1889

TOOMEY v. RAMA SAHI.

We may, with reference to the principle to which we have just referred, that when considerations relating to the person with whom a man is willing to contract, as, if personal relations between the parties, or the personal condition or qualifications of the promisee, form an element or may fairly be supposed to have done so in the entering into of the contract, mention a passage in Vice-Chancellor Wood's judgment in the case of *Stevens* v. *Benning* (1), at pp. 175-6. In this case we limit ourselves to the proposition that this contract cannot be construed as one which was entered into save with reference to the person, qualifications, status, and position of the Baboos of the concern of which they had charge. Therefore, we hold that neither by importation into the agreement, nor by any equitable principle, is the plaintiff entitled to sue, in this case in his own name as for a breach of contract.

C. D. P.

PRIVY COUNCIL.

P. C.* 1889 *March* 27 *and* 29, *May* 14.

TARACHURN CHATTERJI (DEFENDANT) *v.* SURESHCHUNDER MUKERJI AND OTHERS (PLAINTIFFS).

[On appeal from the High Court at Calcutta.]

Hindu law—Will—Construction of will of Hindu testator—Power to adopt conferred on testator's widow ended on estate vesting in his son's widow—Gift of beneficial interest.

On a claim by the children of the testator's daughter, as against his brother's son, held that the testator's direction to his executor (who was his elder brother), to make over whatever remained of his estate, after payment of debts, to his, the testator's, son ("when he comes of age") had the effect of a gift to that son operating at that time; and that the words in the will, "if my minor son dies," meant, in order to be consistent with the above, "dies before attaining full age."

On the death of the testator's son, after attaining full age and leaving a widow, the testator's widow, although empowered by the will to adopt if the testator's son should die without son or daughter (which he did) could not exercise this power after the estate had, consequently upon the son's death, vested in his widow for her widow's estate.

* *Present:* LORD HOBHOUSE, LORD MACNAGHTEN, and SIR R. COUCH.

(1) 1 K. and J., 168.

1889

TARACHURN CHATTERJI v. SURESH-CHUNDER MUKERJI.

Thayammal v. *Venkatarama Aiyan* (1) referred to and followed.

The testator's son, having succeeded to the estate under the above provisions, himself made his will, whereby he directed that "his cousin brother" (the defendant above-mentioned), on attaining full age, "becoming *dakhilkar* of my share as well as the shares of my elder uncle," should maintain his, the testator's, mother and widow.

Held, that this was not an absolute gift of the beneficial interest, and that the claim of the children of the daughter of the parent testator was valid.

APPEAL from a decree (7th March 1886) of the High Court, which reversed a decree (10th September 1884) of the Second Subordinate Judge of the District of the 24-Pergunnahs.

The present questions related to the construction of two wills. The suit was for a declaration that the plaintiffs, minors suing by their mother, were entitled as heirs to the whole estate of the late Kalichurn Chatterji, only son of the late Madhub Chunder, whose daughter, Thakomoni, having been married to one Jogesh Chunder Mukerji, was the mother who now sued on behalf of her children. Madhub Chunder died in 1845, having been joint with his elder brother, Anund Chunder, who died in 1850, leaving a son, the defendant Tarachurn and a widow Pearimoni, also a defendant. Madhub Chunder by his will, of which his elder brother Anund Chunder was appointed executor, gave a half share in his estate, in case his son Kalichurn should die a minor and without issue, to the son of his daughter, if she should have one; and the other half to Anund Chunder's son, Tarachurn. He also gave to his widow a power of adoption to be exercised in events which however did not occur.

At an earlier stage it was determined, and was not now disputed, that Tarachurn was born before the death of Madhub Chunder. Kalichurn attained full age in 1850, when he, along with his uncle's widow Pearimoni, took the management of the family property. Three years later, in 1854, he died without issue, but leaving a widow Matangini, a minor. He had made a will, dated 14th December 1853, providing as to Tarachurn's becoming *dakhilkar*, and directing the adoption of one of the sons of the latter, in certain circumstances, by Matangini; which provision occasioned some of the doubts in the construction of the document.

(1) L. R., 14 I A., 67; I. L. R. 10 Mad., 205.

1889

TARACHURN CHATTERJI v. SURESH-CHUNDER MUKERJI.

Both the wills appear in their Lordships' judgment.

The plaintiffs' case was that they were entitled to their shares upon a partition by right of inheritance. Tarachurn, in his defence, relied upon the wills as negativing the claim. He also set up a surrender to himself by Kalichurn's widow of her estate, and adverse possession beyond the period of limitation.

The Second Subordinate Judge held that, under the will of Kalichurn, the defendant had a life estate in his property, and that the plaintiffs' title would not accrue till his death.

On the plaintiffs' appeal to the High Court, a Divisional Bench (Prinsep and Trevelyan, J.J.) reversed this decision, being of opinion that the plaintiffs' title as heir was not affected by anything in the will either of Madhub, or of Kalichurn, or by surrender or by adverse possession.

That part of the judgment, which bears upon the only questions to be disposed of on this appeal, was as follows:—

"Madhub's will may be shortly described in the following terms:—After appointing his elder brother Anund to be his executor, and making provision for payment of his debts and certain expenses connected with his family, it provides that his widow should receive a certain sum as maintenance. Anund was appointed to manage the estate as heretofore, until the testator's minor son Kalichurn attained majority, when Anund is directed to account to him. Permission to his widow to adopt with the consent of Anund is given, if Kalichurn should die without issue. In the event of Kalichurn dying, it is provided that if Thakomoni, his daughter, should be married and give birth to a son, then on that son attaining majority, he should receive one-half of the testator's estate, the other half going to Anund's son, and in the event of her dying without a son, she would receive maintenance."

In regard to the will of Kalichurn, the Judges expressed the following opinion:—

"On Tarachurn attaining majority, it was further provided that he should become *dakhilkar* of the entire estate, including both his own and Kalichurn's share. The testator's widow is directed to adopt a son of Tarachurn, or, in the event of Tarachurn having no son, to adopt a suitable person. The testator's wish is expressed that the property should remain joint; that his widow should

live with the family; and that, if there should be any disagreement and she should live in her own father's house, she should receive maintenance. In the event of her not making an adoption, it is provided that she should have no concern with, or right to, the goods and properties; but inasmuch as no term is specified within which she was to adopt, this stipulation would have no effect until she became physically incapable of adopting. There is nothing in the will to show any intention on the part of the testator to disinherit his widow. The only portion of the will bearing in that direction, as has been already pointed out, relates to her receiving maintenance in a certain sum in the event of her finding it necessary to leave the family house and reside with her father, and on her failure to adopt, which, for reasons stated, is inoperative.

"The object of the testator in giving her maintenance only in the event of her leaving his house, was not to disinherit her but to ensure that the property should remain joint.

"The will declares that 'he who will be heir for the time being will jointly continue in possession of all the aforesaid properties with his co-sharers.' Looking at the general scheme of the will, we think that the widow would be included in the term 'heir for the time being.'

"In our opinion, therefore, on the death of Kalichurn, his minor widow became entitled to his estate, which was to be under the management, *first*, of his step-mother Srimati Debi, and then on his attaining majority, of the senior male member Kalichurn; that a son was to be adopted, but that no provision was made for the inheritance in the event of failure to make this adoption."

Tarachurn appealed to Her Majesty in Council.

Mr. *T. H. Cowie, Q.C.*, and Mr. *R. V. Doyne*, for the appellant, argued that he took an estate for his own benefit in Kalichurn's half of the joint family property, liable only to be defeated in case of an adoption by Matangini, in accordance with the power given to her by her husband's will. The appellant did not take as a mere trustee for her and the heirs of Kalichurn. He was, in the event that had occurred, entitled to one-half of Madhub Chunder's estate, under his will, and that this was so, was confirmed by the will of Kalichurn and the expressions used in it.

1889

TARACHURN CHATTERJI v. SURESH-CHUNDER MUKERJI.

Mr. *J. D. Mayne*, for the respondents, argued that the High Court had correctly construed the wills of Madhub Chunder and Kalichurn.

Mr. *T. H. Cowie, Q.C.*, replied, claiming in the end that the High Court ought not to have made Tarachurn liable for the costs of the suit.

Afterwards, on 14th May, their Lordships' judgment was delivered by

SIR R. COUCH.—The appellant (one of the defendants in the suit) is the son of Anund Chunder, who died in 1850. The respondents (the plaintiffs in the suit) are the grandsons of Madhub Chunder, the brother of Anund. He died on the 14th October 1845. Madhub Chunder had a son, Kalichurn, who died on the 23rd October 1853, after attaining majority, and a daughter, Thakomoni, the mother of the respondents. Kalichurn left a widow, Matangini, who died on the 21st December 1879. The property in suit is the share of Madhub in the joint property of himself and Anund, and the respondents are entitled to it by inheritance if it is not disposed of by the will of Madhub, which was made shortly before his death, or by the will of Kalichurn, by virtue of one or the other of which the appellant claimed to be entitled to the property. It was not disputed that the will of Kalichurn was genuine, and Madhub's was found to be so by both the lower Courts. The only questions in this appeal are the constructions of these wills.

The will of Madhub addressed to his brother Anund, after stating that he had a half share in their joint property, and giving directions for the payment of debts and the maintenance of his wife and son and daughter, and the education of the son and other matters, says: "God forbid, but if my minor son should die and my daugther should get married and a grandson be born, then on the said grandson's attaining majority you will give him half of my share, whatever it may be, and give half to your son: God forbid, but if she having no son becomes a widow, then you will pay her Rs. 4 a month for maintenance. You shall perform the Sharodia (Durga) puja, srads of parents and others, and pay perquisites and presents to the spiritual guide and family

priest according to the circumstances and your sense: God forbid, if you die before my son and daughter attain majority, then you may appoint attorney whomsoever you may think fit. You shall account for and make over whatever remains of the estate after payment of debts to my son when he comes of age. If you be of opinion that my half share should be sold and Company's papers should be purchased (with the proceeds), you may sell it for its proper value. Further, if my only son dies before he gets children, my wife may, with your consent, adopt a son." It has been found by the High Court, and is not now disputed, that Tarachurn was born before the date of this will.

The direction to make over the estate to the son when he comes of age has the effect of a gift to him to take effect at that time, and the words, "If my minor son dies," in order to be consistent with that, must mean dies during minority. On the son's death after coming of age leaving Matangini, his widow, Madhub Chunder's wife would not have power to adopt a son, the estate of Kalichurn having become vested in his widow.—*Thayammal* v. *Venkatarama Aiyan* (1).

The will of Kalichurn is now to be considered, as, if the appellant has any title to the property, it must be under that. In the official translation of it in the Record of Proceedings it is said in several places to be torn and illegible, and it was agreed before their Lordships that the statement of it in the judgment of the Subordinate Judge should be taken as correct. This is as follows (the figures 1, 2, &c., being inserted by the Judge):—

"The testator after describing the properties standing *swanami* and *benami* and in possession and out of it, and stating that his father, Madhub, and Madhub's elder brother, Anund, had jointly acquired them with their own earnings, and were in joint possession and enjoyment (*dakhal voge*) thereof, and were performing the ceremonies and maintaining the family with the profits and their own earnings, says in the will: "As my younger uncle died, leaving no issue or widow, in 1248, during the lifetime of my father and the elder uncle, they remained in possession (or were possessors, *dakhilkars*) of all the estate. In the meantime, through the influence of evil stars, they became heavily involved in debts, and before they were all paid off, my father died in Assin 1252. I was then a minor, and *my mother*,

(1) L. R., 14 I. A., 67; I. L. R, 10 Mad., 205.

1889

TARACHURN CHATTERJI v. SURESH-CHUNDER MUKERJI.

Srimati Debi, was my guardian in law Courts under the guidance of my elder uncle, who (with his own earnings and the profits of the estate, performed the ceremonies and maintained the family, myself and my mother, as before, and paid off a large proportion of the debts) died in Srabun 1257, leaving his minor son, Tarachurn Chatterji, and my aunt, his widow, as his heirs. The said aunt, through evil advice of bad men, being about to divide the properties, I, on attaining my majority in 1257, made statements in some Courts with regard to some of the properties as if they were my father's self-acquired and exclusive properties, with a view to prevent the threatened division (or partition), and, taking upon myself the payment of debts due to some of the creditors, made arrangements with them, and am gradually paying them off. But, in fact, maintaining those properties, debts, and dues still joint, I am in joint possession (*dakhilkár*) of the whole estate in conjunction with my said aunt, and am performing the ceremonies and maintaining the family. But I am so seriously ill now that my life is despaired of, and man is mortal and life is uncertain. I, therefore, deem it proper to make a will of the properties that will fall to my share. So laying down these rules I make my will, that (as) ere this my mother was my guardian according to the *anumati-patra* of my mother and my elder uncle's consent, (1) I appoint my mother (step) the executrix of my said whole estate. So long as my cousin brother Tarachurn does not attain majority, my mother, in conjunction with my aunt, shall maintain and protect my minor wife, Matangini Debi, and perform the ceremonies and maintain the family as before, pay off the creditors' debts, conduct the lawsuits already pending in Courts or to be instituted hereafter, file documents, pay debts howsoever incurred, take back documents and realize dues. (2) Afterwards on attaining majority, my cousin brother, Tarachurn, becoming possessor (*dakhilkar*) of my share *as well as the share of my elder uncle*, shall maintain my mother and wife. (3) Further, I, being the only son of my father, *it is provided in his said anumati-patra that if I die before the birth of any issue, my mother shall adopt a son according to Shastras*. If my mother does adopt a son, well and good; otherwise on attaining majority my wife shall adopt one of Tarachurn's sons, and shall pass her time (life) under the kurtaship (management and protection) of Tarachurn. God forbid, if Tarachurn does not get issues, then she may adopt a son of somebody else fit for the purpose. (4) When the ijmali properties have not hitherto been partitioned, they shall remain joint. (5) And save and except turuf Belpukhuria chuck lands purchased in auction, *nobody shall have power to dispose of any other property by morigage, gift, or sale*. (6) The heir for the time being shall remain in possession (*dakhilkar*) of the aforesaid whole estate jointly with the co-sharer and perform the ceremonies and maintain the family, take proper notice of my sister and cousin sister, and my wife shall accept *muntra* (spiritual or religious initiation) according to the *kulachar* (family custom) from my

spiritual guide, or whomsoever may be living of the family of my *guru*, and shall live in my house. (7) *My mother and others* shall cause her to perform the proper religious ceremonies. (8) If there be disagreement in any respect and she lives in her father's house, she shall get Rs. 10 per month for her maintenance from my *mother and others*. (9) If she does not adopt a son in the manner heretobefore provided for, there shall remain (*or be*) no concern (*elaka*) with and right (*sattwa*) to the estate and things, &c., on the part of my wife. (10) My clothes and raiments are left in the care of my mother and aunt. Tarachurn shall get them (*paibek*) when he comes of age. (11) Except those (clothes and raiments) the *ijlmali* metal plates and utensils and those used for puja and the whole of the immoveable and moveable estate are left *ijmali*. (12) My mother and aunt may sell the said Belpukhuria chuck lands . . . . to pay off debts or to purchase other properties nearer home.' . .

In the lower Courts much stress appears to have been laid on the word *dakhilkar*, which it was contended applied to one holding by virtue of his own title, and not to a possession held on behalf of another as an executor or trustee. The ordinary meaning of the word is "occupant," but the testator where he says he is in joint possession of the whole estate in conjunction with his aunt, and where (at No. 6) he says "the heir for the time being shall remain in possession of the aforesaid whole estate jointly with the co-sharer and perform the ceremonies and maintain the family," appears to give it a large meaning. In order to see what it means in the sentence, "Afterwards on attaining majority my cousin brother, Tarachurn, becoming possessor (*dakhilkar*) of my share as well as the share of my elder uncle, shall maintain my mother and wife," the context must be looked at. These are the only words that can operate as a gift to Tarachurn. The testator begins by appointing his step-mother executrix, meaning manager of his estate. So long as Tarachurn does not attain majority, she is to manage in conjunction with his aunt. On attaining majority, Tarachurn is to become possessor of the share, whether in the same capacity as the step-mother or otherwise is doubtful, but what follows assists in discovering the intention of the testator. He alludes to the provision in his father's will that if he dies without issue, his mother should adopt a son, who apparently, he thinks, should take the estate; and he says that if his mother does not adopt a son, his wife shall adopt one of Tarachurn's sons, and if Tara-

1889

TARACHURN CHATTERJI v. SURESH-CHUNDER MUKERJI.

churn has no sons, she may adopt the son of somebody else. That he wished an adoption to be made is apparent from the direction (9) that if his wife did not adopt a son she was to have no concern with, and right "to, the estate and things, &c.," and the words at (6), "the heir for the time being shall remain in possession," seem to be intended to refer to an adopted son rather than to Tarachurn. If the intention was that Tarachurn on attaining majority was to take the estate for his own benefit, it would be giving him a direct interest to prevent the wife making an adoption, which he might do by refusing to give one of his sons, and thus defeat that intention It is more reasonable to suppose that the intention was to benefit the family of Anund by obliging the wife to adopt a son of Tarachurn, than by giving the estate absolutely to Tarachurn on his attaining majority. Their Lordships are of opinion that the proper construction of the will is, that it provided for the management of the property on the death of Kalichurn, and gave power to his widow to adopt, under certain limitations; that, on his death, his widow Matangini became entitled to his estate, and on her death, the plaintiffs became entitled. This was the opinion of the High Court, which made a decree accordingly, reversing the decree of the first Court. That Court had ordered the costs of Tarachurn and another defendant, Ram Krishen Nuskur, to be paid out of the estate of Kalichurn, but the High Court ordered those defendants to pay the plaintiffs' costs in the High Court and also in the first Court, and the other defendants to bear their own costs in all Courts. Their Lordships think that the costs of all parties in the appeals to the High Court and in the first Court should be paid out of the estate of Kalichurn, and they will humbly advise Her Majesty to vary the decree of the High Court accordingly, and in all other respects to affirm it. This variation ought not to make any difference in the order as to the costs of this appeal, and the appellant will pay the costs of it.

Appeal dismissed.

Solicitors for the appellants: Messrs. *Barrow & Rogers.*

Solicitors for the respondents: Messrs. *T. L. Wilson & Co.*

C. B.