executed. This is not a case in which one of the executors did not take out probate as in *Bal Gangadhar Tilak* v. *Shirinivas Pandit* (1). All did so. All, therefore, had to concur in choosing the boy and this they did not do. It follows that the adoption was invalid and against the authority of the deceased husband.

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BALI NATH v. RATTAN LAL.

ADDISON J.

For the reasons given, I would accept the appeal and dismiss the suit. As the appellants have to give up their contention that Basheshar Nath was not validly adopted to Naneh Mal and as they have failed to disprove the factum of the plaintiff's adoption, I would leave the parties to bear their own costs throughout.

HARRISON J.—I agree.

HARRISON J.

A. N. C.

Appeal accepted.

APPELLATE CIVIL.

Before Tek Chand and Monroe JJ.

UMRAO SINGH (DEFENDANT) Appellant

versus

BALDEV SINGH (PLAINTIFF)
SUKH DEV SINGH (DEFENDANT) } Respondents.

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Nov. 22.

Civil Appeal No. 531 of 1932.

Hindu Law — Will — bequeathing absolute estate—to several minor sons—but restricting alienation and partition of it till youngest of them has attained majority—whether restriction is valid.

P, a Hindu, governed by the Mitakshara executed a will declaring that " the heirs to his property, both moveable and immoveable," were his three minor sons, and in a subsequent

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clause stated that "his immoveable property should not be partitioned until all his three sons had attained majority, and that no one should be competent to effect transfer of any part thereof up to that time."

Held, that inasmuch as the testator had declared in unmistakable terms that his three sons were his heirs, and were absolute owners in equal shares of his property, the subsequent clause in the will restricting the sons' powers of alienation and partition in respect of the immoveable property until the youngest of them had attained majority was invalid; it being settled law that where in a deed of gift or will, an absolute estate of inheritance is created in favour of a person, any subsequent clause which purports to restrict it is invalid and the donee, or legatee takes an absolute estate as if the deed contained no restrictive condition. *And* the rule is the same even though the restriction is for a limited period only, and purports to cut down the donee's right to enjoy the property as full owner or alienate it until a certain age beyond the date of his majority, except in cases where in the interval the income of property has been disposed of in favour of a third party.

Mulla's Principles of Hindu Law, 7th edition, paras. 392 to 394, Gaur's Hindu Code, 3rd edition, para. 2086 *et seq.* relied upon.

Raikishori Dasi v. *Debendranath Sirkar* (1), distinguished.

First Appeal from the decree of Chaudhri *Kanwar Singh, Senior Subordinate Judge, Gujranwala, dated the 10th March, 1932, granting the plaintiff a preliminary decree for partition of 1/3rd house property and moveable property.*

M. L. PURI, KANSHI NATH AGGARWAL and MEHR CHAND SUD, for Appellant.

IQBAL SINGH and BALWANT RAI, for Plaintiff-Respondent.

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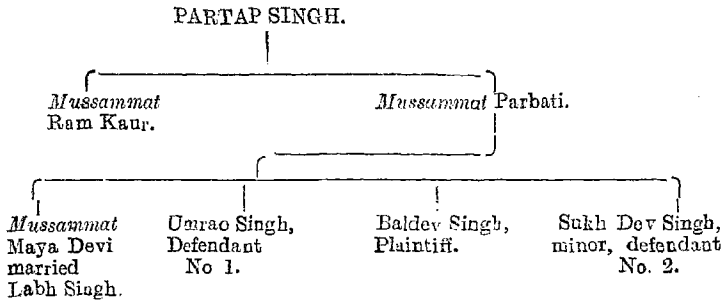
TEK CHAND J.

The judgment of the Court was delivered by—

TEK CHAND J.—In order to understand the facts of this case it is necessary to refer to the following pedigree-table :—



On the 20th March, 1917, Partap Singh executed a will declaring that the heirs to his moveable and immoveable properties were his three sons—Umrao Singh, Baldev Singh and Sukh Dev Singh, minors, that during their minority their mother *Mussammat* Parbati would be their guardian and his son-in-law Labh Singh and nephew Lehna Singh would help *Mussammat* Parbati in the management of the estate, that when the eldest son Umrao Singh attained majority he would manage the estate in consultation with his mother, and later on, when Baldev Singh became major he also would help in the management. In paragraph 7 of the will, however, the testator laid down that " my immoveable property shall not be partitioned until all my three sons attain majority, nor shall any body be competent to effect transfer of any part thereof up to that time." In paragraph 13, it was recited that the testator had already given 1½ squares out of his land in *Chak* No. 101 in district Lyallpur to his eldest son Umrao Singh " by virtue of *Sardari*," and this land shall remain entered in Umrao Singh's name in the papers as before but he " shall consider

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the income thereof as joint until his brothers attain majority."

Soon after the execution of the will Partap Singh died on the 30th September 1917. The eldest son Umrao Singh attained majority in 1921, and in the following year *Mussammat* Parbati died. Baldev Singh, plaintiff, completed his eighteenth year on the 29th August, 1924. The youngest son Sukh Dev Singh is still a minor. The exact date of his birth is not known, but it is common ground that he is over 17 years old now.

On the 25th January, 1926, Baldev Singh instituted a suit for rendition of accounts against Labh Singh, Umrao Singh and Sukh Dev Singh, minor. This claim was resisted by Labh Singh and Umrao Singh and was dismissed on the 23rd November, 1926, by *Rai Bahadur Lala* Rangi Lal, District Judge, Gujranwala, on the ground that the parties being members of a joint Hindu family, of which Umrao Singh was the manager, a suit for accounts did not lie against him. The learned Judge also held that the provision in paragraph 7 of the will prohibiting partition of the immoveable properties till " all the sons had attained majority " was void under Hindu law, and he expressed the opinion that the only remedy open to the plaintiff, if he was dissatisfied with the management of Umrao Singh, was to seek partition of the family properties.

On the 22nd January, 1931, Baldev Singh brought the present action in the Court of the Senior Subordinate Judge, Gujranwala, seeking possession by partition of one-third of the moveables and house properties mentioned in the Appendix to the plaint and praying for a declaration that he was entitled to have his one-third share in the joint agricultural lands partitioned

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by the revenue authorities. He also prayed that Umrao Singh, defendant No. 1, be required to render accounts of the entire property "from beginning to end."

Umrao Singh, defendant No. 1, for himself and as the guardian *ad litem* of Sukh Dev Singh, minor, defendant No. 2, raised a number of preliminary objections against the maintainability of the suit, and also filed a lengthy written statement on the merits. The learned Senior Subordinate Judge framed three preliminary issues as follows :—

1. Is the plaint properly stamped?
2. Does the suit lie as framed?
3. Is the suit not premature?

The first two issues were found in favour of the plaintiff by order dated the 9th October, 1931, and the parties were directed to produce such evidence as they desired on the third issue. The learned Judge heard arguments on this point on the 10th March, 1932, and he forthwith passed an order, holding that the restriction on partition contained in paragraph 7 of the will was void under Hindu Law and that the plaintiff having attained majority before the institution of the suit, was entitled to ask for partition of his share of the joint properties. He accordingly held that the suit was not premature. But, instead of proceeding to frame issues on the other points raised in the pleadings the learned Judge proceeded at once to pass a preliminary decree under Order 20, rule 18, for partition of one-third of the house properties and moveables in dispute and appointed a local commissioner to effect partition. He also granted the plaintiff a declaration that he had a one-third share in the agricultural lands in dispute, the partition of which

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could be sought in the revenue Courts. The judgment is silent as to the prayer in the plaint relating to the rendition of accounts by defendant No. 1, but we are told that, after the aforesaid order was passed, the learned Judge called upon defendant No. 1 to produce in Court certain account-books and that proceedings relating to this matter are going on.

Umrao Singh has appealed, and the first contention raised on his behalf is that the learned Judge was in error in holding that the condition in clause 7 of the will restricting partition of immoveable properties till the youngest son Sukh Dev Singh attained majority was void. After hearing lengthy arguments, I am of opinion, that the contention is without force and must be overruled. It is clear from the will that the testator declared in unmistakable terms that his three sons were his heirs and were absolute owners, in equal shares, of his moveable and immoveable properties. But in a subsequent clause of the will, he tried to restrict their power of alienation and partition in respect of immoveable properties until the *youngest* of them had attained majority. It is settled law that where in a deed of gift or will, an absolute estate of inheritance is created in favour of a person, any subsequent clause which purports to restrict that interest is invalid, and the donee or legatee takes an absolute estate as if the deed contained no such restrictive condition. And the rule is the same even though the restriction is for a limited period only, and purports to cut down the donee's right to enjoy the property as full owner or alienate it until a certain age beyond the date of his majority, except, of course, in cases where in the interval the income of the property has been disposed of in favour of a third party. (See

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Mulla's *Principles of Hindu Law*, 7th edition, paras. 392 to 394, and Gour's *Hindu Code*, third edition, para. 2086 *et seq*, and the authorities cited therein). It is admitted that the case before us does not fall within the exception stated above. Here, Umrao Singh attained majority in 1921 and the plaintiff Baldev Singh in 1924, but powers of each of them to have his share partitioned or alienated is postponed till 1933 when the youngest son would attain majority. This restriction is clearly repugnant to the absolute estate created in the earlier part of the will and is, therefore, invalid.

Mr. Puri relied largely on certain observations of the High Court of Calcutta in *Raikishori Dasi* v. *Debendranath Sirkar* (1) but they were not necessary for the decision of the case and do not appear to have been adopted by their Lordships of the Privy Council who affirmed the decision of the High Court on the actual points involved in the case. I hold, therefore, that the suit is not premature by reason of the fact that the youngest son of the testator had not attained majority at the time of its institution and to this extent the decision of the learned Subordinate Judge is correct.

But the action of the learned Judge in passing forthwith a preliminary decree for partition of the moveable and immoveable properties was irregular and cannot be sustained. As stated already, issues on the preliminary objections only had been framed and the trial of the case on the merits had not begun. The pleadings of the parties show that there were serious disputes between them on several questions of fact. These matters had not been put in issue, nor any

(1) (1888) I. L. R. 15 Cal. 409 (P.C.).

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evidence recorded. It is, therefore, difficult to understand how the learned Judge could have granted the plaintiff a declaration fixing the shares of the parties in the agricultural lands and passed a preliminary decree for partition of the other immoveable and moveable properties. As a result of this hasty and ill-considered procedure we find that he has decreed to the plaintiff a one-third share in $1\frac{1}{2}$ squares of land in *Chak* No. 101, District Lyallpur, which the testator had bequeathed to Umrao Singh, defendant No. 1, alone. In his statement made in Court on the 18th July 1931 the plaintiff did not object to this provision in the will, and his counsel has frankly admitted before us that he cannot support this part of the decree. It appears from the record that soon after the learned Judge pronounced his order, the matter was pointedly brought up before him by a petition filed by counsel for defendant No. 1, but the learned Judge took no notice of it.

Again, we find that in his claim the plaintiff had included a large number of moveables, but the defendants in their written statement did not accept the plaintiff's list as correct, and yet a decree for partition of all these moveables has been passed without any enquiry whatever. A cursory glance at the list shows that it contains some items in regard to which the plaintiff should have been called upon to file further particulars. For instance, we find included in it cash, ornaments and other articles described as having been given by the father-in-law of the plaintiff as dowry at the time of his marriage. No enquiry was made as to whether these articles were given to the bride or the bridegroom, whether they were partible, and how and when they came into the possession of

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defendant No. 1, and yet the learned Judge has passed a decree that they be divided among the three brothers. It will thus be seen that the case has been very carelessly handled and must be sent back for re-trial.

I would accordingly accept the appeal, set aside the decree of the Senior Subordinate Judge and remand the case for trial and decision in accordance with law. * * * * * * *

Court-fee on this appeal will be refunded; other costs will be costs in the cause.

A. N. C.

Appeal accepted.
Case remanded.

APPELLATE CIVIL.

Before Broadway C. J. and Abdul Qadir J.

1932

Nov. 24.

BHOLA RAM (DEFENDANT) Appellant

versus

ARJAN DAS AND OTHERS (PLAINTIFFS)
NANAK CHAND AND OTHERS (DEFENDANTS) } Respondents.

Civil Appeal No. 2215 of 1926.

Civil Procedure Code, Act V of 1908, Section 105: Appeal from decree—Order setting aside abatement of suit not embodied therein—whether correctness of—can be re-agitated in the appeal.

The surety-defendant died in April 1921 during the pendency of the suit. An *ex parte* decree passed against his estate in June 1921 was set aside and, on plaintiff's application, dated October 1921, to implead deceased's minor sons, the trial Judge concluded that the abatement should be set aside and, after hearing pleas by the *guardian ad litem*, proceeded to pass a decree in the suit against the estate of the deceased surety as well, without making any further reference therein to the abatement which had been set aside.