest which Tara Chand was to acquire under the will would go over to his mother *only if Tara Chand died before the testator or if he died during his minority*, but not otherwise.

He further submitted that in construing this will, which is the will of a Hindu, it is proper to take into consideration what are known to be the ordinary motives and wishes of a Hindu with respect to the devolution of his property, and that a Hindu, except in rare cases, would not deprive his sons or grandsons of their rights of inheritance, or even curtail the same, for the benefit of his widow.

No doubt the submission of the learned Counsel is perfectly legitimate and proper, but the primary duty of a Court of construction is to give to the words of the will their plain and natural meaning, and the words of this will are specific. Their Lordships think that, whilst they must give due weight to the submission of the learned Counsel, they must construe the words as they find them. They therefore hold that the intention of the testator *as expressed* was that the defeasance clause would come into operation on the death of Tara Chand, if the same happened during the lifetime of his mother, and cannot be restricted in the way that Counsel suggested. The answer to the first question propounded is therefore that on the death of Tara Chand *Mst. Koklan* became entitled to a moiety of the property left by Kanhaya Lal and that *Mst. Bolo* has no interest therein.

The learned District Judge found the facts as follows :—

“ When Kanhaya Lal died, Mohan Lal managed the property. On his death Surjan Das managed it and a year or two later Tara Chand also took part in the management. On the death of Surjan Das and Tara Chand, agents were appointed under registered powers of attorney by *Mussammats Sarani* and *Bolo*, the mothers of the minors *Sant Ram*, *Hari Ram*, and

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Mehr Chand, to manage the property and that arrangement has been continuing up to date. The account books of the property show that the income has been credited half and half to the two branches of Sultan Singh's descendants: an allowance of Rs. 20 p.m. has been made to *Mussammat* Koklan and it has been debited all along first to Tara Chand's account and later to Mehr Chand's. Since the death of Surjan Das and Tara Chand the mothers of the minors have been receiving from the property a sum of about Rs. 400 a month for their various expenses. Kanhaya Lal's widow and descendants continued to live jointly until 4 or 5 years ago when *Mussammat* Koklan and Bolo began to live separately."

The Court of the Judicial Commissioner did not come to any different finding and their Lordships accept the finding of the learned District Judge as correct.

A suit was filed on the 11th July, 1922, on behalf of the infant Mehr Chand by his mother *Mst.* Bolo against the two minor sons of Surjan Das through their mother for partition and possession of the properties left by Kanhaya Lal in equal shares. *Mst.* Koklan petitioned to be added as defendant, denying that her minor grandson had any right at all and claiming under the will to be the absolute owner of the half share in suit. The suit was subsequently withdrawn with liberty to bring a fresh suit.

On these facts the question arises whether the claim of the plaintiff is barred by limitation.

Learned Counsel for *Mst.* Bolo argued that Article 120 applies to this suit in respect of the movable properties, and that when Tara Chand died the right to sue accrued to the plaintiff and the suit



as regards the movable properties is therefore barred by limitation.

Learned Counsel for the plaintiff, *Mst. Koklan*, also submitted that Article 120 of the Limitation Act is applicable but that the right to sue did not accrue until Mehr Chand on the 11th July, 1922, instituted the suit which was subsequently withdrawn. He further submitted that if Article 120 did not apply, then Article 127 or 123 is applicable. If Article 127 or 123 is applicable, then the suit is clearly within time, but even if Article 120 applies to this suit, then their Lordships are of opinion that the suit is within time.

Article 120 is as follows :—

Suit for which no period of Limitation is provided elsewhere in this Schedule.	Six years.	When the right to sue accrues.
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There can be no "right to sue" until there is an accrual of the right asserted in the suit and its infringement or at least a clear and unequivocal threat to infringe that right by the defendant against whom the suit is instituted.

No doubt *Mst. Koklan's* right to the property arose on the death of Tara Chand, but in the circumstances of this case their Lordships are of opinion that there was no infringement of, or any clear and unequivocal threat to, her rights till the year 1922, when the suit, as stated above, was instituted.

*Mst. Koklan* was living as a member of a joint family, consisting of herself, her infant grandson, and daughter-in-law, and they constituted *Kanhaya Lal's* branch of the family of *Sultan Singh*.

The grant of powers of attorney by *Mst. Sarani* and *Bolo* to a manager to manage the joint property,

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and the method in which the account books were kept, show the way in which the joint properties were managed. Such methods of management are not uncommon amongst Hindus.

Their Lordships therefore hold that the suit is not barred by limitation. They are of opinion that the appeal of *Mst. Bolo* should be dismissed and that of *Mst. Koklan* allowed, and that the following declaration should be made: That on the true construction of the will the plaintiff is entitled to an absolute interest in the one-half share in which she and Tara Chand were interested at the time of the latter's death, but this declaration is without prejudice to the question whether any, and if so to what extent, the restriction on alienation imposed by the will of Kanhaya Lal is valid.

It follows therefore that *Mst. Koklan* is entitled to a decree for partition and that this suit should be remitted to the learned District Judge to carry out the directions of their Lordships. The appellant, *Mst. Bolo*, must pay the costs of *Mst. Koklan* before this Board. There will be no order for costs in the Courts below and any costs paid under any order should be returned to each other respectively. The costs of partition would be dealt with by the learned District Judge.

Their Lordships will humbly advise His Majesty accordingly.

A. M. T.

*Mst. Bolo's appeal dismissed.*

*Mst. Koklan's appeal accepted.*

Solicitor for defendant, *Mst. Bolo*: H. S. L. Polak.

Solicitor for plaintiff: T. L. Wilson & Co.