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The suit was not maintainable by the step son, as he was no heir of the appellant.

Mr. *Twidale*, for the respondent, contended that the intention of the donor to create a life-interest only was apparent, as the gift was clogged with conditions. Hindus were always unwilling to vest property absolutely in females. A reference to their habits and customs would strengthen such inference. If the deed was absolute the appellant could alienate the property during the life-time of children. But she could not do so under the deed. The gift is fettered with a condition. The gift was for particular purposes—*Syad Mahomed Shumsul Hoda* v. *Shewakram* (1).

(1) *Before Sir Richard Couch, Kt., Chief Justice, Mr. Justice Bayley, and Mr. Justice Mitter.*

The 13*th September* 1870.

SYAD MAHOMED SHUMSUL HODA (ONE OF THE DEFENDANTS) *v.* SHEWAKRAM (PLAINTIFF).*

See also 14 B.L.R. 229.

Baboos *Anukul Chandra Mookerjee* and *Ramee Chandra Mitter*, Mr. *R. E. Twidale*, and Munshi *Mahomed Yusaff* for the appellant.

Mr. *Paul* (with him Mr. *M. M. Datta*, Mr. *C. Gregory* and Baboo *Amernath Bose*) for the respondent.

THE facts of the case are sufficiently stated in the judgment of the Court, which was delivered by

COUCH, C.J. (MITTER, J., concurring) —On the 16th of August 1830, Roy Harnarayan, the great-grandfather of the plaintiff, presented a petition to the Collector, the translation of which is as follows:—"The entire rent-free and rent-paying estates and gardens appertaining to the zillas of the Behar province, and buildings and ghat tungi, ryotkhanas, and household furniture, and other real and personal property which descended to my ancestors, one after the other, and at last to me, from Rani Mima Bibi, wife of my late brother Raja Bassantram, who, the said brother, was son-in-law of Maharaja Ram Narayan, according the vyavashta of the Pundits and decision of the Sudder Court, are now in my possession. But as in 1229, my son Kalika Prasad died, and in 1237 my younger brother Rae Ganga Prashad and his wife died, leaving no issue, and as my wife predeceased them, and only Rani Dhan Koer, the widow of my late som Kalika Prasad, is at present living, who has only two daughters, Mussamats Bibi Shitabo and Bibi Dulari, and no other children or heir, I decare her (Rani Dhan Koer) my heir, and as with the exception of the said Rani Dhan Koer, I have no other heir or malik nor can there be any, of which circumstances I have already preferred information in my petition of 16th April 1830; and life is uncertain, I consequently request that the name of Rani Dhan Koer, the widow of my late son, be registered in the Collectory mutation book as proprietor and malguzar in the place of

* Regular Appeal No, 53 of 1870, from a decree of the Judge of Patna, dated the 31st December 1869.

Baboo *Annada Prasad Banerjee* in reply.

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KEMP, J. (After stating the facts).—The pleader for the appellants, Baboo Annada Prasad Banerjee, wished to raise an

"my name with regard to the property, "both khiraji and lakheraji, noted at "the foot of this petition, situate in "Zilla Patna. Further, as of Rani Dhan "Koer, there are two daughters, who, "after marriage by the blessings of Pro- "vidence, may be blessed with children "they and their children, therefore, are "and will be (the)heirs and maliks.[But] "as long as I live, I shall keep the man- "agement of my household affairs in my "own hands, and look after all the transac- "tions of dihat, &c., myself as heretofore." Roy Harnarayan died on the 1st of March 1838. He had an only son Kalika Prasad, who had died, leaving a widow, Rani Dhan Koer, and two daughters, who survived Roy Harnarayan. One of the daughters married Amanat Roy, and died childless. The other married Roy Lachman Prasad, and died on the 27th Kartik 1255 (1847), leaving an only son, the plaintiff in this suit, then an infant. On the 13th of November 1854, Rani Dhan Koer sold to the defendant Shumsul Hoda a portion of the property which belonged to Roy Harnarayan, and this suit was brought to obtain a declaration that the sale was not binding on the plaintiff and that he was entitled to the estate of Roy Harnarayan on the death of Rani Dhan Koer.

The lower Court held that the plaintiff was entitled to a decree for setting aside the sale conditional on the repayment of the purchase-money by the plaintiff, and the defendant appealed from this decision.

On the argument of the appeal, the defendant's counsel rested his case upon the construction of the petition, and did not rely upon the case which the defendant had set up in the lower Court that the sale was made to meet urgent necessities and upon which the lower Court had come to a finding against him. The plaintiff objected to the condition for repayment of the purchase-money. Both parties treated the petition as a testamentary instrument, as it was their interest to do; for otherwise neither could have any title against the heir of Roy Harnarayan if there was one. Notwithstanding this consent, it is necessary for us to decide whether it is a testamentary instrument or not. In my opinion it must be considered to be a testamentary instrument although it sought to have the name of Rani Dhan Koer registered immediately. The words "I declare her" (Rani Dhan Koer) "my heir" and "they and their children are and will be the heirs and maliks," as well as the provision that as long as he lived he should keep the management in his own hands, I think, show that it was Roy Harnarayan's intention that it should be a testamentary disposition of the property, and I believe that this mode of making one is not uncommon. If it is considered as a gift, the same rules of construction would apply to it. In construing it, we are entitled to look at the state of the testator's family, and, I think, also at the fact that he was a Hindu; and if either of his grand-daughters had a son, that son would be entitled to offer funeral oblations to him. This mode of construction is fully confirmed by the following passage in the judgment of the Privy Council, in the case of *Sreemutty Soorjeemoney Dassee* v. *Denobundoo Mullick* (1)

"In determining that construction what "we must look to, is the intention of "the testator. The Hindu law, no "less than the English law points to "the intention as the element by which "we are to be guided in determining "the effect of a testamentary disposi-

(1) 6 Moore's I. A., 526. See 550.

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argument that, inasmuch as the property in dispute was the stridhan of the appellant Pabitra Dasi, although she could not

"tion; nor, so far as we are aware, "is there any difference between the "one law and the other as to the mate- "rials from which the intention is to "be collected. Primarily, the words of "the will are to be considered. They "convey the expression of the testator's "wisnes; but the meaning to be attach- "ed to them may be affected by sur- "rounding circumstances; and where this "is the case, those circumstances no "doubt must be regarded. Amongst the "circumstances thus to be regarded, is "the law of the country under which the "will is made, and its dispositions are "to be carried out."

Considering then the state of his family and that he was a Hindu, and taking the entire instrument, and construing its parts with reference to each other, I think it was the intention of Roy Harnarayan that the estate should be kept in his own family, and that the daughters and their children, as well as Rani Dhan Koer, should succeed to his property, and this may be effectuated by allowing them to take after Rani Dhan Koer. That is a more natural disposition than their taking jointly with her. I think the words "I have no other heir or malik, nor can there be any," may be read as meaning immediate heir, and as showing an intention that Rani Dhan Koer was to be the first to succeed.

According the decision in *Tagore* v. *Tagore* (1), the daughter's children, not being in existence at the death of Roy Harnarayan, could not take any interest under the will; but effect will be given to the intention consistently with this decision by holding that Rani Dhan Koer took the property for her life, and that, subject to that estate, the daughters took it absolutely as joint owners. This also provides for the contingency of Rani Dhan Koer dying before Harnarayan, as the gift to the daughters would then take effect at his death, and the interest of the daughters being vested, on the death of one of them without children, her share passed to the survivor, the plaintiff's mother; and on her death, the plaintiff became entitled to the whole as her heir.

It may be objected that, if the daughters take jointly, and both have children, the children of the one who dies first will be excluded, unless there is a partition in her life-time; but it is only by this construction that the estate can be kept in the testator's family, and the husband of a childless daughter be prevented from succeeding to her share. The construction which I put upon this instrument is different from what was put upon it in the suit in which Charter Lal Sing and others were defendants in the case of *Chattar Lal* v. *Shewukram* (2). I have carefully considered that judgment and have found myself unable to concur in it. I am therefore of opinion that the plaintiff is entitled to the property on the death of Rani Dhan Koer,

The condition that the sale is to be set aside only on the re-payment by the plaintiff of the whole of the purchase-money, cannot be supported. The Judge's reason for it is quite insufficient; but it appears that there was a mortgage upon the property for Rs. 14,000, which was made in order to discharge encumbrances created by Roy Harnarayan and some bonds, and that this mortgage was redeemed by money paid into Court by the defendant. This sum of Rs. 14,000 ought to be allowed to him, and the decrees must be modified by substituting it for the purchase-money which the decree requires to be paid as the condition upon which the sale is to be set aside. The costs of this appeal to be paid by the defendant.

(1) 4 B. L. R., 103

(2) 5 B. L. R., 123.

alienate such property, the plaintiff would not be her heir but her daughter, and failing her, her daughter's son, but the Court refused to hear the pleader on this point, as the plea was most expressly abandoned in the Court below, and was not raised in the grounds of appeal. The determination of this case depends wholly upon the construction to be put upon the deed dated the 22nd Magh 1250 (3rd February 1843). This deed, which is not disputed, was executed by Guruprasad Jana; he had two wives; by the first wife he had a son the plaintiff: by the younger wife he had two sons and two daughters; one of the daughters predeceased her father. The deed, after reciting that the donor Guruprasad Jana was the malik of the disputed talook and his name was registered as such in the Collector's rent-roll, and that the gift was a "*pritidan*," or gift from motives of affection, proceeds thus (a literal translation) :—

"You,—*i. e.*, the donee Pabitra Dasi,—are my youngest wife, "and you have two minor sons, therefore, for your charitable "purposes, and to enable you to support your infant sons, I "have given you the aforesaid talook, you from this date "having become possessor of the aforesaid talook, after pay- "ing the Government revenue, from the remaining profits, will "perform acts of charity, and will support and maintain your "sons. For these purposes I have executed this deed of gift."

The donor had two wives; the gift to the youngest, and probably the favourite wife, was a gift the consideration of which was the donor's affection for her. The main object was no

BAYLEY, J.—I much regret to have to differ from the Chief Justice and Mr. Justice Mitter in this case.

In the case of *Chattar Lal Singh* v. *Shewukram* (1), a decision was come to upon the very same deed by Mr. Justice Hobhouse and myself. The translation there adopted was one agreed upon by both parties,

After most fully considering the further arguments and the judgment of the Chief Justice and of Mr. Justice Mitter, I cannot say I am prepared to alter the opinion recorded by Mr. Justice Hobhouse and myself.

It is at the same time needless to repeat at length the reasons there recorded as the same reasons prevail with me now. I still think that, if Harnarayan intended to preserve the inheritance to his granddaughters and their children, he would have said so in the above deed, and the greater the necessity, according to Hindu feeling as to providing for funeral oblation (a feeling apparently relied on by the Chief Justice and Mr. Justice Mitter), the greater the reason for Harnarayan to have been explict in the terms he used.

(1) 5 B. L. R., 125.

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doubt to provide for her and not to leave her and her minor sons dependant upon a co-wife and step-mother. It may be said that as the two sons died minors, that one of the objects for which the gift was made no longer exists, but for all this the deed appears to us to contain nothing which in any way restricts the donee's title. It appears to us to give the property absolutely to the donee.

If the terms had been ambiguous, we might no doubt have to look behind it and consider the motives of the donor, but as there is no such ambiguity we are bound to give effect to the deed.

We reverse the decision of the Subordinate Judge and decree this appeal with costs and interest thereon payable by the respondent.

Appeal allowed.

[FULL BENCH.]

Before Mr. Justice Norman, Offg. Chief Justice, Mr. Justice Loch, Mr. Justice Bayley, Mr. Justice Macpherson, and Mr. Justice Mitter.

1871 June 12.

RAM CHARAN BYSAK AND ANOTHER (DECREE-HOLDERS) *v.* LAKHI KANT BANNIK AND OTHERS (JUDGMENT-DEBTORS).*

10 BLR 108

Limitation—Act XIV of 1859, ss. 19 & 20—Execution of Decree.

A decree of the High Court on appeal from the Mofussil, must be executed within three years, under section 20 of Act XIV 1859. Such decree is not a decree of a Court estsblished by Royal Charter within the meaning of section 19.

THE appellants in this case held a decree against the respondents, dated the 30th December 1863, for a certain sum of money, being the amount of six hundis. The decree was passed by the Subordinate Judge of Dacca. On appeal, the High Court, on the 18th February 1865, by its decree simply dismissed the appeal with costs, without affirming the decree of the Court below. After several attempts to execute the decree, the appellants again applied for execution on 16th December 1869, when the judgment-debtor contended that the decree was

* Miscellaneous Regular Appeal, No. 299 of 1870, from an order passed by the Subordinate Judge of Dacca, dated the 31st May 1870.