think that the questions referred should be answered as follows:

(i) A plea to the jurisdiction is a plea in bar; and, therefore, the proper judgment would be, that the suit be dismissed; but whatever may be the form used, it should be stated that the suit abates or is dismissed "for want of jurisdiction," otherwise the plaintiff might be prejudiced when he brings his suit in another Court.

(ii) We think that the Court has power in such a case to award costs to the defendant. The question of jurisdiction is one which the Court is bound to try, and as the plaintiff invites the trial by bringing his suit, it is only right that he should pay costs if he turns out to be wrong. It appears to us that the cases of *Lawford* v. *Partridge* (1) and *Peacock* v. *The Queen* (2) have been virtually overruled by the case of *McIntosh* v. *The Lord Advocate* (3).

APPELLATE CIVIL.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Mitter.

SHOSHI SHIKHURESSUR ROY, A WARD OF COURT, BY HIS MOTHER (DEFENDANT) *v.* TAROKESSUR ROY (PLAINTIFF).*

1880 *Sept.* 9.

Hindu Law—Will—Construction of Will—Restriction of Gift to Male Descendants void—How such a Gift should be construed..

A gift by will upon condition that the subject-matter should descend to heirs male only, is void by Hindu law.

By his will a Hindu testator made a gift of certain immoveable property to his nephews and their descendants in the male line with a condition that, "if any of them die childless, then his share shall devolve on the survivors of my nephews and their male descendants, and not on their other heirs."

Held, that the gift was bad in so far as it restricted the subject-matter of the gift to male descendants, but that the language used relating to the gift over to the testator's surviving nephew or nephews, was not inconsistent with the intention of the testator that the whole augmented share should pass to the plaintiff, the sole surviving nephew; but that, having regard to the doctrine frequently acted upon by the Courts of India, he was only entitled to a life-estate therein.

* Appeal from Original Decree, No. 205 of 1878, against the decree of Baboo Jodu Nath Mullick, First Subordinate Judge of Rajshahye, dated the 2nd May 1878.

(1) 1 H. & N., 621. (2) 4 C. B., N. S., 264, at p. 268.

(3) L. R., 2 App. Cas., 41, at p. 78.

1880

SHOSHI SHIKHURESSUR ROY v. TAROKESSUR ROY.

THIS was a suit brought to recover possession of an eight-anna share in two mouzas, together with mesne profits since the period of dispossession.

The plaintiff stated that Raja Chunder Shikhuressur Roy, his uncle, by a will dated 2nd Srabun 1272 (16th May 1865), bequeathed under the 8th clause, an eight-anna share in three estates, to Kumar Tarokessur Roy (the plaintiff), Kumar Jugodissur Roy, and Kumar Sibessur Roy, his brothers, providing "that they should possess the same in equal shares, having no right to alienate the same by gift or sale, but that they, their sons, grandsons, and their descendants in the male line should enjoy the same: if any of them die childless, which God forbid, then his share shall devolve on the survivors of my nephews and their male descendants, and not on their other heirs;" that, on the death of the testator in 1273 (1866), his widow made over possession of the said properties to the father of the plaintiff, as guardian of the plaintiff and his two brothers, but subsequently again took possession of the properties and made them over to the Court of Wards on behalf of her minor son (the defendant); and that both the plaintiff's brothers died unmarried.

The widow of the testator, as representative of her minor son, contended, that the will had been tampered with; that the alleged gift to the nephews of the testator was contrary to Hindu law; and that, according to the will, the plaintiff and his brothers took only a life-interest in the properties, the gift beyond the life-interest being void; and that the two brothers of the plaintiff having died, their shares reverted to the testator's lawful heirs.

The Subordinate Judge held, that the will had not been tampered with, but that the testator had intended to tie up his estates in the direct male line, contrary to the Hindu law; but further added, that as the plaintiff survived his other brothers, that part of the will which provided that, in the event of any one of the nephews dying without issue, his share was to go over to the surviving nephew, was capable of taking effect, and therefore the plaintiff was entitled to a decree for possession of the eight-anna share of the estates with wasilat.

The defendant appealed to the High Court.

1880

SHOSHI SHIKHURESSUR ROY v. TAROKESSUR ROY.

The *Advocate-General* (Mr. *G. C. Paul*, with him Baboo *Annoda Pershad Banerjee*) for the appellant. — I contend that the will is a forgery, the original will having been altered by interpolating leaves; the will which the testator made had his seal at the top and end of each page. Clause 8 is entirely inconsistent with the schedule, and this discrepancy has not been mentioned by the Judge. The testator has, by the words of the will, attempted to make a species of estate-tail, which he cannot do; see *The Tagore case* (1). Can the donee, therefore, have more than an estate for life? If the estate which the testator intended to give was one which the law prohibits, effect cannot be given to his intention; and here it is clear, he endeavoured to give more than a life-estate. See *Bhoobun Mohini Debia* v. *Hurrish Chunder Chowdhry* (2). The gift is further one to a class, some persons of which were not in existence at the time of the death of the testator, and consequently the whole bequest is void—*Srimati Bramamayi Dasi* v. *Jages Chandra Dutt* (3); see also the case of *Soudaminey Dossee* v. *Jogesh Chunder Dutt* (4).

The *Standing Counsel* (Mr. *J. D. Bell*, with him Baboo *Srinath Dass*) for the respondent.—The Courts are always inclined to assist a will as much as possible, where it is plain that the testator desired to make an absolute gift; and I contend that an absolute gift was given—*Mussamut Kollany Koer* v. *Luchmee Pershad* (5). The present case seems very much on a footing with *Sreemutty Soorjeemoney Dossee* v. *Denobundoo Mullick* (6). [GARTH, C. J.—I do not think that case applies, as, if we gave you an absolute estate, we should be doing that which the testator directly declared should not be done; but in *Soorjeemoney's* case (6) the Court were enabled to give her an estate-in-fee consistently with the terms of the will.] The other side have relied on the case of *Bhoobun Mohini Debia* v. *Hurrish Chunder Chowdry* (2), but there the gift was intended to convey

(1) 9 B. L. R., 377, at p. 406.
(2) I. L. R., 4 Calc., 23, at p. 27; S. C., L. R., 5 I. A., 138.
(3) 8 B. L. R., 400.
(4) I. L. R., 2 Calc., 262.
(5) 24 W. R., 395.
(6) 9 Moore's I. A., 123.

1880

SHOSHI SHIKHURESSUR ROY v. TAROKESSUR ROY.

more than a life-estate, intending to convey what the law prohibits; and their Lordships of the Privy Council put a fair construction on the will, and gave an absolute estate to Kassissari.

The judgment of the Court (GARTH, C. J., and MITTER, J.) was delivered by

GARTH, C. J.—The plaintiff brought this suit to recover possession of an eight-anna share of taluks numbered 278 and 456, under the following circumstances:—

These two taluks and another numbered 96, together with several other estates, &c., constituted the joint property of two brothers, Raja Chunder Shikhuressur Roy and Raja Mohessur Roy, each entitled to a moiety. The plaintiff is one of the sons of the latter, and the minor defendant is the sole surviving son of the former. When Raja Chunder Shikhuressur died, Raja Mohessur had five sons living, *viz.*, the plaintiff, Kumar Jugodissur, and Kumar Sibessur, being three uterine brothers by a deceased wife, and Bissessur and Kopessur by his then living wife. Chunder Shikhuressur died on the 29th Srabun 1272 (August 1865), leaving him surviving a widow, Ranee Soudamini, and only son, the minor defendant, by the aforesaid Ranee, and two daughters, whether by the aforesaid Ranee or not is not clear upon the evidence. He died at Rampur Boalia, the head-quarters of the district of Rajshahye, having come thither about ten or twelve days before his death, accompanied by only a few servants; not a single member of his family was about him at the time of his death. It is not disputed that 27 days before his death,—*i. e.*, on the 2nd Srabun 1272,—he executed a will at his family residence at Taherpur, distant about eight or ten hours' journey from the head-quarters.

It is alleged that, by the 8th clause of this will, Raja Chunder Shikhuressur bequeathed his eight annas share of the taluks in claim, as well as of the taluk No. 96, to the plaintiff and his two uterine brothers. The clause in question is to the following effect:—

"My brother's sons, Kumar Jugodissur Roy, Kumar Tarokessur Roy, and Kumar Sibessur Roy, shall receive, for defrayment of the expenses of their pious acts, the following out of the

properties left by me, to wit: my one half share in Parganna Chungoo, recorded as No. 278 in the Collectorate of Zilla Rajshahye in Dihi Dolil, and others appertaining to Tuppa Byas, and recorded as No. 456; and in Mouza Dihi Govindpur in Parganna Sautool, recorded as No. 96 in the touji or rent-roll of the Collectorate of Zilla Dinagepore. The said three nephews shall hold possession of the above in equal shares, and shall pay the Government revenue of the same into the Collectorate. They shall have no right to alienate the same by gift or sale, but they, their sons, grandsons, and other descendants in the male line shall enjoy the same, and shall perform acts of piety as they respectively shall think fit for the spiritual welfare of our ancestors. If any of them die without leaving a male child (which God forbid), then his share shall devolve on the surviving nephews and their male descendants, and not on their other heirs."

The plaintiff further alleged, that, after the death of his uncle his father was allowed to take possession of the eight annas share of all these three taluks as guardian of his three sons. But from the month of Bysack 1273 B. S., Ranee Soudamini, on behalf of her minor son, the defendant in this case, dispossessed him from the aforesaid eight annas share of the two taluks claimed in this suit; that, subsequently, when the whole estate of the minor defendant was taken charge of by the Court of Wards, the disputed share of the two taluks also came into their possession.

The plaintiff's elder brother, Kumar Jugodissur Roy, and his younger brother, Sibessur Roy, having both died on the 24th Maugh 1279 B. S. (February 1873) and the 5th Kartick 1276 (October 1869) respectively, without leaving any male issue, the plaintiff claims the whole eight annas share under the terms of the will. The taluk No. 96 is not included in this suit, because it is alleged that, out of the share bequeathed by the will, he is in possession of four annas, the other four annas being in possession of the Court of Wards, not on behalf of the minor defendant, but on behalf of the widow of his elder brother Kumar Jugodissur Roy.

According to the provisions of the Act relating to the Court

1880

SHOSHI SHIKHURESSUR ROY v. TAROKESSUR ROY.

of Wards, the suit was brought against the minor defendant represented by the manager appointed by the Court of Wards, *viz.*, Horo Gobind Bose. But the Court of Wards, by an order dated the 28th May 1877, authorized Ranee Soudamini, the mother of the minor defendant, to appear as his guardian, instead of the aforesaid manager, and thenceforward the suit was defended by the Ranee on behalf of her minor son.

Her defence was, that the 8th clause and several other clauses of the will, upon which the plaintiff relies, are not genuine, but were substituted by some of the amlahs of the deceased Raja shortly before his death in the place of certain other clauses of the original genuine will. It was further stated in the defence, that, supposing the clause in question is genuine, the bequest is in many respects invalid, and that, at any rate, the plaintiff is not entitled to more than a life-interest in a one-third share of the eight annas which the clause in question purports to bequeath.

The lower Court, overruling the defence, decreed the plaintiff's suit. On appeal all the points raised in the defence have been raised before us, and with reference to them two questions call for decision: First, whether the 8th clause of the will produced in this case, as that of the Raja Chunder Shikhuressur, is genuine or not? and secondly, if it is genuine, upon a correct construction of it, what are the rights of the contending parties under it in respect of the eight annas share of the two taluks which form the subject-matter of this suit?

(After considering the evidence the learned Chief Justice continued.)

On the whole, upon a careful consideration of the evidence we think that the conclusion of the lower Court upon the question of the genuineness of the will filed in this case is correct.

The next question is, what are the rights of the contending parties under the 8th clause with reference to the taluks in suit. The gift in the first place is to the three brothers, including the plaintiff, and to their succeeding generation in the male line. There is this further condition that, should any of the brothers die without leaving a male child, then his share shall devolve on his surviving brother or brothers and their male descendants.

We are of opinion that the condition imposed upon the gift, that its subject-matter should devolve on male descendants only, is invalid. In *Jotendro Mohun Tagore* v. *Ganendro Mohun Tagore* (1) the Judicial Committee observe :—"It follows directly from this, that a private individual, who attempts by gift or will to make property inheritable otherwise than the law directs, is assuming to legislate; and that the gift must fail, and the inheritance take place as the law directs." Further on they say:—"If, on the other hand, the gifts were to a man and his heirs to be selected from a line other than that specified by law, expressly excluding the legal course of inheritance, as for instance, if an estate were granted to a man and his eldest nephew, and the eldest nephew of such eldest nephew, and so forth for ever, to take as his heirs, to the exclusion of all other heirs, and without any of the persons so taking having the power to dispose of the estate during his lifetime, here, inasmuch as an inheritance so described is not legal, such a gift cannot take effect, except in favor of such persons as could take under a gift to the extent to which the gift is consistent with the law. The first taker would in this case take for his lifetime, because the giver had at least that intention. He could not take more, because the language is inconsistent with his having any different inheritance from that which the gift attempts to confer, and that estate of inheritance which it confers is void."

Applying the principle enunciated in these observations to the terms of the will in this case, it is clear that, under the bequest, the three brothers, including the plaintiff, received the taluks in equal shares for their respective lives, and that the course of succession which was subsequently indicated by the testator being contrary to Hindu law, the particular estate of inheritance which he attempted to create was void.

Therefore, on the testator's death, a one-third share of the eight annas of the taluks in suit devolved upon the plaintiff, enjoyable by him for his life, and the remaining two-thirds in equal shares devolved upon his two brothers, enjoyable by them in equal shares for their respective lives.

(1) 9 B. L. R., 377, at pp. 394, 395, and 396.

1880

SHOSHI SHIKHURESSUR ROY v. TAROKESSUR ROY.

But then these brothers died, one after the other, without leaving any male issue. Kumar Sibessur died first on the 5th Kartick 1276 (October 1869), leaving him surviving the plaintiff and his elder brother Kumar Jugodissur. On the happening of such a contingency as this, the will provides that the share bequeathed to the deceased was to devolve upon the surviving brothers and their male descendants. This latter limitation, being contrary to Hindu law, is void. But the gift over to the surviving brothers is not invalid according to Hindu law; see *S. M. Soorjeemoney Dossee* v. *Denobundoo Mullick* (1) and the observations of the Judicial Committee upon that case in *Tagore* v. *Tagore* (2).

For similar reasons, upon the death of Kumar Jugodissur without leaving any male issue, his original share (*viz.* $\frac{1}{3}$) devolved upon the plaintiff. It is somewhat doubtful whether, along with Jugodissur's original share (*viz.* $\frac{1}{3}$), the share received by him on the death of Sibessur also did not pass to the plaintiff. But having regard to the provisions relating to the legacy as a whole, we think that it was the intention of the testator that the whole augmented share should pass to the plaintiff, who was the sole surviving brother. The language used relating to this gift over to the surviving brother or brothers is not inconsistent with this intention.

We, therefore, come to the conclusion, that the whole eight annas share of the two taluks, the subject-matter of this suit, has devolved upon the plaintiff under the provisions of the will of Raja Chunder Shikhuressur. But we do not agree with the lower Court that the plaintiff's right thereto is absolute. His interest will determine with his death, and, upon the happening of that event, the disputed share of the taluks in question will revert to the legal heir of the testator.

In modification of the decree of the lower Court, we decree the possession of the disputed share of the two taluks, which is the subject-matter of this suit, and declare that the plaintiff has therein only a life-interest. We do not interfere with the

(1) 9 Moore's I. A., 123, at p. 134.

(2) 9 B. L. R., 377, see pp. 399, 400.

decree of the lower Court as to mesne profits, but, under the circumstances of the case, we think that each party should bear his own costs in this as well as in the lower Court.

Decree varied.

1880

SHOSHI SHIKHURESSUR ROY v. TAROKESSUR ROY.

Before Mr. Justice Morris and Mr. Justice Prinsep.

IN THE MATTER OF THE PETITION OF NILMONEY SING.*

UMANATH MOOKHOPADHYA *v.* NILMONEY SING.

1880 *Sept.* 10.

Probate—Application for Order revoking Probate—Attaching Creditor of Next-of-kin—Succession Act (X of 1865), s. 234.

A judgment-creditor, who has attached property of his debtor, which purports to have been inherited by such debtor from his deceased father, may, where the will of such deceased is set up and proved at variance to his interests, apply for a revocation of the order granting probate of the will so set up.

Komollochun Dutt v. *Nilruttun Mundle* (1) followed.

THE facts of this case material to this report are as follows:—One Bamon Dass died some time in January 1875, leaving him surviving his widow Bhoyharini Debi, his son Taranath, and several other sons. Nilmoney Singh, the petitioner, having obtained a decree against Taranath, attached, in February 1875, certain lands purporting to be the property of Taranath inherited from his father. The widow Bhoyharini intervened in these attachment-proceedings; but, on the 11th February of the same year, her claim was disallowed. Subsequently, on the 14th March 1876, Bhoyharini, in conjunction with her sons other than Taranath, applied for, and on the 24th of the same month obtained, an order granting her probate of the alleged will of her husband Bamon Dass. The probate itself, however, was not issued till the 21st of December following. On the 1st April 1876, Bhoyharini instituted a suit against Nilmoney, praying for a declaration of her right to

* Appeal from Original Decree, Nos. 108 and 109 of 1879, against the decree of L. R. Tottenham, Esq., Officiating Judge of Nuddea, dated the 24th March 1879.

(1) I. L. R., 4 Calc., 360.