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it is apparently also true that they have never been asked to pay. In our opinion it cannot be said that they have been out of possession, for the possession of the Magistrate purported to be and really was, as already stated, a possession on behalf of such of them as might eventually prove themselves entitled to such possession. Under these circumstances, it seems to us that there has in fact been no abandonment by any of the defendants of their holdings in the disputed area.

The appellant, therefore, is not entitled to obtain direct possession of the lands in suit nor is she, having regard to what we have already stated as to the conditions under which the deposit is held, entitled to claim to be paid in part payment of the rent alleged to be due to her for the years 1292 to 1309, the amount in deposit in the Magistrate's Court.

We have been asked to allow the plaint at this stage to be amended and to remand the suit to the lower Court in order to enable the plaintiff to recover any rent, which may not be barred by limitation. We are not disposed to allow any amendment at this stage. But apart from this, it seems to us that as this suit is framed against a large number of tenants, some belonging to one village and some to another and there is no allegation as to which of them are in possession of or tenants of any particular plot, there would be great difficulty in turning the suit into a suit for rent.

The appeal is, therefore, dismissed with costs.

Appeal dismissed.

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[861] APPELLATE CIVIL.

Before Mr. Justice Pratt and Mr. Justice Mitra.

AMULYA CHARAN SEAL *v.* KALI DAS SEN.*

[28th March, 1905.]

Hindu Law—Will—Construction of will—Gift over—Defeasance—Vesting of corpus in abeyance—Executors and trustees, position of—Hindu Law—Adoption—Adoption of sons in succession.

Where under the terms of a will the corpus of the estate was not to vest until the happening of a certain event, it would in the meantime vest in the heir, and on the death of the heir (intestate) it would devolve on his heir.

Executors and trustees of Hindu wills executed before the 1st September, 1870 are merely managers and no estate vested in them.

Sarat Chandra Banerjee v. *Bhupendra Nath Basu* (1) followed.

A clause of defeasance in order to be operative must contain express words or words of necessary implication of a gift over to a definite person.

The implication of a gift over to a second adopted son who may never be adopted cannot prevent the widow of the first inheriting the share taken by the latter.

Where a Hindu gave authority to his widow to adopt sons to him in succession; her power to adopt a second son would terminate on the first adopted son dying leaving a widow in whom the estate became vested.

Bhoobunmoyee Debia v. *Ramkishore Acharj Chowdhry* (2); *Padma Kumari Debi Chowdhrani* v. *Court of Wards* (3); *Keshav Ram Krishna* v. *Govind Ganesh* (4); *Thayammal* v. *Venkatarama* (5) and *Tara Churn Chatterji* v. *Suresh Chunder Mukerji* (6) followed.

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* Appeal from Original Decree No. 89 of 1903, against the decree of Kali Kumar Bose, Subordinate Judge of 24-Pergannahs, dated the 5th January 1905.

(1) (1897) I. L. R. 25 Cal. 103.
(2) (1865) 10 M. I. A. 279; 3 W. R. (P. C.) 15.
(3) (1881) I. L. R. 8 Cal. 302.
(4) (1884) I. L. R. 9 Bom. 94.
(5) (1887) I. L. R. 10 Mad. 205; L. R. 14 I. A. 67.
(6) (1889) I. L. R. 17 Cal. 122.

[Ref. 38 Mad. 1105 ; 49 I. C. 609=22 C. W. N. 353=29 C. L. J. 214=46 Cal. 749 ; 38 Cal. 639 ; 34 All. 405.]

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APPEAL by the plaintiff Amulya Charan Seal.

The facts of the case are fully stated in the judgment of the Court.

The Will of Rajballav Seal was as follows :—

Will of Rajbullav Seal, dated 8th June 1870.

This is the last Will and Testament of me Rajbullab Seal of Amherst Street in the town of Calcutta, land-holder.

[862] Whereas I am the owner of the following properties, portion whereof is situated in Calcutta and portion out of Calcutta, namely.

First.—All those three pieces of garden land and tanks market and tenanted huts situate at Entally, Dihee Punchannogram in the zillah of Twenty-four Parganas and Sub-division of Alipur containing by estimation forty-two bighas more or less subject to a mortgage hereinafter mentioned.

Second.—All that piece of land situate at Entally aforesaid containing about two bighas called or known by the name of Pundit Bagan.

Third.—The dwelling-house No. 87, Amherst Street, in which I am now residing, containing by estimation one cotta and twelve chittacks of land.

Fourth.—All that piece of tenanted land being No. 40, Harcutagully in Calcutta containing by estimation ten cottas and eight chittacks of land.

Fifth.—All that piece of tenanted land at Tallygunge in the zillah of the Twenty-four parganas containing by estimation four bighas or thereabouts, together with certain trees thereon.

Sixth.—A tank with the land appertaining thereto situate at Banderhatty in the zillah of Hooghly containing an area of about five bighas.

And whereas I am the registered owner of five shares in the Assam Tea Company and of certain jewellery house-hold furniture and shawls and there are certain outstanding debts due to me and whereas my wife Sreemutty Dosee is still alive and I have three grandsons by a daughter called Luckohira Dosee since deceased named respectively Kallydoss Sen, Bholanath Sen and Satuck Churn Sen all of which grandsons are now living with me and whereas the first abovementioned property at Entally is now under mortgage to Sreemutty Radharanee Dosee wife of Babu Adit Churn Mullick under an English mortgage, dated on or about the twentieth day of July one thousand eight hundred and sixty-nine for rupees seven thousand and seven hundred bearing interest at twelve per cent. per annum and payable three years after date and whereas having no son of my own, I am desirous of having one adopted to me and I also desire that an idol may be established and consecrated in manner hereinafter mentioned. Now I do hereby give devise and bequeath unto my Executrix and Executors and Trustees hereinafter named, their heirs, executors, administrators, representatives and assigns (according to the nature of the same respectively) all and singular my immoveable and moveable property whatsoever upon the trusts following (that is to say).

First.—Upon trust that the Trustees or Trustee for the time being of this my Will shall and do with all convenient speed after my decease absolutely sell and dispose of my said five Assam Tea Company's shares jewellery and shawls and also the landed properties fourthly, fifthly and sixthly hereinbefore mentioned or such or any or either of them in such manner as they he or she shall think fit and shall out of the proceeds thereof pay my funeral expenses and a sum of rupees four hundred for the expenses of my *Addo Shraad* and any mortgage and other debts which I may owe at the time of my death and my testamentary expenses and shall hold the balance if any of such proceeds of sale and all rents and profits which may be recovered in respect of the immoveable properties hereinbefore directed to be sold or any or either of them before the said last mentioned properties are sold which together with my other remaining property shall form my residuary estate.

[863] *Second.*—That the said Trustees or Trustee for the time being of this my Will shall divide the rents, income and profits of my said residuary estate which shall remain (after defraying thereout all collection and other charges) into four equal parts and shall pay two out of such four parts or shares to my wife during her life for the maintenance, education, support and advancement of the son who is to be adopted to me as hereinbefore mentioned and shall after my wife's death pay the two last mentioned equal fourth parts or shares to the guardian of such son for the like purposes

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and that my said executors shall pay the third of such four equal parts or shares of the said income to my said wife during her natural life for her own maintenance and for the performance of pious acts and for defraying the expenses of the daily and periodical worship of the said idol whether established in my lifetime or by my wife and shall pay the remaining fourth equal share of the said income of my residuary estate to my said wife during her life time for the maintenance, education, support and advancement of my said three grandsons.

Third.—I hereby direct that my wife during her life shall reside in my family dwelling-house in Amherst Street rent-free and my son to be adopted and my grandsons shall live in that house with her.

Fourth.—I hereby direct that in case any of my grandsons shall happen to die in the life of my wife and before attaining the age of twenty years without leaving any male issue, his share in the rents and profits of my residuary estate shall be equally divided amongst his surviving brothers until the time of distribution hereinafter mentioned when his share in the corpus shall be divided amongst such of my grandsons as shall be then living or have died leaving male issue, who may be then living such issue taking per stirpes and not per *capita*.

Fifth.—That after the death of my wife and on my said adopted son and grandsons respectively attaining the age of twenty years my Trustee or Trustees for the time being shall divide my residuary estate into four equal parts or shares and shall transfer two of such parts or shares to my said adopted son for his own absolute use and benefit and one of such parts or shares to the said adopted son in trust for the said idol so as to enable him to defray the expenses of the daily and periodical worship of the said idol out of the income of the said one-fourth part or share, which expenses I hereby declare shall be a charge on such one-fourth share of my residuary estate and the remaining one of such parts or shares shall be transferred to my said three grandsons equally for their own use and benefit in case they shall be living or if they or any or either of them shall be dead then to such of them as may then be alive and to the male issue of such of them as may be dead leaving such issue to take equally per stirpes and not per *capita* the shares to which their deceased father would have been entitled.

Sixth.—I hereby authorize and direct my wife at the expiration of one year from my decease to adopt a son, who shall be entitled to receive in manner aforesaid the moiety or half part of share of my residuary estate and that in the event of my son so adopted by my wife dying in her life time under the age of twenty years without leaving male issue him surviving, my said wife shall adopt another son to me in the place of him so dying and every son so subsequently adopted shall succeed to the share and interest of my said adopted son in my said estate in the manner herein mentioned.

[864] *Seventh.*—I hereby direct and authorize my said wife to establish a Salgram Thakoor a family idol immediately after my decease and I declare that the costs of establishing and consecrating such idol shall be borne by and paid out of the corpus or income of my said estate at the discretion of the Trustees for the time being of this my Will and I declare it to be my wish that the superintendence of the worship of such idol together with the custody of the said idol and the ornaments, utensils and articles appertaining thereto shall be taken by my wife and that upon her decease my adopted son and his male descendants shall superintend and conduct the performance of the worship of the said idol.

Lastly.—I nominate, constitute and appoint my said wife Sreemutty Mutty Dassee and Mr Henry Hamilton Remfry solicitor and Babus Toolseedoss Seal of Colootolah and Bholanath Chunder of Aheretolla to be the Executors or Trustees of this my Will and I direct that on my adopted son attaining his age of eighteen years he shall be joined as an Executor or Trustee of this my Will and it is my Will that in case any Trustees or Trustee of this my Will hereby appointed or hereafter to be appointed shall die or be absent from Calcutta for twelve Calendar months or be desirous to be discharged of or from or become incapable to act in the trusts referred then and in every such case it shall be lawful for my wife and after her death for the surviving or continuing Trustees or Trustee or the executors or administrators of the last surviving or continuing Trustee by any deed or deeds to appoint any other person or persons to be a Trustee or Trustees in the place or stead of the Trustee or Trustees so dying or being absent or desiring to be discharged or refusing, declining or becoming incapable to act as aforesaid and the trust premises or such of them as shall then be subject to the trusts aforesaid shall be so assigned and transferred as to become vested in such new Trustee or Trustees jointly with the surviving or continuing Trustee or Trustees and every such new

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Trustee shall as well before as after the premises shall have been so vested in him have all the powers and authorities of the Trustee, in whose room he shall be substituted and I do hereby declare that my executors and trustees and the survivor of them shall and may at all times out of the first monies that may come to their or either of their hands re-imburse and indemnify themselves and himself respectively all such costs charges and expenses as they or any or either of them may be put unto or sustain in or about the execution of the trusts of this my Will and that neither of them shall be answerable for any loss which, may happen to the said trust premises the same shall happen by or through her his or their wilful neglect or default nor for any loss which may happen from depositing any of the trust monies or securities in the hands of any Banker nor the one for the other of them neither shall either of them be answerable for more monies than shall actually come into her or his hands by virtue of this my Will and hereby revoking and making void all former or other Wills by me at any time heretofore made I do declare this to be my last Will and Testament. In witness whereof I have hereunto set my hand this Eighth day of June one thousand eight hundred and seventy.

Babu *Ram Charan Mitra*, Babu *Golap Chandar Sarkar*, (Dr. *Rashbehary Ghose* and Babu *Charu Chundra Ghose* with them) [865] for the appellant. The intention of the testator was to perpetuate his line by adoption, to consecrate a deity and provide for its worship and to make provision for his daughter's sons. From the will it appears that it was the intention of the testator that the estate should remain in his widow till her death ; the executors were directed to make over the entire income to the widow for certain purposes, and the adopted son was to have the estate, if he should survive the widow and attain the age of twenty—this is provided in paragraph 5 of the will which contains the only clause devising the estate to the adopted son. By giving the estate to the adopted son after the death of the widow, a life estate is given to the widow by implication: Bigelow on Wills, p. 307 ; Hawkins on the Construction of Wills, p. 178. So that by making the second adoption, the widow was only divesting her own estate. The bequest to the first adopted son, being a bequest on his attaining the age of twenty, was a contingent bequest and as he died within the lifetime of the widow and before attaining the age of twenty, he could not transmit any estate to his heir. If any absolute estate vested in the first adopted son it became divested on his dying without male issue as the will provides that in that event the second adopted son is to take the estate taken by the first adopted son. *Bhoobun Mohini Debia* v. *Hurrish Chunder Chowdhry* (1) ; *Soorjeemoney Dossee* v. *Denobundoo Mullick* (2). This will was executed four years after the decision in *Bhoobunmoyee's* case (3) and the testator made appropriate provisions so that the second or third adoption might validly take place. The only impediment to the second adoption arises from the decisions which hold that if the adoptive father's property is vested in somebody other than the adopting widow, the power to adopt could not be exercised, the power to adopt being looked upon as a power of appointment over the property. In this case at the time of the second adoption the estate was vested in the adopting widow.

Moreover the plaintiff's adoption having been recognized by the other side in a certain suit—he having been made a party [866] defendant to that suit and he could only be made a party as adopted son,-the validity of the adoption cannot be questioned now more than six years after the adoption.

(1) (1878) I. L. R. 4 Cal. 23 ; L. R. 5 I. A. 138.

(2) (1862) 9 M. I. A. 123.

(3) (1865) 10 M. I. A. 279 ; 3 W. R (P.C.) 15.

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Babu *Samatul Chunder Dutt* (Babu *Atul Chunder Dutt* with him) for the respondents. By the will one half of the property was not given to anybody until adoption; in respect of it there was an intestacy in the meanwhile and it was taken by the heir at law—so that it vested at first in the widow and then on the first adoption, in the first adopted son. The contention that it was divested on the first adopted son dying without male issue and went over to the second adopted son is unsound as it amounts to directing that the estate of the first adopted son was to go not to his heirs at law, but to his brother by adoption—that is in a line of succession not permitted by Hindu Law. *Bhoobun Moyee Debia* v. *Ramkishore Acharj Chowdhry* (1) supports my contention.

Babu *Golap Chunder Sarkar* in reply.

Cur. adv. vult.

PRATT AND MITRA, JJ. The question involved in this case relates to the validity of the adoption of the plaintiff appellant before us. The lower Court has held that the adoption is not valid according to Hindu law.

The main question argued before us is whether, having regard to the terms of the will of Raj Bullav Seal dated the 8th June 1870, the plaintiff can claim to be his validly adopted son.

Raj Bullav Seal was a Hindu inhabitant of Calcutta, and has will is in the English language and was prepared by an English solicitor. He died on the 10th June 1870, leaving a widow Mati Dasi, a daughter Luckohira who was born of a deceased wife Chandra Moni Dasi, and three grandsons Kalidas Sen, Bholanath Sen and Sarthak Chandra Sen.

The scheme of his will may be stated in a few words:—He directed that his widow Mati Dasi, his solicitor Mr. Remfry and Babus Tulsi Das Seal and Bholanath Chandra should be the executors and trustees, and that they should be in possession of his estate until certain events as directed in other parts of his will should happen. The trustees and executors were to make over the [867] income of his estate to his widow Mati Dasi, and she was to appropriate a half share of such income for her own maintenance, and the maintenance of a son, who was to be adopted by her. One fourth of the income was to be appropriated to religious purposes, and the remaining one-fourth to be appropriated to the maintenance, education, and support of his three grandsons. The widow was to continue to receive the profits and appropriate them in the way indicated above until her death. The three grandsons and the adopted son were to have possession of the property absolutely in shares of one-fourth and one-half respectively after the death of the widow, provided they attainted the age of twenty years before that event. The remaining one-fourth share of the property was to be held by the adopted son for religious purposes. The widow was directed to adopt a son after the expiration of one year from the testator's death, but if such adopted son died before attaining the age of twenty years without leaving any male issue, she could adopt another son to take the place of the deceased adopted son.

The testator obviously intended that there should be no distribution of the corpus until the events specified in the will took place; and the widow was to receive the profits for the benefit of herself and her adopted son and the grandsons. The distribution of the corpus only was to remain in abeyance.

By virtue of the authority vested in her, Mati Dasi adopted one Jogendra Nath Seal in March 1873. He was married to Katyani Dassi, who is

(1) (1865) 10 M. I. A. 279; 3 W. R. (P. C.) 15.

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defendant No. 3 in this case. He died in December 1885, leaving a daughter Rajlakshmi Dasi, who has not been made a party to this suit. At the time of Jogendra Nath's death he was of the age of 17 years. In April 1888, it is alleged the present plaintiff was adopted by Mati Dasi. In the meantime Sarthak Charan, one of the grandsons of the testator died. Mati Dasi herself died in September 1899, and the defendants took possession of the estate left by the testator to the exclusion of the plaintiff. The present suit was commenced on the 9th October 1901 for the construction of the will of Raj Bullav Seal, for a declaration that the plaintiff was his duly adopted son, and was entitled to have possession of three-fourths share of the estate left by him, for the performance of the religious trusts mentioned in the will and for his own personal use and for other reliefs.

[868] The main defence of the defendants was that Jogendra Nath having died leaving a widow and a daughter, the power of Mati Dasi to adopt a second son was extinguished.

The Subordinate Judge in the lower Court gave effect to this contention without going into any evidence as regards the other issues raised in the case.

The main question argued before us is, as we have indicated above, the question of the validity of the adoption. We may note, however, that the defendants did not admit the factum of adoption.

The question seems to us to be concluded by authority. In *Bhoobunmoyee Debia* v. *Ram Kishore Acharj Chowdhry*, (1) the Judicial Committee in a case very much similar to the present held.—"That on the death of a son leaving a widow, the power given by the original owner to his own widow to adopt, could not be exercised." In that case, Gour Kishore Acharj Chowdhry had died leaving a widow Chundrabullee Debya and a son Bhowanee Kishore. Bhowanee Kishore was afterwards married and left a widow Bhoobunmayee. After Bhowanee's death Chundrabulle adopted Ram Kishore, and it was contended upon such adoption that Ram Kishore became entitled to the property left by Gour Kishore to the exclusion of Bhoobunmoyee. Ram Kishore was unsuccesful in the litigation.

In *Padma Kumari Debi Chowdhrani* v. *Court of Wards*, (2) which arose out of the facts connected with the case of Mussamat *Bhoobunmayee Debia* v. *Ram Kishore Acharj Chowdhry* (1), the Judicial Committee observed "Upon the vesting of the estate in the widow of Bhowanee the power of adoption was at an end and incapable of execution."

In *Keshav Ram Krishna* v. *Govind Ganesh* (3) Justice West took the same view and held "that no adoption could take place during the lifetime of the widow of a deceased son.

In *Thayammal* v. *Venkatarama* (4) the Judicial Committee again adopted the same view and held—"that the survival of a son's widow and the vesting of the estate in her put an end to the right of the widow of the original owner to adopt a son. And **[869]** in *Tara Churan Chatterji* v. *Suresh Chunder Mukerji* (5) the same conclusion was arrived at.

We cannot, therefore, come to any other conclusion except that arrived at by the Subordinate Judge, *i.e.*, that the adoption of the plaintiff is not valid, the power of Mati Dasi to adopt a second son having terminated on the first adopted son dying, leaving a widow and a daughter.

(1) (1865) 10 M. I. A. 279; 3 W. R. (P. C.) 15.
(2) (1881) I. L. R. 8 Cal. 302.
(3) (1884) I. L. R. 9 Bom. 94.
(4) (1887) I. L. R. 10 Mad. 205; L. R. 14 I. A. 67.
(5) (1889) I. L. R. 17 Cal. 122.

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It has been contended, however, that upon a true construction of the will of Raj Ballav Seal, his estate did not vest in Jogendra Nath before his death, and that as regards the half share of the property which was to go to Raj Bullav's adopted son, Jogendra Nath's widow Katyani did not inherit any property from her husband, but that such share of the property remained in Mati Dasi, and that therefore, Mati Dasi could exercise the power vested in her as regards adopting a second son on the death of the first adopted son before his attaining the age of twenty years.

As we have seen, the scheme of the will is that the estate should not vest in any person until the death of Mati Dasi ; and that being so, the estate vested, by law, in the legal heir, as there was an intestacy as regards the corpus ; and as soon as Jogendra Nath was adopted the corpus became vested in him, though he was not entitled to possession until the death of the widow or until he arrived at the age of twenty years. The corpus of the estate having thus vested in him, his widow became entitled to it on his death. The argument submitted to us is, therefore, not of much force.

It has also been contended that Jogendra Nath having died before attaining the age of twenty years, the gift over under the sixth clause of the will had operation in depriving his widow of the inheritance and that the corpus vested in Mati Dasi herself, who could by adoption deprive herself. But there is an absence in the clause of any expression indicating that there was a gift over to Mati Dasi. A clause of defeasance in order to be operative must contain express words or words of necessary implication of a gift over to a definite person or persons. The implication of a gift over to a second adopted son, who might never have been adopted would not be sufficient to prevent the widow of Jogendra Nath from inheriting her deceased husband's share.

[870] We are, therefore, of opinion that these contentions are not sound. We need hardly state that the settled rule of law hear is that, as regards wills executed before the Hindu Wills Act came into operation, namely, the 1st September 1870, the property of a Hindu did not vest in trustees who were considered to be merely managers. This was definitely held in *Sarat Chandra Banerjee* v. *Bhupendra Nath Basu* (1) The executors and trustees under Raj Bullav's will had, therefore, no estate under the will of Raj Bullav, and there was thus an intestacy as regards the corpus.

Two other questions have been raised on behalf of the appellant, viz., limitation and estoppel. We do not see how these questions can arise in the view which the lower Court took and which we have taken, as regards the *status* of the plaintiff with reference to the estate of Raj Bullav. If he is not in the position of a son of Raj Bullav and is a stranger, we do not see how he can ask for a construction of the will. No question of limitation or estoppel arises. Materials for enabling us to decide these questions are also wanting.

The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

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(1) (1897) I. L. R. 25 Cal. 108.