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in relation to the execution, discharge or satisfaction of the decree within the meaning of s. 244 of the Code. That is a view which well accords with common sense, and, we think, we should adopt it.

We accordingly set aside the judgment of the Court below and send the case back for trial on the merits.

Costs will abide the result.

Case remanded.

M. N. R.

Before Mr. Justice Pratt and Mr. Justice Geidt.

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May 7.

GOOROO DAS MUSTAFI
v.
SARAT CHUNDER MUSTAFI.*

Hindu Law—Will, construction of—Words of inheritance—O putra pautradi, meaning of—Hindu widow's estate—Estate for life—Intention of the testator—Power given to adopt, effect of.

A will contained, amongst others, the following directions:—"After my death my widow, being in possession for the term of her natural life (*jabat jiban*) of my properties, shall perform the *Iswar Seba* and other rites. My widow shall have power to adopt. . . . After the death of my widow, my brother's son and his sons and grandsons, &c. (*o putra pautradi*), being in possession of my properties, shall perform the *Iswar Deb Seba.*" The widow died without adopting any son.

Held, the words '*o putra pautradi*' are equivalent to *putra pautradi krame* and are words of inheritance. The intention of the testator was to give the widow, not a Hindu widow's estate but an ordinary life estate. The brother's son took a vested estate of inheritance, subject to the widow's life estate, and only liable to be divested by the widow's adoption of a son. The widow not having adopted any son, the brother's son took the ultimate estate absolutely, and his sons would inherit equally, though some of them were not born at the time of the testator's death.

THE defendants appealed to the High Court.

This appeal arose out of an action for recovery of possession of certain properties with *mesne* profits. The allegation of the plaintiffs was that one Sarbeswar Mustafi died on the 13th November 1863 after executing a will, the material terms of which ran as follows: —

"After my death my widow (Taramoni), being in possession for the term of her natural life (*jabat jiban*) of all the moveable

*Appeal from Original Decree No. 50 of 1900, against the decree of Babu Hemangoo Chunder Bose, Subordinate Judge of Hooghly, dated the 25th of September, 1899.

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and immoveable properties which I have, shall perform the *Iswar Seba* and other rites in honour of the deities; but she shall act according to the advice of my brother's son, Lakshmi Das Mustafi. My widow shall have power to adopt, if she gets any son of Lakshmi Das Mustafi for adoption; she shall be able to take repeatedly sons in adoption, one after another, each on the demise of the former: if she does not get the son of Lakshmi Das for adoption, then she shall not have power to adopt any one else. After the death of my widow, my brother's son, Lakshmi Das Mustafi, and his sons, grandsons, &c. (*o putra pautradi*), being in possession of my moveable and immoveable properties, shall perform the *Iswar Deb Seba* and the other rites in honour of the deities for all times to come." At the time of Sarbeswar's death, Lakshmi Das had three sons—Gurudas, Purna, and Umesh. After the death of his first wife, Lakshmi Das married for the second time and had three more sons—Sarat, Hem, and Manmatha—by his second wife. Manmatha died in December 1887. Lakshmi Das died in May 1887, and Taramoni died in January 1892 without adopting any son. The plaintiffs in the present suit were Sarat, Hem, and their mother as heiress of Manmatha, while the three sons of Lakshmi Das by his first wife were the defendants. The plaintiffs alleged that, under the terms of the will, Lakshmi Das obtained a vested interest in the estate of Sarbeswar subject to Taramoni's life estate and liable to be divested by Taramoni's adoption of a son, which, however, never took place. Therefore all the sons of Lakshmi Das, who were alive at his death, would be entitled to inherit the properties of Sarbeswar in equal shares. It was also alleged that the defendants had collusively obtained a deed of gift from Taramoni, according to which they had registered their names as full owners of the properties of Sarbeswar, and that the deed was void, as the widow had no power to make the grant. The plaintiffs therefore sought to recover possession of a half-share of the properties with *mesne* profits, and to have it declared that the gift was void. The defence, *inter alia*, was that Taramoni had acquired a Hindu widow's estate, and that, so long as she was alive, no one could have a vested interest in the succession. Therefore none of Lakshmi's sons, grandsons, &c., who were not alive during the lifetime of the testator, could inherit after Taramoni's death. The

learned Subordinate Judge of Hooghly, Babu Hemangoo Chander Bose, held that an absolute estate was conferred on Lakshmi Das under the terms of the will, and accordingly he decreed the plaintiff's suit.

Dr. Ashutosh Mukerji and *Babu Juda Lal Kanjilal* for the appellants.

Dr. Rash Behary Ghose and *Babu Shama Prasanna Mozumdar* for the respondents.

PRATT J. This appeal arises in a suit for the recovery of property with *mesne* profits. The facts are admitted and the case depends upon the construction of the will of Sarbeswar Mustafi, dated the 3rd November, 1863. He died on the 13th November, 1863, leaving a widow (Taramoni), a brother (Radhajiban), and a deceased brother's son (Lakshmi Das). At the time of Sarbeswar's death, Lakshmi had three sons—Gurudas, Purna, and Umesh,—who are the defendants in this suit. Subsequently, *i.e.*, in November, 1865, Lakshmi married a second wife, by whom he had three sons—Sarat, Hem, and Manmatha—the last of whom died in December, 1887. Lakshmi Das died in May, 1887, and Taramoni in January, 1892. The plaintiffs are Sarat, Hem, and their mother as heiress of Manmatha, while the three sons of Lakshmi by his first wife are the defendants.

It appears that Taramoni executed a deed of gift of the property in favour of Guru, Purna, and Umesh, and it is admitted that the deed is void at her death. The Will first bequeaths Sarbeswar's entire estate to his widow for as long as she shall live (*jabat jiban*). Then she is given power to adopt one after another any son of Lakshmi Das, but no other person. Then comes the passage: "After the death of my widow, my brother's son, Lakshmi Das Mustafi and his sons, grandsons, and so forth (*adi*), being in possession of my immoveable and moveable properties, shall perform the *Iswar Deb Seba* and other rites in honour of the deities for all times to come." Then follows a clause regarding Taramoni's *Stridhan*, with which this suit is not concerned. The next paragraph recites that there had been a gift of half the testator's property to Radhajiban on certain conditions,

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and this was confirmed, unless Radhajiban disregarded the stipulations, in which case the half share would go to Taramoni and Lakshmi Das, or, as it is worded, "the entire 16 annas property shall remain in the possession of Lakshmi Das and in the possession of my wife." Such a contingency has not arisen. Then follow certain legacies payable out of sums due under decrees of Court. Then comes a bequest of the balance of the decretal money, viz., Rs. 9,675, which was to be invested in Government paper. The material portion reads thus: "The rest of the original paper shall remain in my wife's possession during her lifetime, and after her demise shall remain in possession of Lakshmi Das Mustafi."

The contention of the plaintiffs is that, under the terms of the will, Lakshmi obtained a vested estate of inheritance subject to Taramoni's life estate, and liable to be divested, like Taramoni's, by an adoption which, however, never took place. If that be the correct construction, the inheritance would be shared equally by all of Lakshmi's six sons, and therefore the plaintiffs are entitled to recover half the property from the defendants, who have taken possession of the whole. On behalf of the defendants, who are appellants before us, it is contended that Taramoni acquired a Hindu widow's estate and that, so long as she was alive, no one could have a vested interest in the succession; and that, on Taramoni's death, none of the class described as Lakshmi's sons, grandsons and the rest, could inherit, who were not alive at the time of the testator's death. I need not stop to enquire whether in such a case the disposition would fail as to all of the persons constituting the class, because some of the sons are incapable of taking. That is the well-settled rule in England, and was recently applied to the will of a Hindu widow by Stanley J. in the case of *Rajomoyee Dassee* v. *Troylukho Mohiney Dassee* (1). I am saved from the necessity of considering whether that rule is always applicable in this country, because I fully agree with the Subordinate Judge that the ultimate estate, which the testator intended to confer, was an absolute one upon Lakshmi Das, and

(1) (1901) I. L. R. 29 Calc. 260.

that the words *o putra pautradi* are equivalent to "*putra pautradi krame.*" That this is so is also made manifest from the context, where twice over Lakshmi Das is associated with Taramoni in the inheritance without any reference to sons or grandsons. I further think that the intention was to give Taramoni an ordinary life estate and not that of a Hindu widow. The language employed to express such an intention seems to me quite clear and unequivocal, and I do not think a contrary intention can be inferred from the mere fact that power was given to the widow to adopt a son and so divest herself of the estate. This is not a case in which it is contended that the testator gave his widow an absolute estate and which raises the question whether the intention to give more than the ordinary widow's estate can be deduced. The considerations which apply to that class of cases are inapplicable here.

It is evident that the testator intended that Lakshmi Das should be an object of his bounty; yet if he gave Taramoni a Hindu widow's estate, she would fully represent the estate and, in that case, Lakshmi Das, being only a contingent remainder man, the testator's intention would be liable to be defeated by partial intestacy. A construction which might lead to such a result is always to be avoided, where the terms of the Will are open to a different construction. Life estates to widows are not unknown in this country. Such an estate was clearly intended and explicitly conferred in the present case.

There is no objection regarding the decree for *wasilat*, and this appeal is accordingly dismissed with costs except as regards the appellant, Purna Chunder Mustafi, who has compromised with the respondents.

GUPTA J. The subject-matter of dispute is the estate of Sarbeswar, which is in the possession of the defendants, the three sons of Lakshmi Das by his first wife. The plaintiffs are the two surviving sons of Lakshmi Das by his second wife, together with their mother as heiress of a third son, deceased. The plaintiffs claim to be entitled to a moiety of the estate, while the defendants claim the whole estate, and both these claims are rested on the terms of Sarbeswar's Will.

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Mr. Justice Pratt has recapitulated the facts and the terms of the Will, and it is unnecessary for me to repeat them. The learned Subordinate Judge who tried the case has found that, under the terms of the Will, Lakshmi Das took a vested estate of inheritance, subject to Taramoni's life estate and liable to be divested by an adoption which, however, never took place. At the hearing of this appeal against that finding, Dr. Ashutosh Mukerji in the first place contested with much force the view that the estate conferred on Taramoni was an estate for life. He contended that there is in the Will no gift in express terms to the widow, and that what the testator contemplated was that Taramoni should have not a life estate, but a widow's estate, and he reinforced this contention by reference to the power of adoption conferred on her. He therefore argued that the testator's entire estate was taken by the widow, and that there was no remainder, which could vest during her life-time in the subsequent legatees. In support of this view he quoted a passage from Mayne's Hindu Law, 6th Edition, page 795, where it is pointed out that it is incorrect to speak of a widow's estate as being one for life. "The Hindu Law," says Mayne, "knows nothing of estates for life, or in tail or in fee. It measures estates not by duration, but by use." Again, at page 818, the same authority lays down :—"The nature of a woman's estate must, as already stated, be described by the restrictions which are placed upon it, and not by terms of duration. It is not, in any sense, an estate held in trust for reversioners within the limits imposed upon her: the female holder has the most absolute power of enjoyment. She is accountable to no one, and fully represents the estate ; and so long as she is alive, no one has any vested interest in the succession." The conclusion to which Dr. Mukerji invited us to come on the above authority was that as no one had a vested interest in the estate till Taramoni's death, no one could take, who was not alive at that date. On this view Lakshmi Das would be excluded, and the plaintiffs could not take as his heirs.

The first observation that I have to make on this line of reasoning is that, if the estate conferred on Taramoni was a widow's estate, there could be no gift in succession to her ; for, as Mr. Mayne points out in a sentence following the passage above quoted from

page 795 of his work, "the distinctive feature of the (widow's) estate is that at her death it reverts to the heirs of the last male owner." Now the heirs of the last male owner are not the descendants of Lakshmi Das, but Radhajibun, Sarbeswar's brother. If the argument addressed to us by the appellant's pleader is sound, it would follow that neither the plaintiffs nor the defendants are entitled to Sarbeswar's property—a presentation of the case that has hitherto not been made by either party. We pointed out this result to Dr. Mukerji in the course of the argument, and his reply was that, even if the correctness of the deduction be admitted, it is a sufficient answer to the plaintiff's claim. Though the defendants may not be entitled to Sarbeswar's property, the plaintiffs have to prove a valid title before they can recover.

I am, however, unable to adopt the premises on which this argument is founded. The widow's estate of which Mr. Mayne treats is an estate created by law and not by will. The very fact that Sarbeswar made a disposition of his property on the determination of the widow's estate clearly indicates that the estate, which Sarbeswar contemplated should be taken by his wife, was not a widow's estate as known to the Hindu law. The words "my widow being in possession of my properties during her natural life (*'abat jiban, i. e.*, as long as she lives) shall perform &c." do in my opinion confer on the widow a life estate, however close to a Hindu widow's estate in many respects the testator may have contemplated that this life estate should approximate.

It was next contended on behalf of the appellants that the plaintiffs are precluded from taking under the Will by reason of the fact that the bequest to the subsequent legatees was contingent on the failure to exercise the power of adoption conferred on the widow, and that the legacy therefore did not vest till the adoption became impossible, that is, till the date of Taramoni's death. At that date Lakshmi Das was not alive, and it was therefore argued that neither Lakshmi Das nor his heirs, as such, could take on the widow's death. It is true that the gift to "Lakshmi Das, his sons, grandsons, &c." finds place in the Will after the authority to adopt. But there is no expression in the Will which makes the gift dependent on the failure to exercise the power. On the contrary, the mode in which the gift is conferred indicates that

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the testator contemplated that the authority would not be exercised. "After the death of my widow my brother's son, &c., being in possession of my properties shall perform." I agree with the learned Subordinate Judge in thinking that the true construction of this provision is that the gift should vest at once in the subsequent legatees, but be liable to be divested in case a son should be adopted.

The last question with which I have to deal is whether, by the use of the words "my brother's son, Lakshmi Das Mustafi, and his sons, grandsons, &c.," an estate of inheritance was conferred on Lakshmi Das, or whether these words are to be taken distributively as conferring a joint estate on Lakshmi Das and his descendants. This issue, if framed in the technical but concise language of English law, would be put thus—are the words "sons, grandsons, &c." words of limitation or of purchase? If these words are interpreted as the Subordinate Judge has interpreted them, in the former sense, the plaintiffs are entitled to succeed. If the words are interpreted in the latter sense, then only those of Lakshmi Das and his descendants, who were alive at the date of the testator's death, are entitled to take, and the defendants will rightfully repel the plaintiffs, who were persons born, or represent a person born, after the death of the testator.

The form of words now generally used when an estate of inheritance is conferred by Will is *putra pautradi krame*, that is, "sons, grandsons in succession." The form used in the present will is "*O putra pautradi*," that is, "and sons, grandsons, &c." The Subordinate Judge has held that this deviation from the usual form imparts no difference in meaning. In considering this point we must remember that the Will under discussion was executed nearly forty years ago. Though the power of making Wills has long been recognised among Hindus, there can be no doubt that it was not so freely exercised in former times as at present. When Wills were few and far between, each testator in making a gift to a man and his heirs would use any expression that seemed to represent his meaning. As the habit of making Wills became more general, and as their contents became more widely known through the grant of probate or administration, those different expressions would tend to crystallise into a

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common form, and we cannot be surprised that, even so late as forty years ago, this common form was not in general use. The Subordinate Judge has observed that, if the gift was to the sons and grandsons as well as to Lakshmi Das, the word "and" would probably have been inserted between 'sons' and 'grandsons,' and the words "&c." would have been omitted. There is, to my mind, much force in this comment, and I think there can be no doubt that the words actually used are words of inheritance, and that an absolute estate was conferred on Lakshmi Das. I am confirmed in this view by the provisions in the subsequent paragraphs, in which further dispositions of property are made in favour of the widow and Lakshmi Das without any mention of his sons and grandsons.

For the reasons above stated, I agree that the appeal fails and must be dismissed with costs.

S. C. G. *Appeal dismissed.*

PRIVY COUNCIL.

GOKUL MANDAR.

v.

PUDMANUND SINGH.

P.C.*
1902
June 10.
July 9.

[On appeal from the High Court at Fort William in Bengal.]

Bengal Tenancy Act (VIII of 1885) s. 5, cl. 5—Tenure-holder—Decision of Revenue Officer in settlement proceedings under Chapter X of the Act —Res judicata—Subsequent suit in Civil Court for ejectment—Civil Procedure Code (Act X of 1877) and (Act XIV of 1882) s. 13.

The Bengal Tenancy Act (VIII of 1885) s. 5, cl. 5, enacts that "where the area held by a tenant exceeds 100 standard bighas, the tenant shall be presumed to be a tenure-holder, until the contrary is shown."

Held (affirming the judgment of the High Court) that the defendant was presumably a tenure-holder within the section, and that the evidence in the case did not show the contrary. The defendant was consequently liable to ejectment.

With reference to a contention raised as to whether, a decision in previous proceedings under the Bengal Tenancy Act, that the defendant was a tenure-

* *Present*:—LORD DAVEY, SIR ANDREW SCOBLE, and SIR ARTHUR WILSON.