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IN THE MATTER OF THE PETITION OF MUSSAMAT PHULJHARI KOER.

keeping with their petition of 1841. The evidence does not raise the slightest doubt in my mind as to the absence of any separation, and it was for the party pleading separation to prove it. I would dismiss the appeals with costs.

Appeals dismissed.

Before Mr. Justice Norman, Offg. Chief Justice, and Mr. Justice Ainslie.

SRIMATI BRAMAMAYI DASI, REPRESENTATIVE OF THE LATE KRISHNA KISHOR GHOSE (PLAINTIFF) *v.* JAGES CHANDRA DUTT AND OTHERS (DEFENDANTS.)*

1871 *Sept 5.*

Hindu Will—Construction of Hindu Will—Issue—Act XXI of 1870—*Succession Act* (X *of* 1865), *s.* 102.

Where a testator directed in his will that (1st) " on the death of either of my four sons leaving lawful male issue, such issue shall succeed to the capital of principal of the respective shares of his or their deceased father or fathers, to be paid or transferred to them respectively on attaining the full age of twenty-one, years ;" (2nd), "if either of my four sons shall die leaving male issue, and the whole of such issue shall afterwards die under the age of twenty-one years and without male issue, the share or shares of the sons so dying shall go and belong to the survivors of my said sons and to my two grandsons (named in the will) for life and their respective male issue, absolutely after their death ; and (3rd), " on the death of either of my sons without leaving any " male issue," his share is to go and belong to the survivors of my said sons and my two grandsons (named in the will) for life, and their respective male issue absolutely after their death in the same manner and proportions as hereinbefore described respecting their original shares ." It was *held*

1st—That a vested interest was conferred upon the issue immediately upon the death of the father. The expresssion "to be paid or transferred to them respectively on attaining the age of twenty-one years" was a mere attempt to defer the period of payment to or enjoyment by such issue.

2nd—That the gift over was void, because the event on which it was to take effect might be indefinitely remote, even if the words "male issue" be construed as meaning sons. The meaning of "male issue" is not confined to sons alone.

3rd—That, in accordance with the ruling in *Ganendra Mohan Tagore* v. *Upendra Mohan Tagore* (1), a gift by a Hindu to a person not ascertained or capable of being ascertained at the time of the death of the testator cannot

*Regular Appeal, No. 235 of 1870, from a decree of the Judge of 24-Pergunnahs, dated the 25th August 1870.

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

take effect: therefore the gift to the unborn male issue of the sons and grandsons of the testator must fail. Where there is a gift to a class, and some persons constituting such class cannot take in consequence of the remoteness of the gift or otherwise, the whole bequest must fail.

Held also, in accordance with *Ganendra Mohan Tagore* v. *Upendra Mōhan Tagore* (1) that a Hindu cannot under any circumstances make a gift by will to an unborn person or persons.

On the 9th September 1866, Cali Das Dutt, a member of a joint Hindu family, borrowed Rs. 15,500 from Krishna Kishor ghose and gave him a mortgage of his share of certain porcerties belonging to tho Dutt family, *viz.*, Lot Poroi, talook No. 351, a putni tenure called Dihi Nouggi, &c. and certain permanent ticca tenures within the putni. In the same month Kali Das Dutt became an insolvent. On the 8th April 1868, the Official Assignee put up for sale the rights and interest of Kali Das Dutt in the mortgaged properties, and Krishna Kishor purchased them. He brought this suit to obtain possession of 5 annas and 17½ gandas, as the share of Kali Das with mesne profits.

The defendants admitted that the plaintiff was entitled to the share of Kali Das but they said that they were unable to ascertain the extent of his share; they denied that they were even asked to give possession of his share. They produced the wills made by the common ancestor Ukur Dutt, and by Ramnarayan and Ram Mohan Dutt, and said that the provisions of these wills had complicated the apportionment of the family inheritance.

Kali Das did not file a written statement, but appeared and made an oral statement in which he admitted the plaintiff's claim, and he calculated his own share of the property to be 5 annas 12 gandas 2 cowries and 2 krants.

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

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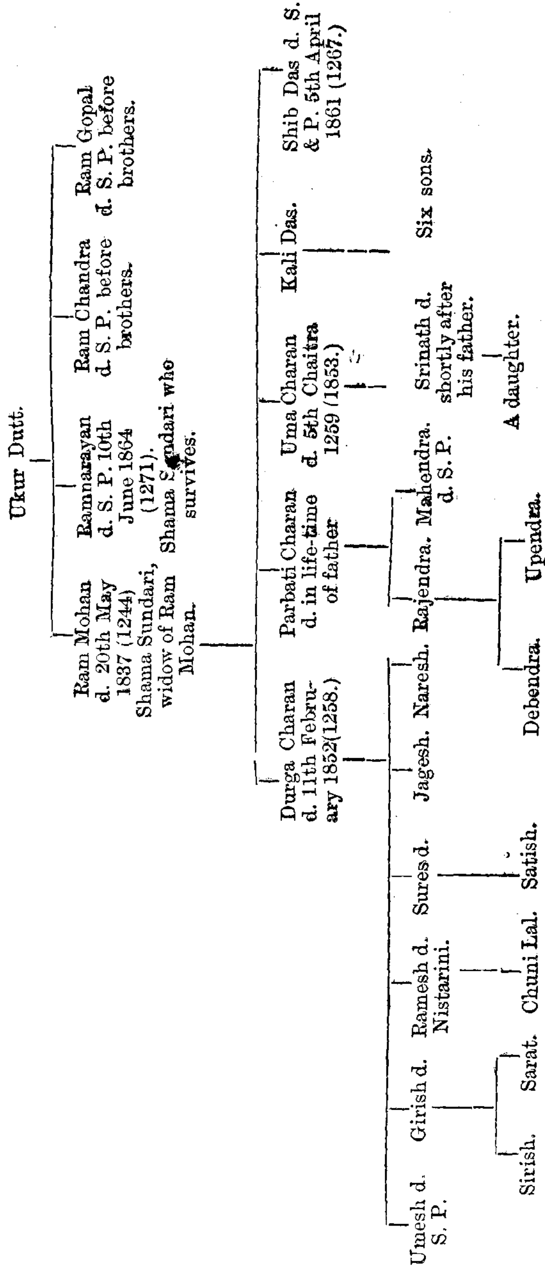
The following pedigree shows the state of the family :—



The property claimed consisted of *first*, shares in the zemindari Lot Poroi; Lot Poroi had been purchased on the 2nd of April 1863: *secondly*, simillar shares in the putni talook of the zemindari Dihi Nouggi; the putni, of Lot Nouggi had been acquired on the 11th of August 1864: *thirdly*, similar shares in 2,000 bigas of maurasi ticca jumma in the putni talook of Dihi Nouggi, registered by the Collector on the 10th August 1861 under Act XI of 1859. It appeared to be admitted that, under the will of Ukur Dutt, Ram Mohan, his eldest son, took 4 annas and 7½ gandas; and each of the remaining sons, 3 annas and 17½ gandas; and that after the death of Ram Chandra and Ramgopal, Ram Mohan's share was 8 annas and 5 gandas, and Ramnarayan's 7 annas and 15 gandas. By the will of Ram Mohan Dutt, it was declared that his eldest son Durga Charan Dutt for his life, and his male issue after his death, should have a share larger by two-and-a-half pice, or five-eighths of one-sixteenth than his other sons or two grandsons. Durga Charan therefore received 1 anna 10 gandas and 2 cowries *plus* 12 gandas and 2 cowries, equal to 2 annas and 3 gandas, making each of the other shares, that is to say, that of Kali Das 1 anna 10 gandas and 2 cowries.

Ramnarayan died in 1864, and by his will he left one-third of his property to Kali Das. Ramnarayan's share was, as stated above, 7 annas and 15 gandas, one-third of which is 2 annas 11 gandas 2 cowries and 2 krants. The plaintiff also claimed that Kali Das became entitled to 10 gandas and 2 krants, or one-third of the share of Uma Charan on the death of his son Sri Nath without male issue. The other two-thirds of Uma Charan's share, she said, went to Shib Das the son, and Rajendra the grandson, of Ram Mohan.

The question as to the plaintiff's title to one-third of the share of Uma Charan turned upon the construction of the will of Ram Mohan, which was as follows :—

"This is the last will of me, Ram Mohan Dutt of Mollunga, in the "town of Calcutta, banian. I direct that my talooks, zemindaries, &c., "subject to the preference hereinafter given to my eldest son Durga "Charan Dutt and his male issue, shall be divided into five equal parts "and shares, and I further direct that each of my four sons—Durga "Charan Dutt, Uma Charan Dutt kali, Das Dutt, and Shib Dass Dutt

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"shall and be and possessed of one of such shares, and shall receive the "interests and dividends thereof for his own use and benefit during his "life, and that my two grandsons Rajendra Dutt and Mahendra Nath "Dutt, sons of my deceased son Parbatti Charan Dutt shall hold and be "possessed of the other of the said five shares during their respective "lives, and shall in like manner receive the interest and dividends thereof "in equal shares for their own use and benefit; and I further direct "that, on the death of any or either of my said four sons or of the said "Rajendra Dutt and Mahendra Nath Dutt leaving lawful male issue, "such male issue shall succeed to the capital or principal of the share "or respective shares of his or their deceased father or fathers to be "paid or transferred to them respectively on attaining the full age of "twenty-one years.

"But my will is and I declare that in such division my eldest son "Durga Charan Dutt for life, and his male issue after his death, shall have "a larger share by two and a half pice (or five-eighths of a sixteenth), "more than any other sons and than my said two grandsons Rajendra "Dutt and Mahendra Nath Dutt anything hereinbefore mentioned to "the contrary notwithstanding.

"But if any or either of my siad four sons shall die without leav- "ing any male issue, or, if he or they shall die leaving such male issue, "and the whole of such issue shall afterwards die under the age of "twenty-one years and without male issue, in such casethe share or shares "of my said sons so dying shall " after deducting therefrom the sums of "Co.' Rs. 2,000 to be paid to each of the widow or widows, if any, and "the sum of Co.'s Rs. 1,000 for the marriage of each of the daughter "or daughters, if. any, ofmy son or sons so dying) go to and belong "to the survivors of my said sons and my said two grandsons Rajendra "Dutt and Mahendra Nath Dutt for life and their respective male issue "absolutely after their deaths in the same manner and proportion as "is hereinbefore described respecting their original shares.

"I further direct that if. either of my said two grandsons Rajendra "Dutt and Mahendra Nath Dutt shall die without leaving lawful male "issue, or if the whole of such male issue shall afterwards' die under "the age of twenty-one years and without male issue, his half part of the "said one-fifth share of my estate shall (after making the same deductions "for the widows and daughters, if any, of such male issue as provided "above for the widows and daughters of my said sons) go and belong "to the other of my said two grandsons for life and his lawful male issue absolutely after his death, and if both of my said two grandsons

"Rajendra Dutt and Mahendra Nath Dutt shall die without leaving
"male issue, or if such male issue shall afterwards die under the age of
"twenty-one years and without male issue, then the one-fifth share intend-
"ed for the said Rajendra Dutt and Mahendra Nath Dutt and their male
"issue shall (after making the same deductions for their respective
"widows and daughters, if any, as above provided for the widows and
"daughters of my said sons) go to and belong to my said four sons and
"the survivors of them for life and their respective male issue absolute-
"ly after their death in the same manner and proportions as is above
"declared respecting their original shares."

Uma Charan died in 1853, leaving a son Srinath, who died shortly after his father under the age of twenty-one years, leaving as his heiress, according to Hindu law, a daughter who appeared to be now living, but who was not a party to this suit.

Shib Das died in April 1861. The question as to his share also depended on the construction to be put upon the following passage in the will :—" On the death of either of my sons, with-
" out leaving any male issue, his share is to go to and belong
" to the survivors of my said sons and my said two grandsons
" Rajendra Nath Dutt and Mahendra Nath Dutt for life and their
" respective male issue absolutely after the death in the same
" manner and proportions as hereinbefore described respecting
" their original shares."

The Subordinate Judge, in whose Court the suit was instituted, framed the following issues :—

First.—What is the extent of the share of Kali Das?

Secondly.—Who is liable for the mesne profits?

The question in the first issue was in fact to what share of the family estate had Kali Das succeeded by inheritance. The Judge of 24-Pergunnas, by whom the case was tried, gave the plaintiff a decree for 4 annas and $3\frac{35}{1536}$ gandas of the properties in question with mesne profits and costs.

The plaintiff appealed to the High Court.

Baboos *Kali Mohan Das* and *Srinath Das* for the appellant contended that on the death of Srinath, the son of Uma Charan, under twenty-one years of age, the share of Uma Charan, under the will of Ram Mohan, became divisible in equal third parts or

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shares amongst his two surviving brothers Kali Das and Shib Das and his nephew Rajendra. The words "male issue" must be construed from the context to mean sons. So, on the death of the sons, the surviving brothers took. As to the share of Shib Das, the testator merely gives the property to the surviving sons for their lives. Even if the gift be a gift to the surviving sons, and the living male issue for life, the latter portion of the gift, *viz.*, the gift to the living male issue may fail, and the gift to the surviving sons may stand, and so the gift may take effect.

Baboos *Rames Chandra Mitter, Taraknath Sen* and *Ashutosh Mookerjee* for the respondents contended that the words "male issue" in the will could not be construed as meaning sons, that, *first*, the gift over upon the whole of the male issue of either of the sons of Ram Mohan dying under the age of twenty-one years, without male issue, was too remote, and therefore not valid under any law—*Bhoobun Moyee Debea* v. *Ramkishore Acharj* (1); and, *secondly*, that Srinath, on the death of his father Uma Charan, took an absolute interest in the share devised to the issue of Uma Charan. A Hindu can under no circumstances make a valid gift by will to an unborn person or persons—*Ganendra Mohan Tagore* v. *Upendra Mohan Tagore* (2). The gift in the case of Shib Das' share fails equally for remoteness. It is a gift to a class; and if any persons of that class cannot take, the gift is invalid, and fails altogether.

NORMAN, J. (after stating the facts).—The first question we have to decide seems to be concluded by the decision of this Court in the case of *Ganendra Mohan Tagore* v. *Upendra Mohan Tagore* (2). Sir Barnes Peacock was of opinion that a Hindu could not under any circumstances make a gift by will to an unborn person or persons. Even if under the Hindu law, there could be a gift to any unborn person, there can, I think, be no doubt that, as the law stood, prior to the passing of Act XXI of 1870, the unborn son must have taken immediately at the expiration of the life-interest of the prior taker. The direction in the

(1) 10 Moore's I.A., 279; see 308. (2) 4 B. L. R., O. C., 103.

will of Ram Mohan that, "on the death of either of my four "sons leaving lawful male issue, such issue shall succeed to the "capital or principal of the respective shares of his or their de-"ceased father or fathers," in my opinion conferred an interest which vested in the issue immediately on the decease of the father. The expression "to be paid or transferred to them respect-"ively on attaining the age of twenty-one years" is a mere attempt to defer the period of payment to or the enjoyment by such issue. Each of the son's sons would then succeed to, or take, immeediatly on the death of his father, the captial of, or an absolute interest in, his share. The case resembles in this respect the English cases of *Sidney* v. *Vaughan* (1) and *Chaffers* v. *Abell* (2). If a different construction were put upon the will, the gift to the issue would have been void, because by Hindu law an estate cannot remain in suspense or abeyance and without an owner.

The testator attempts to make a gift over in the event of the issue not attaining the age of twenty-one years. The event upon which the gift over is to take effect is, "if either of the four sons "die leaving male issue, and the whole of such issue shall after-"wards die under the age of twenty-one years and without male "issue, in such case the share or shares of my said sons so dying "shall go and belong to the survivors of my said sons and my "said two grandsons Rajendra Dutt and Mahendra Nath Dutt "for life and their respective male issue absolutely after their "death in the same manner and proportions as is hereinbefore "described respecting the original shares." Now even, if the word "male issue" be construed as meaning "sons," it is clear that the event on which this gift over is to take effect may be very remote. A son might be born to one of the testator's sons forty years after the death of the testator. The death of such a son's son, at the age of twenty years, might constitute the event upon which, according to the terms of the bequest, the property would go over to the surviving children of the testator for their lives or their issue absolutely. During all that time, *i. e.*, the duration of a life in being at the time of the death of the testator, and a period which may

(1) 2 Brown's Par. Cases., 254. (2) 3 Jur. N. S., 577.

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extend to twenty years and eleven months afterwards, it would be utterly uncertain who would be the person to take on the happening of the event. Before the passing of Act XXI of 1870, I believe that there is no case in which it has been held that a Hindu testator could make a gift to take effect at a period more remote than the expiration of a life in being (1).

But Baboo Rames Chandra Mitter contended that the words "male issue" could not be construed as meaning "sons." To apply a test, if a son of the testator to whom a son had been born who pre-deceased him, died living a grandson, if the term "male issue" is to be restricted to sons, under the first alternative, the surviving sons and their issue would take to the exclusion of such grandson. But it certainly could not be said that such grandson did not fall within the meaning of the term "male issue," as that expression is generally understood : and it would be repugnant to the feelings of a Hindu ancestor that he should be excluded. In Jarman on Wills, vol. 2, p. 92, a case is given where a similar point arose in England—*Ross* v. *Ross* (2). Construing the words "male issue" as "descendants issued from his loins," suppose a son of the testator had issue, a son. a grandson, and a great-grandson, each of whom might of course be born after the death of the original testator. The son, grandson, and great-grandson would be the male issue of the son. Suppose, after the death of the son, the son's son, son's grandson, and son's great-grandson were to die all under the age of twenty-one years, it is clear that, while the great grandson survived, it could not be said that "the whole of the male issue" of the son had died under the age of twenty-one years. It therefore follows that the gift over upon the death of the whole of the male issue under twenty-one years, &c., contemplates an event which may happen at a period indefinitely remote. Until the event happened, it would be wholly uncertain who would be the person intended to take under the

(1) The gift over would clearly be void under the 101st section of the Indian Succession Act, which enacts that "no bequest is valid whereby the vesting "of the thing bequeathed may be delayed " beyond the life-time of one or more "persons living at the testator's decease, " and the minority of some person who " shall be in existence at the expiration " of that period, and to whom if he " attains full age" (eighteen years), "the "thing beaqueathed is to belong," *per* NORMAN, J.

(2) 20 Beav., 645.

limitation in the will. The son, the grandson, and the great-grandson would have successively taken an absolute interest in the estate. Each in succession after attaining his full age of eighteen, might have sold or disposed of the whole or any part of his share. Each in turn could have defeated any intention and any direction of the testator with respect to the property. The attempt to direct the course of the devolution of the property, after it had so completely passed out of the reach and control of the testator, is clearly futile. The case bears, on this point, a strong analogy to *Bhoobun Moyee Debea* v. *Ramkishore Acharj* (1).

I think it clear that the gift over on the whole of the male issue of a son of Ram Mohan dying without issue under the age of twenty-one was invalid.

I have endeavored to show that, on the death of Uma Charan, Srinath took an absolute interest in the share which belonged to his father.

The next question which arises is as to the share of Shib Das, who died in April 1861. On the death of either of the testator's sons, without leaving any "male issue," his share is "to " go to and belong to the survivors of my said sons and my said " two grandsons Rajendra Nath Dutt and Mahendra Nath Dutt " for life and their respective male issue absolutely after their " death in the same manner and proportions as hereinbefore " described respecting their original shares."

It should be observed that, looking at the context, and with reference to the manner in which the original shares are given, it appears that the testator does not give the property amongst the surviving sons for their lives, but to the surviving sons and the living male issue of the deceased sons as a class,—the surviving sons to take for their lives, the issue of the deceased sons absolutely. Giving to the word issue the natural sense, the effect would be that the " male issue " of the deceased sons might include persons who would probably not be in a position to take by descent as heirs of the testator, as, for instance, grandson's grandsons might exclude many others who might be the testator's heirs according to Hindu law. Therefore, on

(1) 10 Moore's I. A., 279.

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the death of a son, without issue, the class indicated would not take by descent. They must take, if at all, by gift. The case of *Ganendra Mohan Tagore* v. *Upendra Mohan Tagore* (1) is a distinct authority, by which we are bound, that a gift by a Hindu to a person not ascertained or capable of being ascertained at the time of the death of the testator cannot take effect. The gift, therefore, so far as it is a gift to the unborn male issue of the sons and grandsons of the testator must fail. Now it is a well-settled rule in construing wills, founded upon excellent reasons, and which has been adopted in the 102nd section of the Indian Succession Act, that, where there is a gift to a class and some persons constituting such class cannot take in consequence of the remoteness of the gift or otherwise, the whole bequest must fail. Upon that principle, I think, we are bound to say that the gift over on the death of Shib Das wholly fails.

On the death of Shib Das, it appears that his mother, Shama Sundari Dasi, the widow of Ram Mohan, who is still living, was his heir according to Hindu law. If, therefore, the gift over fails, on the death of Shib Das, his share went to Shama Sundari. But even if the gift over on the death of Shib Das, is not invalid, there is another reason why the plaintiff has failed to prove that, in the life-time of Shama Sundari, Kali Das could take the share of Shib Das in the property comprised in this suit. Lot Poroi and the putni talook Nouggi were acquired out of the surplus income or profits of the joint property after the death of Ram Mohan. The case of *Sreemutty Soorjeemoney Dossee* v. *Denobundoo Mullick* (2) is a distinct authority that, under circumstances similar to those in the present case, the accumulations of the surplus income of the joint property of a Hindu family go to the heirs of the person out of whose income it was accumulated. The property purchased after the death of Shib Das, may have represented accumulations made during his life-time, and if so, as well such accumulations as the property by which they are now represented, would belong to the heirs of Shib Das, and would not be affected by the will of Ram Mohan.

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

(2) 6 Moore's I. A., 526.

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For these reasons we think that it is not shown that Kali Das was entitled to more than 4 annas 2 gandas and 2 krants.

The decree of the lower Court will be modified accordingly.

The appeal of the plaintiff will be dismissed, and the cross-appeal of the defendants decree with costs.

In the absence of the heirs of Kali Das, we do not of course decide whether, as to the whole or any part of the property, Kali Das took more than a life-interest.

AINSLIE, J.—I concur in the decree proposed to be made by the learned Chief Justice. It seems to me clearly established by the judgment in *Ganendra Mohan Tagore* v. *Upendra Mohun Tagore* (1) cited by him, that under the Hindu law, unmodified by Act XXI of 1870, there existed no power to make a gift to a person unborn at the time of the testator's death, and that there was no rule corresponding to that now embodied in section 101 of Act XXI of 1870 under which the vesting of an estate could be deferred for the life-time of a person living at the testator's decease, and the minority of some person who should be in existence at the expiration of that period, and to whom, if he attained full age, the thing bequeathed was to belong. The testator Ram Mohan Dutt has assumed that he could by will control the disposition of his property for a period not exceeding twenty-one years from the death of the persons named in his will who were living at his death; and if this were conceded, I see nothing in the will to make the buquests void; but unless this is conceded, the will fails for the reasons assigned by the Chief Justice, and therefore, I do not think it necessary to consider at length what the provisions contained in it are, and how the word "issue" is used. I may say briefly that I understand that it has been in one place used in a limited sense, and not in its most comprehensive sense, for the testator talks of issue of beforementioned issue; and from the context it seems to me clear that the beforementioned issue must be limited to issue living at a particular time.

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