

**(1946) 04 CAL CK 0012**  
**In the Calcutta High Court**  
**Case No : Appeal No. 36 of 1945**

Aniruddha Mitra

APPELLANT

Vs

Arabinda Mitra and others

RESPONDENT

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**Date of Decision :** 05-04-1946

**Acts Referred:**

**Citation :** (1946) 04 CAL CK 0012

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### **Judgement**

Gentle, J.—This appeal against the judgment and decree of Das J. arises out of a suit, by way of an originating summons, instituted by Aniruddha Mitra for construing the will of his late father, Rai Bihari Lal Mitra. The only questions which now require determination are whether a residuary bequest in cl. 9 of the will in favour of the legitimate son or sons, natural born or adopted, of Aniruddha offends the provisions of Ss. 113 and 114, Succession Act, 1925, and whether there is an intestacy with regard to the residuary estate which Aniruddha is entitled to inherit. Das J. found in favour of the bequest and against an intestacy and this is Aniruddha's appeal against the learned Judge's decision. The testator was a wealthy Hindu, he died on 7th February 1933 leaving his wife, Sm. Nayani Mitra, his only son, Aniruddha Mitra (plaintiff) and his son's wife, Sm. Nivanani Mitra, surviving him. By his will, dated 5th July 1931, the testator appointed the Administrator-General of Bengal (defendant 3) his sole executor with liberty to make over the property to the Official Trustee of Bengal for the purpose of carrying out the trusts in the will. Probate of the will was granted to the Administrator-General on 29th August 1933. The estate is worth about Rs. 30,00,000. The material provisions of the will, including cl. 9, are:

Clause 5.- After my death my wife Sm. Nayani Mitra, my son Aniruddha Mitra and his wife shall be entitled to reside for the respective terms of their natural lives in my family dwelling house and use the furniture therein but they shall not be at liberty to remove or dispose of the said furniture in any way. Clause 7.- My executor or trustee shall pay the sum of rupees seven hundred per month to my wife Sm. Nayani Mitra, the sum of rupees seven hundred per month to my son Aniruddha Mitra and the sum of rupees seven hundred per month to Sm.

Nivanani Mitra the wife of my son Aniruddha Mitra for their maintenance respectively during the respective terms of their natural lives. In the event of the death of any one of the said three persons the monthly allowance so payable to the person so dying shall be paid to the two survivors in equal shares for life. On the death of one of such two persons the last survivor of the said three persons shall be paid the said monthly allowances payable as aforesaid to the two that are dead in addition to his or her own monthly allowances of rupees seven hundred.

Clause 8.-The executor and trustee shall pay the sum of rupees four thousand per month out of the income of my estate to the University of Calcutta (defendant 2) for the advancement of female education amongst Hindu females of Bengal.

Clause 9. - The legitimate son or sons of my son Aniruddha Mitra, whether natural born or validly adopted, shall become entitled to all the rest and residue of my property. If there is only one son of my son such residue shall be made over to such son of my son on his completing the age of twenty-one years and if there are more sons of my son than one then to such sons of my son Aniruddha Mitra in equal shares on the youngest of the said sons completing the age of twenty-one years. Until the youngest son of such son or sons attains the age of twenty-one years the executor or trustee shall pay the sum of rupees seven hundred per month to each of such son or sons of my son Aniruddha Mitra for maintenance and education.

Clause 10.-Until the youngest of the son or sons of my son Aniruddha Mitra shall complete the age of twenty-one years, all surplus income of my property after the expenses aforesaid shall be accumulated and invested by my executor or trustee either in Government securities or in immovable property yielding income and the accumulation and/or the property so acquired shall be made over by my executor or trustee to the son or sons of my son Aniruddha Mitra on the youngest of them (if more than one) completing the age of twenty-one years.

Clause 11.-If a son is not born to or is not adopted by my son Aniruddha Mitra during my lifetime, then the income of my property movable and immovable after the expenses aforesaid shall be paid to the University of Calcutta for the advancement of education in such manner as the said University shall think fit amongst Hindu females of Bengal until such time as a son shall be born to or shall be adopted by my son Aniruddha Mitra or his wife.

Clause 12.-If no son is at all born to or is at all adopted by my son Aniruddha Mitra or his wife, then the whole of my property movable and immovable shall, subject to the bequests, annuities and directions aforesaid be made over to the University of Calcutta for being applied by the said University in such manner as it shall think proper for the advancement of education amongst Hindu females of Bengal.

2. The bequests in cls. 9 and 12 are residuary bequests, the bequest in the

former clause is in favour of a class, namely, the sons, including an adopted son, of the testator's son. It was conceded that the bequest in cl. 8 in favour of Calcutta University is valid and no contest arises with regard to it. Aniruddha's wife is mentioned by name only in cl. 7 by which inter alia, a life annuity of Rs. 700 monthly is given to the wife Nivanani. The right of residence and use of furniture is given to Aniruddha's "wife", in cl. 5, but no name is stated and the wife's name is not mentioned in cls. 11 and 13 with respect to a son being adopted by Aniruddha's "wife". Clause 9 refers to Aniruddha's son or sons, natural born or validly adopted, but reference is not made to this wife either by name or description.

3. At the date of the testator's death, 7th February 1933, Aniruddha and his wife, Nivanani, were both alive but no son had been born to or adopted by Aniruddha. Thereupon the provisions of cl. 11 became operative in favour of the University of Calcutta. On 14th July 1934, Aniruddha adopted Arabinda Mitra (defendant 1), who is said to have been born on 19th October 1932. On 24th August 1936 Aniruddha was adjudicated an insolvent and Mr. Dinesh Chandra Roy Chaudhuri (defendant 4) was appointed Receiver in the insolvency. On 7th May 1943, Aniruddha obtained his discharge upon certain conditions to which reference is not required.

4. The questions in the originating summons, which Das J. was required to answer, question 1 being restated by him, were: (1) Is the gift in cl. 9 of the will void on the ground that it is hit by S. 114 and/or S. 113, Succession Act? (2) In the circumstances of the case can the gift over in cl. 12 of the will take effect? (3) Is the plaintiff entitled to the estate of the testator subject to the provisions in cls. 5 and 7 of the will? (4) Direction that the estate be administered in terms of the will as construed by this Honourable Court.

5. The learned Judge answered question 1 in the negative, he held that questions 2 and 4 did not arise and, regarding question 5, he directed the executor to administer the estate in terms of the will as construed. Question 3 related to the bequest in cl. 8 in favour of Calcutta University but in light of the concession regarding the validity of that bequest nothing now arises with regard to that question and it has been omitted. Reference to a number of provisions of the Succession Act, 1925, will be made and which can now conveniently be stated :

Section 57?"The provisions of this part (Ss. 57 to 191) which are set out in Sch. 3 shall, subject to the restrictions and modifications specified therein apply (c) to all wills and codicils made by any Hindu.... on or after 1st day of January 1927....

Schedule III. Sections.... 87, .... 111, 112, 113, 114, 115, 116.... 119.....

Clause 2.-Nothing therein contained shall authorise any Hindu.... to create in property any interest which he could not have created before 1st day of September 1870.

Clause 3.-Nothing therein contained shall affect any law of adoption....

Clause 5.-In applying any of the following sections, namely.....112, 113, 114, 115 and 116 to such wills the words "son" "sons".... shall be deemed to include an adopted son....

Section 87.-The intention of the testator shall not be set aside because it cannot take effect to the full extent but effect is to be given to it as far as possible.

Section 111.-Where a bequest is made simply to a described class of persons, the thing bequeathed shall go only to such as are alive at the testator's death.

Exception. If property is bequeathed to a class of persons described as standing in a particular degree of kindred to a specified individual but their possession of it is deferred until a time later than the death of the testator by reason of a prior bequest or otherwise; the property shall at that time go to such of them as are alive, and to the representatives of any of them who have died since the death of the testator.

Section 112.-Where a bequest is made to a person by a particular description and there is no person in existence at the testator's death who answers the description, the bequest is void. Exception. If property is bequeathed to a person described as standing in a particular degree of kindred to a specified individual but his possession of it is deferred until a time later than the death of the testator, by reason of a prior bequest or otherwise, and if a person answering the description is alive at the death of the testator or comes into existence between that event and such later time, the property shall, at such later time, go to that person, or if he is dead, to his representatives.

Section 113.-Where a bequest is made to a person not in existence at the time of the testator's death, subject to a prior bequest contained in the will, the later bequest shall be void, unless it comprises the whole of the remaining interest of the testator in the thing bequeathed.

Section 114.-No bequest is valid whereby the vesting of the thing bequeathed may be delayed beyond the lifetime of one or more persons living at the testator's death 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, the thing bequeathed is to belong.

Section 115.-If a bequest is made to a class of persons with regard to some of whom it is inoperative by reason of the provisions of S. 113 and S. 114, such bequest shall be (void in regard to those persons only and not in regard to the whole class). (The words in brackets were substituted for the words "wholly void" by the Transfer of Property (Amendment) Supplementary Act 1929).

Section 116.-Where by reason of any rules contained in Ss. 113 and 114 any bequest in favour of a person or a class of persons is void in regard to such person or the whole of such class, any bequest contained in the same will and

intended to take effect after or upon failure of such prior bequest is also void.

Section 119.-Where by the terms of a bequest the legatee is not entitled to immediate possession of the thing bequeathed, a right to receive it at the proper time shall, unless a contrary intention appears by the will, become vested in the legatee on the testator's death, and shall pass to the legatee's representatives if he dies before that time and without having received the legacy, and, in such cases the legacy is from the testator's death said to be vested in interest.

Explanation. An intention that a legacy to any person shall not become vested in interest in him is not to be inferred merely from a provision whereby the payment or possession of the thing bequeathed is postponed, or whereby a prior interest therein is bequeathed to some other person, or whereby the income arising from the fund bequeathed is directed to be accumulated until the time of payment arrives or from a provision that, if a particular event shall happen the legacy shall go over to another person.

6. Section 114 enacts the rule against perpetuities prevailing in British India. By the ordinary law, a Hindu attains majority at the age of 18 years. Therefore, under the section, the limit of time during which a bequest in. a will most vest is the period covered by (a) the lifetime of a person or persons living at the date of the testator's death and (b) not longer than 18 years after the termination of such lifetime.

7. On behalf of Aniruddha, Dr. S. K. Gupta contended that; (1) The rules in Ss. 113 and 114 must be applied as at the testator's death and they are with respect to possibilities at that time and are not confined to actual events; (2) The bequest in cl. 9 is contingent upon the son, or the youngest if more than one, completing the age of 21; (3) The bequest is subject to prior bequests in cls. 5, 7 and 11; (4) Since there was no son at the testator's death, the possibilities, at that time, of there never being a son or if there were a son, he might not complete 21 years, prevented the bequest from vesting; these possibilities rendered the bequest invalid and void by possible non-fulfilment of the contingency and for defeasance; (5) The bequest does not comprise the whole of the testator's interest and is void under S. 113; (6) The bequest will not vest as required by S. 114 and, in consequence is invalid; (7) Since the bequest in cl. 9 is invalid or void, the bequests in cls. 11 and 12 are also void under S. 116 resulting in an intestacy of the residuary estate which Aniruddha is entitled to inherit Those contentions were supported by the Receiver in Aniruddha's insolvency, defendant 4, on whose behalf Mr. R. Deb further contended that: (8) The bequest creates an interest in property in favour of a person or persons unborn at the testator's death. Such bequest could not be created by a Hindu before 1st September 1870 and, therefore, under S. 57 and cl. (2) of Sch. 3, Succession Act 1925, the bequest is invalid.

8. Formerly, a Hindu could not make a gift, either inter vivos or by will, in favour of an unborn person; such gift is now validated by the Hindu Disposition of

Property Act, 1916, subject, as therein provided, to the limitations contained in Ss. 113, 114, 115 and 116, Succession Act. Sections 111 and 112 are not included in the limitations. Prior to 1929, S. 115, Succession Act, rendered a bequest to a class wholly void if, by reason of S. 113 or S. 114, it was inoperative with regard to some members of the class; S. 115 was amended in 1929, and now such bequest is void only with respect to those members and it is valid with regard to the remaining members of the class. The provisions of the Succession Act, including the limitation sections mentioned in the Hindu Disposition of Property Act, must be considered in light of bequest in favour of unborn persons being valid since 1929. Mr. Deb's contention regarding S. 57, Succession Act, can conveniently be dealt with at this juncture. By reference to Sch. 3, Succession Act, 1925, S. 57 makes the provisions of several sections of the Act (to which reference is unnecessary) applicable to the will of a Hindu, subject to the restrictions and modifications contained in that schedule. The relevant restrictions and modifications are that : Nothing contained in those sections shall authorise a Hindu to create an interest in property which he could not have created before 1st September 1870. It was argued by Mr. R. Deb that, since prior to that date, a Hindu could not make a gift to an unborn person, and since Sch. 3 expressly provides that nothing contained in the enumerated sections shall authorise a Hindu to create an interest in property which he could not have created prior to the above date, the effect of S. 57 and the schedule is to make unlawful a bequest to an unborn person; consequently the bequest in cl. 9 of the will is invalid. 8 Cal. 637 Alangamanjeri v. Sonamoni ('82) 8 Cal. 637 was cited in support of this argument.

9. The Hindu Wills Act, 1870, so far as material, applied to Hindu wills in Bengal after 1st September 1870 but, by proviso 5 to S. 3, nothing in that Act authorised any Hindu to create in property an interest which he could not create before the above date. Prior to the Hindu Disposition of Property Act, 1916, a gift, inter vivos or by will, by a Hindu to an unborn person was unknown to Hindu law. That Act validates such gift, subject to the limitations contained in Ss. 113, 114, 115 and 116, Succession Act 1925. 8 Cal. 637 Alangamanjeri v. Sonamoni ('82) 8 Cal. 637 decided in 1882, held that, by reason of the proviso to S. 3 in the Hindu Wills Act, a bequest in a will could not be made to an unborn son. That was the law prevailing in 1882, but since the Hindu Disposition of Property Act, 1916, that case is no longer good law. Neither in Sch. 3 nor in any other part of the Succession Act, 1925, is the Hindu Disposition of Property Act repealed and it is still effective. The Hindu Wills Act, 1870, is now repealed and its provisions, in part, are to be found in S. 57, Succession Act. Schedule 3 does not provide that a Hindu cannot create an interest in property which could not be created before September 1870 but that the enumerated sections in the schedule do not authorise such creation. Mr. Deb's contention ignores the power to create an interest in property in favour of an unborn person which is given by the Act of 1916, which power is not taken away by the Succession Act. Mr. Deb further contended that S. 112, Succession Act, makes void a bequest in favour of unborn

persons. The power of a Hindu to make a bequest by will to an unborn person, given by S. 2, Hindu Disposition of Property Act, 1916, is subject to the limitations and provisions specified in S. 3 (a), contained in Ss. 113, 114, 115 and 116, Succession Act; S. 112 is not included in the limitations upon the power. The bequest in cl. 9 in favour of Aniruddha's sons is not limited to the sons alive at the testator's death; cl. 11 makes this clear; whilst the bequest is subject to Ss. 113 and 114 it is not subject to S. 112 and is not rendered void by it; further, the latter part of the exception to last section expressly excludes invalidity with respect to a son or sons who come into existence between the death of the testator and the time to which possession of the property bequeathed is deferred. In my opinion Mr. Deb's two contentions cannot prevail.

10. It does not appear to have been in contest before Das J. that the rules in Ss. 113 and 114-(a) have to be applied as at the testator's death, (b) include possibilities existing at that time and are not confined to actual events. In his judgment the learned Judge observed that those principles are respectively (a) beyond controversy and (b) well established. Mr. H. C. Mazumdar, for the Administrator-General, argued before us to the contrary and relied upon 12 Cal. 663 *Ram Lall v. Kanailal* ("86) 12 Cal. 663 and 24 Cal. 646 *Bhoba Tarini v. Peary Lall* ("97) 24 Cal. 646 in support of his contention. Those decisions were given when a gift to an unborn person was invalid and in each case it was held that a gift to a class was valid with respect to those members who were alive at the date the gift became operative but was invalid with regard to members of the class unborn at that date, It was argued that those cases conflict with and should be preferred to 2 Cal. 262 *Soudaminy v. Jogesh* ("77) 2 Cal. 262 which was also decided before validation of a gift to an unborn person and when S. 102, Succession Act, 1865, (corresponding to S. 115 of the present Act before it was amended) was operative; it was held that a gift to a class was wholly void when some members of it could not take for remoteness. I do not consider that 12 Cal. 663 *Ram Lall v. Kanailal* ("86) 12 Cal. 663 and 24 Cal. 646 *Bhoba Tarini v. Peary Lall* ("97) 24 Cal. 646 support Mr. Mazumdar's contention. The time when the rules in Ss. 113 and 114 have to be applied has been settled by the Judicial Committee in 52 I. A. 310 *Soundara Rajan v. Natarajan* ("25) 12 A. I. R. 1925 P. C. 244 : 48 Mad. 906: 52 I. A. 310 : 92 I. C. 289 (P. C.) in which it was observed, at page 319, that the validity of gifts "must be scrutinised as at the death of the testator." The actual decision in that case was that since there was a possibility that the interest of some members of the class, in whose favour a bequest was made, would not vest as required by S. 101, Succession Act, 1865, (corresponding to the present S. 114) the whole gift was invalid under S. 102 (corresponding to S. 115 before it was amended). That decision was pronounced when, if a bequest was inoperative with regard to some members of a class to whom it was given, the whole bequest was void. Whilst 2 Cal. 262 *Soudaminy v. Jogesh* ("77) 2 Cal. 262 is authoritative as to when the rule in S. 114, and it must also be the rule in S. 113, should be applied, its effect must be considered in light of the subsequent change in the law.

11. Bearing in mind the above mentioned principles, the material clauses in the will can now be summarised. They are: Rights of residence and use of the furniture in the testator's family house to his wife, his son and his son's wife (unnamed) for their respective lives (cl. 5). Life annuities of Rs. 700 monthly to the testator's wife, son and his son's wife, Nivanani; and on the death of one or two their annuities to be paid to the survivors and survivor for life (cl. 7). An annuity of Rupees 4000 monthly to Calcutta University (cl. 8). If a son was not born to or adopted by the testator's son during the testator's lifetime, the income from the estate, after payment of the aforementioned "expenses" to be paid to Calcutta University until a son shall be born to or adopted by the testator's son or by his wife (unnamed) (cl. 11). The legitimate son or sons of the testator's son, whether natural born or adopted, shall be entitled to the residuary estate; if there is only one son, the residue to be made over to him on his completing the age of 21 years; if there are more sons than one the residue to be made over to them in equal shares on the youngest son completing the age of 21 years; until the youngest son of such son or sons attains 21 the executor shall pay RS. 700 monthly to each son for maintenance and expenses (cl. 9). After the payment of, the above mentioned expenses, all surplus income to be accumulated and invested and to be made over to the testator's son's son or sons on the youngest completing 21 (cl. 10). If no son is born to or adopted by the testator's son or by his son's wife (unnamed) the residuary estate, subject to the bequests, annuities and directions in the will, to be made over to Calcutta University (cl. 12).

12. The residuary bequest in cl. 12 in favour of Calcutta University is contingent upon the testator's son having no natural born or adopted son; since there is an adopted son, this bequest fails. It was not suggested in argument that the direction in cl. 10 to accumulate the balance of income, after payment of expenses (which must mean the annuities in cls. 7 and 8 and the allowances to the testator's son or sons until he or the youngest completes 21 years), offends against any provision of law relating to accumulation. The residuary estate, given by cl. 9, includes the house and furniture, of which rights of user for life are given by cl. 5, and the life annuities given by cl. 7. Even when a prior bequest is with respect of part, and not the whole, of the residue it is nevertheless a prior bequest to which the residuary bequest is subject; such prior bequest, of necessity, must be of something less than the residuary bequest. The bequests in cls. 5 and 7 are prior bequests to which the residuary bequest in cl. 9 is subject. Whilst the income of the testator's estate, after payment of "expenses aforesaid", namely, life annuities in cl. 7 and, possibly, the rights of residence in cl. 5, is given by cl. 11 to Calcutta University until a son is born to or adopted by the testator's son, the residuary bequest in cl. 9 immediately becomes operative directly there is such son. If there had been a son at the testator's death, the bequest in cl. 11 never would have become operative, it ceased to be effective when a son was adopted. In those circumstances, although the bequest in cl. 11 is a prior bequest to the residuary bequest in cl. 9, and although the subject-

matter of the prior bequest is with regard to the subject-matter of the residuary bequest, the enjoyment of the latter bequest is not postponed by virtue of the prior bequest since it becomes operative upon the birth or adoption of a son and when the bequest in cl. 11 ceases to have effect. It is, therefore, not a prior bequest to which the bequest in cl. 9 is subject.

13. Clause 9 provides that the son or sons of Aniruddha "shall become" entitled to the residuary estate; that estate shall be "made over" to "such" son or sons on his or the youngest son completing the age of 21; until the youngest of "such" son or sons attains 21 the executor shall pay Rs. 700 monthly to each "such" son or sons. Dr. Gupta contended that the words "shall become" govern the whole of cl. 9 so that, save for Rs. 700 per month, the gift in favour of "such" son or sons is contingent upon attainment of 21 years by the only or youngest son, if more than one. Consequently, he argued, the gift is conditional upon completion of that age and if it is not attained, there is a defeasance; that was a possibility which existed at the testator's death when the bequest became effective and the whole bequest is therefore void. I am unable to agree with that contention. The bequest is in favour of the testator's son's son or sons alive at the testator's death or subsequently born or adopted. The words "shall become entitled" mean those alive at his death become entitled at that time and those subsequently born or adopted, at the date of birth or adoption. The making over, or payment, is to be to "such" son or "sons"; the intervening monthly allowance of Rs. 700 is payable to "such" son or sons. "Such" son or sons is or are the person or persons who have become entitled to the bequest. The bequest is not contingent upon attainment of 21 years by the son or the youngest son, the payment over at a later date is merely a postponement of possession of the accumulated income and the corpus. This intention of immediate right to the thing bequeathed is borne out by cls. 10 and 11. Upon the testator's death, unless and until there is a son who is entitled to the residuary estate, Calcutta University are entitled to the surplus income but their interest immediately comes to an end upon birth or adoption when, and not until then, the unused income, after paying the monthly allowance of Rs. 700 to the son, is to commence to be accumulated, such accumulations being for the son, who has become entitled to the bequest in cl. 9. The monthly allowance will increase if any further son or sons are born and the accumulations will consequently then become less but the allowances are payable to, and the accumulations are in favour of "such" son or sons, namely those who have become entitled to the bequest. There is no provision anywhere in the will that the allowances and accumulations are in respect of a son or sons who will become entitled upon attainment of 21 years.

14. It is convenient to summarise the above-mentioned conclusions: (1) A bequest in favour of an unborn person is valid, subject to the limitations contained in the Hindu Disposition of Property Act, 1916. (2) The rules in Ss. 113 and 114 have to be applied as at the testator's death but are subject to the provisions of S. 115 and the Hindu Disposition of Property Act. (3) A son or sons

of the testator's son become immediately entitled to the bequest in cl. 9 : (a) If born to or adopted by the testator's son at the death of the testator, (b) upon subsequent birth to or adoption by the testator's son. (4) That bequest is subject to the prior bequests in cls. 5 and 7. (5) That bequest is not contingent upon the attainment of 21 years by the only or youngest son. (6) The provision as to payment is merely a postponement of possession of the thing bequeathed. The questions can now be considered whether the bequest in favour of the class in cl. 9 offends the rules in Ss. 114 and 113, conveniently considered in that order, and, in that connection, whether S. 115 affects the position and rights of legatees of the bequest.

15. First as to S. 115. It has already been pointed out that, prior to the amendment to the section in 1929, if a bequest to a class was inoperative with respect to some members of the class by reason of S. 113 or S. 114, the whole bequest was void; hence the decision in 2 Cal. 262 *Soudaminy v. Jogesh* ('77) 2 Cal. 262 that a gift to a class was wholly void when some members could not take for remoteness; since the amendment, a bequest to a class is void only with regard to the members whose interest is void or invalid by reason of Ss. 113 and 114 but the bequest is effective with respect to the other members whose interest is not hit by those sections. In his judgment, Das J. referred to 71 I. A. 93 *Sopher v. Administrator-General of Bengal* ('44) 31 AIR 1944 P. C. 67 : I. L. R. (1944) Kar. P. C. 238 : 71 I. A. 93 : 216 I. C. 53 (P.C.) and observed that, in that case, the Judicial Committee held that the sections of the Succession Act should be construed in light of the illustrations and since, Das J. added, the illustrations to S. 115 clearly indicate that the members, in whose favour a bequest is saved, must be in existence at the date of the testator's death, the learned Judge expressed the opinion that Arabinda could not claim the benefit of the section; and, it would follow, Das J.'s opinion would be similar with regard to a natural son born to the testator's son after the testator's death. The exact wording of the observation by the Judicial Committee in 71 I. A. 93 *Sopher v. Administrator-General of Bengal* ('44) 31 AIR 1944 P. C. 67 : I. L. R. (1944) Kar. P. C. 238 : 71 I. A. 93 : 216 I. C. 53 (P.C.) is found at p. 102 of the report where Lord Maugham said "S. 113 must, of course, be read and construed in connexion with the illustrations to be found in the Act." Assuming, for the moment, the correctness of Das J. regarding his view as to the indicative in the illustrations : Section 115, itself, does not confine its application to those members of a class who are in existence at the testator's death but the words of the section appear to have general application and effect. No authority was cited laying down that the provisions of a section are confined in their application by the illustrations to the section. Whilst reference to illustrations should be made when the meaning is to be ascertained and, undoubtedly, the section applies to the instances given in the illustrations, but the meaning of a section is not exhausted by the illustrations. With respect, I am unable to agree with Das J. that, by reason of the illustrations to S. 115 its application is limited to members of a class who are in existence at the date of a testator's death. Illustration (i) to S. 115 reads as

follows :

A fund is bequeathed to A for life, and after his death to all his children who shall attain the age of 25. A survives the testator, and has some children living at the testator's death. Each child of A's living at the testator's death must attain the age of 25 (if at all) within the limits allowed for a bequest. But A may have children after the testator's decease, some of whom may not attain the age of 25 until more than 18 years have elapsed after the decease of A. The bequest to A's children, therefore, is inoperative as to any child born after the testator's death, (and in regard to those who do not attain the age of 25 within 18 years after A's death, but is operative in regard to the other children of A).

16. The words in the bracket were substituted, by Act 21 [XXI] of 1929, for the words "as it is given to all his children as a class, it is not good as to any division of that class, but is wholly void." This amendment was made at the same time as the section was amended and in order to make the illustration conform with the section. I am unable to construe the meaning of the illustration in the same way as Das J. I do not take the view that the bequest is inoperative with respect to all of A's children born after the testator's death. I think the meaning of the last sentence is to make the bequest inoperative only as to children, born after the testator's death, who do not attain the age of 25 within 18 years after the death of A but the bequest is operative with respect to such children who do attain that age within those 18 years. In my opinion the illustration manifests the generality and effect of the provisions in S. 115 and that the section applies to all members of a class in whose favour a bequest is made. Before leaving S. 115 and illustration (i) to it, one further matter arises. The bequest, in the illustration, to A's children is contingent upon their attaining the age of 25 and it is inoperative in respect of any child or children who do not attain that age within 18 years after A's death. Those children who attain 25 within 18 years after A's death can take the bequest in spite of other children dying before completing that age within the period and, therefore, failing to take anything. At the testator's death, A then being alive and when the rules in Ss. 113 and 114 have to be applied, there is a possibility that no child of A will attain the age of 25 within 18 years after A's death. If the rules in Ss. 118 and 114 have to be applied inflexibly at the testator's death then, with that possibility present, the bequest would fail in its entirety if Dr. Gupta's contention were correct. But, the illustration provides, the gift does not fail with respect to those members of the class who attain 25 within 18 years after A's death. Therefore, there must be a period of waiting after the testator's death before ascertaining which of A's children can take the bequest by attaining 25 within the 18 years. The position is the same in regard to all of A's children, whether born before or after the testator's death: e.g., at the testator's death (a) A has a child who is one year old and who will be able to take provided he reaches the age of 25 if A survives the testator by at least 6 years, i. e., when the child is 7 years old and who will be 25 in 18 years thereafter; (b) A has a child born one year after the testator's death who will be able to take provided he reaches the age of 25 if survives the testator by 8

years, i.e., when the child is 7 years old and who will be 25 in 18 years thereafter. In light of illustration (i) it is clear that finality as to validity of a bequest has not to be ascertained at the testator's death but there can be a period of waiting thereafter for the happening of some actual events to ascertain which child or children take the bequest. At the testator's death, however, it can be ascertained, so far as S. 114 is concerned, that a bequest will be valid with regard to those members whose interest in it will vest within the statutory period but invalid as to the remaining members; and, also, as to the members whose interests will be valid with regard to vesting, whether, if the bequest is subject to a prior bequest, it comprises the whole of the testator's interest in the thing bequeathed so that it is not void by virtue of S. 113.

17. The law recognises a bequest to an unborn person and, it must follow, to an unborn class; when such a bequest is made there is inevitably the possibility at the testator's death that no such person or class will ever come into existence; if such non-existence and such possibility at that time made the bequest invalid or void, the provisions of the Hindu Disposition of Property Act would have no effect and they would be frustrated. The rule in S. 114 must be applied in light of that Act, the provisions of which are subject to the section. Therefore, a bequest to an unborn person or class is valid provided the bequest vests in that person or in the whole or some members of the class within the period prescribed in S. 114; at the testator's death, the bequest does not fail because there is no one in whom the bequest can vest at that time. If a natural son were born to the testator's son, Aniruddha, he would be a person and a member of the class in whose favour the bequest is made in cl. 9, he would be in existence during the lifetime of a person alive at the testator's death, immediately upon his birth he would become a person entitled to the thing bequeathed, although his possession of it is postponed and his interest in the bequest would thereupon be vested in him. The position would be the same with regard to the subsequent birth of another or other natural born son or sons but, in such event or events, the interest in the bequest of the first born son would be reduced but there would never be a time, subsequent to the first son's birth, during which the residuary estate is not vested in some one or more persons. I am unable to see why the position is not the same with regard to a son adopted by Aniruddha; an adopted son is deemed to have been begotten by the adoptive father.: vide I. A. Sup. Vol. 47 *Jatindra Mohan Tagore v. Ganendra Mohan Tagore* ('72) 9 Beng. L. R. 377 : I. A. Sup. Vol. 47 : 2 Suther 692 : 3 Sar. 85 (P.C.) (which is later discussed). Arabinda, it is stated, was born in 1932, during the testator's lifetime, assuming that is correct, but, nevertheless he had not been adopted at the testator's death so at that time he was not a member of the class in whose favour the bequest is made and his interest could not and did not then vest; but on adoption after the testator's death he became a member of the class and, in my opinion, his interest became vested in him, such vesting taking place within the statutory period. Subject to the bequest not being void under S. 113, which will be considered in the succeeding paragraphs, Arabinda is entitled to take it.

18. Since the bequest is in favour of a person or class not in existence at the testator's death and it is subject to prior bequests, it has now to be examined whether it comprises the whole of the testator's remaining interest in the thing bequeathed, i.e., whether the testator has made a complete disposition of the residuary estate so that the bequest is not void under S. 113. There is no bequest of the residuary estate to any person for life; cl. 9 gives it directly to Aniruddha's son or sons subject to the prior bequests, in cls. 5 and 7, of part of the residuary estate for the lives of the persons therein mentioned. The bequest in cl. 11 has operative effect only (in the event which happened) of there being no son alive at the testator's death and it ceased to be operative and was displaced upon Arabinda's adoption as it would have been had a natural son been born to Aniruddha. The view has earlier been expressed that the completion of 21 years by the only or youngest son is not a contingency but a postponement of possession and the sole question which now arises is whether that postponement has the effect of the bequest not comprising the whole of the testator's interest in the residuary estate. Sections 111, 112 and 119 relate to bequests where possession of the thing bequeathed is postponed. Section 111 expressly, and S. 119, by implication, are referable to bequests to persons alive at the testator's death and, since they are not applicable in the present case, detailed reference to them is not necessary; it suffices to state that by those two sections postponement of possession does not make a bequest void. Whilst S. 112 makes a bequest to a person by a particular description void if there is no such person in existence at the testator's death, the exception to that section provides that: if property is bequeathed to a person described as standing in a particular degree of kindred to a specified individual but his possession of it is deferred until a time later than the death of the testator by reason of a prior bequest or otherwise; and if a person answering the description comes into existence between the testator's death and the later time, the property shall, at such later time, go to that person or if he is dead to his representative, Postponement of possession, therefore, is not repugnant to law when a bequest is made to a person who is either alive or who is unborn at the testator's death.

19. Section 113 is not concerned with postponement of possession but with a failure to vest the whole of the testator's interest in the thing bequeathed. 71 I. A. 93 *Sopher v. Administrator-General of Bengal* (1944) 31 AIR 1944 P. C. 67 : I. L. R. (1944) Kar. P. C. 238 : 71 I. A. 93 : 216 I. C. 53 (P.C.) was relied upon by Dr. Gupta as supporting his contention that the testator has not divested himself of his whole interest in the thing bequeathed. In that case their Lordships of the Judicial Committee pointed out, by reference to the illustrations to S. 113, that a bequest, after a prior bequest, of a life interest to a person not in existence at the testator's death is a gift of something less than the remaining interest of the testator, and that further gifts, however complete in their operation, do not save the bequest; the question is whether the later bequest (cl. 9 in the present case) is a complete disposition of the testator's interest Here, the later bequest is absolute but possession is postponed, as already explained. In 71 I. A. 93

Sopher v. Administrator-General of Bengal ("44) 31 AIR 1944 P. C. 67 : I. L. R. (1944) Kar. P. C. 238 : 71 I. A. 93 : 216 I. C. 53 (P.C.) a trust was created out of which an annuity was payable to the testator's widow during her lifetime; the balance of income to be paid to the testator's sons; a deceased son's share to go to his children, if any, and if childless, to the testator's surviving sons; if only one son or grandchild, the whole of the balance of income to such son or grandchild during the widow's lifetime; the corpus was not to be divided until the widow's death when, both corpus and income were to be distributed in the shares therein directed among the testator's sons and grandchildren (as the case might be) who should survive the widow; but payment was not to be made to a grandchild until he or she should attain the age of 18 and meanwhile a sum of Rs. 500 per month for maintenance was to be paid in respect of each of them. It was pointed out that no grandchild received any income unless and until he survived his father and if no son or grandchild survived the widow there would be an intestacy as regards the surplus income. It was argued that the gifts to the grandchildren of shares in the corpus were contingent on their respectively attaining the age of 18 and also on their surviving their respective fathers. To that argument it was contended that, by the exception to S. 120, Succession Act, where a will bequeaths a fund to any person upon his attaining a particular age and also gives to him absolutely the income from the fund before he reaches that age or so much of it as may be necessary to be applied for his benefit, the bequest is not contingent. It was pointed out by the Board the exception applies only to a case where a fund is given to a person upon attaining a particular age, it has no relation to a contingency of survival to a named person and that the grandchildren were not given any interest in the corpus merely on attaining the age of 18 but, also, they had to survive their father. Their Lordships expressed the opinion that the exception did not apply because it could not be said that the fund, or any part of it, was given to a grandchild upon his attaining the age of 18; he might attain that age and yet would get no interest in the corpus if he predeceased his father for which reason the gifts of the corpus were contingent and, it followed, the bequests to them were void. It was not held by the Judicial Committee, as I venture to read 71 I. A. 93 Sopher v. Administrator-General of Bengal ("44) 31 AIR 1944 P. C. 67 : I. L. R. (1944) Kar. P. C. 238 : 71 I. A. 93 : 216 I. C. 53 (P.C.), that the gifts were void because payment was postponed until the age of 18 was completed. According to 71 I. A. 93 Sopher v. Administrator-General of Bengal ("44) 31 AIR 1944 P. C. 67 : I. L. R. (1944) Kar. P. C. 238 : 71 I. A. 93 : 216 I. C. 53 (P.C.) a beneficiary must receive the interest bequeathed in the same unfettered form as that in which the testator held it.

20. Postponement of possession is not a retention of part of the testator's interest and is not a fetter so as to prevent the whole of that interest being vested in the beneficiary. The interests of the grandchildren beneficiaries in 71 I. A. 93 Sopher v. Administrator-General of Bengal ("44) 31 AIR 1944 P. C. 67 : I. L. R. (1944) Kar. P. C. 238 : 71 I. A. 93 : 216 I. C. 53 (P.C.) did not vest because

their interests in the bequest were contingent upon surviving their fathers. Section 113 has nothing to do with postponement of possession; a failure to vest the whole remaining interest of the testator is repugnant to the section but, when that has been made, it has no application. The bequest in cl. 9 is not contingent upon the legatees surviving any person nor upon the termination of the prior bequests in cls. 5 and 7, although the subject-matter of those bequests forms part of the residuary estate given by cl. 9. The bequest in those three clauses comprises the whole of the testator's interest, such part of the residuary estate as is represented by the bequests in cls. 5 and 7 will ultimately fall into the corpus of cl. 9. The beneficiaries, upon birth or adoption immediately become entitled to their interests and which thereupon vest; the vesting is not delayed or affected by postponement of possession. In these circumstances there is no possibility of there being any remaining interest of the testator. Since nothing remains in the testator there is no defeasance which voids the bequest. In my opinion, Arabinda became entitled to the bequest upon his adoption by Aniruddha and when his interest in it vested. The measure of that interest may be reduced by the birth of a natural son to Aniruddha but such event will not affect the vesting of the bequest save to the extent of the persons in whom it vests. The bequest does not fail by virtue of Ss. 113 and 114 and, consequently, S. 116 does not come into play so as to render void the bequests in cls. 11 and 12, although, now, they will not have operative effect. There is, therefore, not an intestacy of the residuary estate and Aniruddha does not succeed to that residue.

21. Up to the present the questions arising in the appeal have been considered solely with respect to a son born to or adopted by Aniruddha and the views which have been expressed are sufficient to dispose of the main question, namely, whether there is an intestacy of the residuary estate to which Aniruddha could succeed. A considerable part of the long and able argument was directed to the position of a son adopted to Aniruddha after his death by a widow, especially a widow other than Nivanani who was not alive at the testator's death. During the course of his argument that the whole bequest failed because of the possibility, at the testator's death, of the interest of one member of the class not vesting during the statutory period, Dr. Gupta particularly relied upon an after-adoption. He contended that the rights of an adopted son to property arise at adoption and do not relate back to an earlier date; an adoption after the expiration of the statutory period would prevent the bequest vesting as required by S. 114; this would more especially be the case if a son were adopted by a widow other than Nivanani, who was not alive at the testator's death. In light of the opinion expressed that Arabinda has a vested interest in the bequest, it may not be necessary to consider the position of an after-adopted son, but it is desirable to do so in case that opinion is wrong and because the position of an after-adopted son may later arise and, also, out of respect for the able arguments upon the question by all learned counsel concerned. It has first to be considered whether a son adopted by a widow, other than Nivanani, would be a beneficiary of the bequest in cl. 9. Previously it has been pointed out that several clauses of the will

refer to Aniruddha's wife; Nivanani's name as wife is found only in cl. 7 by which she is given a life annuity; the bequest of residence and use of furniture for life in cl. 5 is in favour of the wife (unnamed); cls. 11 and 12 refer to an adoption by Aniruddha's wife, again without a name; the bequest in cl. 9 is in favour of Aniruddha's legitimate sons, natural born or adopted, but his wife is not mentioned either by name or description. An adoption, and a failure to adopt, by an unnamed wife in cls. 11 and 12 relate to an adopted son in whose favour the bequest is made in cl. 9. Clause 9 does not require a natural son to have been born to Aniruddha by a named wife, the bequest is in favour of all natural born sons, with whom an adopted son is included in the description of legitimate sons. Indeed, cl. (5) of Sch. 3, Succession Act, provides that in a will "son" and "sons" include an adopted son. A son adopted by a widow, properly authorised, would be a legitimate son similarly as a natural son born to any wife. Further, since the life annuity in cl. 7 is restricted to a named wife, it can only be inferred that, when the testator desired to limit "wife" to a particular person, he expressly did so, and, by omitting reference to a named wife in other clauses, he did not intend to limit his bequest to a son adopted by Nivanani. In my view the bequest in cl. 9 is in favour of a son adopted by any widow of Aniruddha.

22. It is necessary at the outset of the present consideration to bear in mind the precise wording of S. 114. It requires that a bequest must vest during (a) the lifetime of persons "living" at the testator's death and (b) the minority of the person in existence, (not "living"), at the expiration of (a), in whose favour the bequest is made. It was conceded by Dr. Gupta that by the doctrine of relation back an after-adopted son, in contemplation of law, is deemed to be in existence at the time of the death of his adoptive father but, it was argued, this is solely for the purpose of continuing the adoptive father's line and it has no other purpose, effect or consequence. In this connection a considerable body of case law was cited, for which we are mainly indebted to Mr. N. C. Chatterjee, some of which I propose to discuss. It is convenient, in the first instance, to quote what was laid down by their Lordships of the Privy Council in *I. A. Sup. Vol. 47 Jatindra Mohan Tagore v. Ganendra Mohan Tagore* ("72) 9 Beng. L. R. 377 : *I. A. Sup. Vol. 47 : 2 Suther 692 : 3 Sar. 85 (P.C.)*, more than 70 years ago, with regard to the positions of an adopted son and his adoptive father; it will be seen that no distinction is made between a son adopted by the father during his lifetime and a son adopted by his widow after his death. Whilst references to their Lordships' observations have been made in later decisions, no authority has been cited in which the Judicial Committee has sought to explain that there is any limitation to be placed upon their effect and application. *I. A. Sup. Vol. 47 Jatindra Mohan Tagore v. Ganendra Mohan Tagore* ("72) 9 Beng. L. R. 377 : *I. A. Sup. Vol. 47 : 2 Suther 692 : 3 Sar. 85 (P.C.)* was before the Judicial Committee at the time when a Hindu could not make a gift by deed or by will to an unborn person and it was held that a Hindu testator could not create an interest in property, known to English law, of an estate in tail male. At p. 67 of the judgment by the Board, delivered by Willes J., it is stated:

As to the case of adopted children (so much relied upon during the argument) it is distinguishable because of the peculiar law applicable to that relation. The Hindu law recognises an adopted child, whether adopted by the father himself in his lifetime, or by the person to whom he has given the power of adoption after his death from amongst those of his class, of one to stand in the place of a child actually begotten by the father. In contemplation of law such child is begotten by the father who adopts him, or for and on behalf of whom he is adopted. Such child may be provided for as a person whom the law recognises as in existence at the death of the testator, or to whom by way of exception, not by way of rule, it gives the capacity of inheriting or otherwise taking from the testator, as if he had existed at the time of the testator's death having been actually begotten by him. Apart from this exceptional case, which seems to prove the rule, the law is plain that the donee must be a person in existence capable of taking at the time when, the gift takes effect.

23. The parties supporting the validity of the bequest relied upon these observations as entirely embracing the present case, manifesting that an adopted son, whether the adoption is by the father or by a widow, is in the same position as a natural born son alive at the date of the father's death or, at least, in the position of a posthumous son. Some 14 years before Tagore's case *Jatindra Mohan Tagore v. Ganendra Mohan Tagore* ('72) 9 Beng. L. R. 377 : I. A. Sup. Vol. 47 : 2 Suther 692 : 3 Sar. 85 (P.C.), in which reference to it does not appear, 7 M. I. A. 169 *Bamundoss v. Mt. Tarinee* (1858) 7 M. I. A. 169 : 1 Sar. 616 (P. C.) was an appeal to the Privy Council from the Sudder Court whose judgment received entire concurrence of, and acceptance by, the Board who added nothing to it. The actual decision, as pointed out by the Judicial Committee in 46 I. A. 97 *Pratapsingh v. Agar Singhji* ('18) 5 A. I. R. 1918 P. C. 192 : 43 Bom. 778 : 46 I. A. 97 : 50 I. C. 457 (P. C.) at p. 107, was that a widow's right to sue in respect of her deceased husband's estate was not superseded or destroyed by an authority given to her to adopt which she had not exercised; and the contention was rejected that such widow was considered to be enceinte and the authority had the same effect as if she had conceived a child. The judgment of the Sudder Court in 7 M. I. A. 169 *Bamundoss v. Mt. Tarinee* (1858) 7 M. I. A. 169 : 1 Sar. 616 (P. C.), embodied in the report, contains some observations upon which Dr. Gupta particularly relied; at p. 183:

The after-born son's right is to his share of the estate as it stands at the time of his adoption, and not retrospectively with reference to its state at any supposed period of conception"; at p. 284 "the property is in the widow from the death of the husband till the power of adoption is exercised, Then that adoption divests it from the widow and vests it in the adopted son.

24. Therefore, argued Dr. Gupta, the right to property accrues to an adopted son at the date of adoption and, in that respect, there is no relation back to the adoptive father's lifetime. 7 M. I. A. 169 *Bamundoss v. Mt. Tarinee* (1858) 7 M. I. A. 169 : 1 Sar. 616 (P. C.) was cited in two decisions of the Madras High Court,

4 Mad. 160 Lakshmana Rau v. Lakshmi Ammal ('82) 4 Mad. 160 and 21 Mad. 10 Ganpati v. Savithriammal ('98) 21 Mad. 10; in the former case it was held that the title of a widow's adopted son does not relate back to the death of the adoptive father; in the latter case a contention to the contrary was rejected as being too late to prevail after 7 M. L. A. 169 Bamundoss v. Mt. Tarinee (1858) 7 M. I. A. 169 : 1 Sar. 616 (P. C.). In 9 C. W. N. 795 Harek Chand v. Bejoy Chand ('05) 9 C. W. N. 795 Mookerjee J. said, at pp. 798 and 799, that an adopted son's title does not relate back to a date earlier than his adoption; but Harrington J., in his judgment at p. 797, does not seem to have thought this view as universally correct since he expressed the opinion that, according to I. A. Sup. Vol. 47 Jatindra Mohan Tagore v. Ganendra Mohan Tagore ('72) 9 Beng. L. R. 377 : I. A. Sup. Vol. 47 : 2 Suther 692 : 3 Sar. 85 (P.C.) for certain purposes, an adopted son may be regarded as having been in existence at the time of his adoptive father's death. When referring to 7 M. I. A. 169 Bamundoss v. Mt. Tarinee (1858) 7 M. I. A. 169 : 1 Sar. 616 (P. C.) the learned author of Edn. 10 of Mayne's Hindu Law says, at p. 277 :

The rights of a boy as adopted son arise only from the date of the adoption in the sense that he is bound by such acts of the widow as would bind the heirs of the husband after her. An adopted son is not necessarily bound by all the dealings with the estate between the death of his adoptive father and his own adoption.... If she (widow) has created any incumbrances, or made any alienations which go beyond her legal powers, the son can set them aside at once.

25. In 54 I. A. 248 Krishnamurti Ayyar v. Krishnamurti Ayyar ('27) 14 A. I. R. 1927 P. C. 139 : 50 Mad. 508 : 54 I. A. 248 : 101 I. C. 779 (P. C.) their Lordships of the Privy Council observed at p. 262:

When a disposition is made intra vires by one who has full power over property under which a portion of that property is carried away, it is clear that no rights of a son who is subsequently adopted can affect that portion which is disposed of.

26. This observation must relate to a lawful alienation; recognition of an unlawful alienation is not accorded in the above quotation. As was observed by Lokur J. at p. 368 in I. L. R. (1945) Bom. 353 Ramchander v. Shanker ('45) 32 A. I. R. 1945 Bom. 229 : I. L. R. (1945) Bom. 353 : 221 I. C. 279 (F. B.) in a Full Bench case :

the adopted son is entitled to recover his adoptive father's share in the family property, subject of course to any lawful alienations that might have taken place prior to his adoption.

27. It does not appear the Judicial Committee has given to the observations in 7 M. I. A. 169 Bamundoss v. Mt. Tarinee (1858) 7 M. I. A. 169 : 1 Sar. 616 (P. C.) the application which Dr. Gupta contended they should be accorded, so as to restrict the commencement of an adopted son's right to property to the date of his adoption; it has been held that an after-adopted son is entitled to take, or to recover back, property belonging to the adoptive father, as against a collateral to

whom it had passed on the father's death: vide 46 I. A. 97 *Pratapsingh v. Agar Singhji* ('18) 5 A. I. R. 1918 P. C. 192 : 43 Bom. 778 : 46 I. A. 97 : 50 I. C. 457 (P. C.) and 60 I. A. 242 *Amarendra Mansingh v. Sanatan Singh* ('33) 20 A. I. R. 1933 P. C. 155 : 12 Pat. 642:60 I. A. 242:143 I. C. 441 (P.C.), and also property inherited by a surviving natural son of the adoptive father which had passed to a collateral upon the natural son's death before adoption: vide 70 I. A. 232 *Anant Bhikappa v. Shankar Ramchandra* ('43) 30 A. I. R. 1943 P. C. 196 : I. L. R. (1944) Bom. 116 : I. L. R. (1944) Kar. P. C. 28 : 70 I. A. 232 : 210 I. C. 369 (P. C.). Later, those three authorities will be discussed. At one time it appears to have been thought, more particularly in Bombay, that a coparcenary came to an end upon the death of the last member of the coparcenary when the coparcenary property passed to a collateral who obtained it in his own right; if subsequently, a son were adopted by the widow of a member of the coparcenary, such son was not entitled to and did not acquire any right to the property since, the coparcenary ended before the adaption, there remained no coparcenary property to which he acquired a right to obtain. This view arose out of a decision by the Bombay High Court in 14 Bom. 463 *Chandra v. Gojrabai* ('90) 14 Bom. 463. In that case a Hindu K, had two sons, B and N. B predeceased K leaving a widow with authority to adopt a son, which was not exercised before K's death; when K died N took the property, died and his widow obtained possession of it; after N's death, B's widow adopted son, C, who sued N's widow to recover the property. It was held that at his death N was the full owner of the property as the last survivor of the joint family and it devolved as his own; a subsequent adoption did not divest a person upon whom the inheritance had devolved from a lineal heir of B although if the question had arisen between the adopted son and N, the adopted son would have been entitled to succeed; the adoption could not divest the estate already vested in a collateral in succession to one who had become the owner, although it would have divested any member of the undivided family of which B was a member.

28. In 1918 *Pratapsingh's case* *Pratapsingh v. Agar Singhji* ('18) 5 A. I. R. 1918 P. C. 192 : 43 Bom. 778 : 46 I. A. 97 : 50 I. C. 457 (P. C.) came before the Judicial Committee; there, land was granted out of an impartible family estate to younger sons for jivai (maintenance) which reverted back to the estate upon failure of male descendants of the grantee; the holder died in October 1903 without issue, his widow remained in possession of the jivai lands and adopted a son in March 1904, it was held that the adopted son inherited the lands to the exclusion of a collateral of the adoptive father to whom they would have reverted upon a failure of a male descendant. At pp. 106 and 107 of the report the Board observed:

Now it is an explicit principle of the Hindu law that an adopted son becomes for all purposes the son of his father, and that his rights unless curtailed by express texts, are in every respect the same as those of a natural born son. And a learned authority on Hindu law has explained that the only express text by which the heritable rights of an adopted son are "contracted" refers to the case of his

sharing the heritage with an after-born natural (aurasa) son. "In every other instance the adopted son and the son of the body stand exactly in the same position." Again, it is to be remembered that an adopted son is the continuator of his adoptive father's line exactly as an aurasa son, and that an adoption, so far as the continuity of the line is concerned, has retrospective effect; whenever the adoption may be made there is no hiatus in the continuity of the line.

29. I do not think, as Dr. Gupta contended, that the reference to continuity of the adoptive father's line restricts the meaning and effect of the earlier part of the quotation but it is one example of the meaning and effect of that part; if the Judicial Committee had considered there was such limitation, the jivai lands irretrievably must have reverted back to the impartible family estate upon the death of the adoptive father, before the adoption was made. In 1933 Amarendra's case *Amarendra Mansingh v. Sanatan Singh* ("33) 20 A. I. R. 1933 P. C. 155 : 12 Pat. 642:60 I. A. 242:143 I. C. 441 (P.C.) was decided by the Judicial Committee; there the holder of land, devolving by the rule of primogeniture died leaving a natural born son, who inherited the land, and also a widow; thereafter the natural son died unmarried; later, the widow (mother of the deceased natural born son) adopted a son; it was held that the adoption was valid and a claim by a collateral to the land, as against the adopted son, failed. At page 248 of the report, it was observed :

he (an adopted son), in the absence of an aurasa or natural born son, is clothed with all the attributes of a son, and is from the date of his adoption regarded as having been born in his adoptive family.

30. Before the factum of adoption, the person adopted has no rights in, and has no connection with, the family into which subsequently he is adopted and, so far as he is regarded as having been adopted, he can be so considered after, but not before, adoption. In my view, the latter part of the quotation does not in any way qualify the effect of the observations in *I. A. Sup. Vol. 47 Jatindra Mohan Tagore v. Ganendra Mohan Tagore* ("72) 9 Beng. L. R. 377 : *I. A. Sup. Vol. 47 : 2 Suther* 692 : 3 Sar. 85 (P.C.) and does not mean that an adoption has effect only from the date when it takes place. Some further observations in 60 *I. A. 242 Amarendra Mansingh v. Sanatan Singh* ("33) 20 A. I. R. 1933 P. C. 155 : 12 Pat. 642:60 I. A. 242:143 I. C. 441 (P.C.) at page 252, require reference :

It is clear under the decisions of the Board that the vesting in another coparcener does not put an end to the power of adoption;" at p. 255, "the vesting of the property on the death of the last holder in some one other than the adopting widow, be it either another coparcener of the joint family or an outsider claiming by reverter or, their Lordships would add, by inheritance, cannot be in itself the test of the continuance or extension of the power of adoption"; and at p. 249, "nor do the authoritative texts appear to limit the exercise of the power by any consideration of property.

31. In 1935 the Judicial Committee considered an appeal from the Bombay High

Court in 62 I. A. 161 *Vijaysingji v. Shivsingji* ("35) 22 A. I. R. 1935 P. C. 95: 59 Bom. 360: 62 I. A. 161: 155 I. C. 493 (P. C.). In that case a natural born son succeeded upon his father's death to an impartible estate; later he was adopted into another family and, later still, the father's widow adopted a son; it was held, reversing the High Court, that the adoption was valid and could not be impeached simply because it would defeat the estate which had vested in a collateral. 14 Bom. 463 *Chandra v. Gojrabai* ("90) 14 Bom. 463 was not expressly overruled by either of these three decisions of the Judicial Committee. Subsequent to 14 Bom. 463 *Chandra v. Gojrabai* ("90) 14 Bom. 463 it appears to have been considered, particularly in Bombay, it had decided that an adoption, after the death of the last member of a coparcenary, was invalid and, further, since it was not expressly overruled by 46 I. A. 97 *Pratapsingh v. Agar Singhji* ("18) 5 A. I. R. 1918 P. C. 192 : 43 Bom. 778 : 46 I. A. 97 : 50 I. C. 457 (P. C.), 60 I. A. 242 *Amarendra Mansingh v. Sanatan Singh* ("33) 20 A. I. R. 1933 P. C. 155 : 12 Pat. 642:60 I. A. 242:143 I. C. 441 (P.C.) and 62 I. A. 161 *Vijaysingji v. Shivsingji* ("35) 22 A. I. R. 1935 P. C. 95: 59 Bom. 360: 62 I. A. 161: 155 I. C. 493 (P. C.) that 14 Bom. 463 *Chandra v. Gojrabai* ("90) 14 Bom. 463 was still good law. In I. L. R. (1937) Bom. 508 *Balu Sakham v. Lahoo Sambhaji* ("37) 24 A. I. R. 1937 Bom. 279 : I. L. R. (1937) Bom. 508 : 170 I. C. 393 (F. B.) the last survivor of a coparcenary died leaving a widow (who subsequently remarried whereupon all her interest in her late husband's family became extinguished) and a sister who claimed to have inherited the coparcenary property and which she sold to a stranger; thereafter the widow of a pre-deceased coparcener adopted a son, who claimed the property. *Beaumont C. J.* and *Wadia J.* held the adoption was valid but it did not have the effect of reviving the coparcenary, which had terminated on the death of the last member, and divesting the property from the heir of the last surviving coparcener; *Rangnekar J.* held the adoption was invalid, the adopted son did not become a coparcener as the coparcenary property, as such, was no longer in existence and the holder, to whom it had gone, was not divested of it. In 41 Bom. L. R. 760 *Hirachand v. Raoji* ("39) 26 A. I. R. 1939 Bom. 377 : I. L. R. (1939) Bom. 512 : 184 I. C. 876 : 41 Bom. L. R. 760, *Rangnekar J.* held that an adoption was invalid when it took place subsequent to partition between the survivors of a coparcenary. In 41 Bom. L. R. 1300 *Irappa v. Rachayya* ("40) 27 A. I. R. 1940 Bom. 118 : I. L. R. (1940) Bom. 42 : 187 I. C. 504 : 41 Bom. L. R. 1300 *Wadia and Wassoodew JJ.* followed the majority decision in I. L. R. (1937) Bom. 508 *Balu Sakham v. Lahoo Sambhaji* ("37) 24 A. I. R. 1937 Bom. 279 : I. L. R. (1937) Bom. 508 : 170 I. C. 393 (F. B.). The view of the Bombay High Court was not accepted by the Nagpur High Court in I. L. R. (1941) Nag. 707 *Bajirao v. Ram Krishna* ("42) 29 A. I. R. 1942 Nag. 19: I. L. R. (1941) Nag. 707:198 I. C. 581 where a contrary opinion is expressed.

32. The position was set at rest in 1943 by the decision of the Privy Council in 70 I. A. 232 *Anant Bhikappa v. Shankar Ramchandra* ("43) 30 A. I. R. 1943 P. C. 196 : I. L. R. (1944) Bom. 116 : I. L. R. (1944) Kar. P. C. 28 : 70 I. A. 232 : 210

I. C. 369 (P. C.) which expressly disapproved 14 Bom. 463 Chandra v. Gojrabai ('90) 14 Bom. 463 and I. L. R. (1937) Bom. 508 Balu Sakharam v. Lahoo Sambhaji ('37) 24 A. I. R. 1937 Bom. 279 : I. L. R. (1937) Bom. 508 : 170 I. C. 393 (F. B.). There, one of three sons separated from his father and two brothers, taking two plots of land as his share of the family property; subsequently the father and one of the two other brothers died and the surviving brother succeeded to all the family property (excluding the two plots which no longer formed part of it); upon the death of the surviving brother he was survived by his natural born son and a widow; the two plots later devolved upon that son as the nearest reversioner to his uncle (the separated of the three brothers) upon the latter's death; the natural born son died unmarried and a collateral obtained possession of the family property and the two plots; later, the widow (mother of the natural born son) adopted a son who claimed both lots of property from the collateral; it was held he was entitled to the two properties, namely, the family property to which the natural-born son had succeeded on the death of the father and, also the two plots which that son had inherited from his uncle but which he had not obtained from or through his father, in spite of both lots of property having passed to a collateral upon the death of the natural-born son before the adoption. At p. 243 their Lordships observed:

If the effect of an adoption by the mother of the last male owner is to take his estate out of the hands of a collateral of his who is more remote than a natural brother would have been, and to constitute the adopted son the next heir of the last male owner, no distinction can in this respect be drawn, between property which had come to the last male owner from his father and any other property which he may have acquired. Keshav's (natural son) separate watan property devolved not on his mother, who would be his heir at the general law, but on the nearest male in the line of heirs, and if the appellant's adoption as son to Bhikama (adoptive father) puts him in that position, his right to succeed cannot be limited to such watan property as Keshav derived from Bhikapa. On this ground the appellant's suit succeeds as regards the two parcels of land which Keshav inherited from Narayan (the separated uncle).

33. There is a recognised principle of Hindu law, to which reference is made in 46 I. A. 97 Pratapsingh v. Agar Singhji ('18) 5 A. I. R. 1918 P. C. 192 : 43 Bom. 778 : 46 I. A. 97 : 50 I. C. 457 (P. C.), that the share in property of a son adopted by the father is less than the share of a natural son who is born subsequent to the adoption. This principle cannot arise with respect to an after-adopted son, since such adoption can be made by a widow only in the absence of a natural born son surviving the father or after the death of a surviving natural born son. The sole limitation upon an after-adopted son's right to property belonging to the father or to the family or to another male member of the family into which he is adopted, is stated in 12 I. A. 137 Bhubaneswari Debi v. Nilkomal Lahiri ('86) 12 Cal. 18 : 12 I. A. 137 : 4 Sar. 651 (P. C.) where the Judicial Committee at p. 141 observed that:

According to the law as laid down in the decided cases, an adoption after the death of a collateral does not entitle the adopted son to come in as heir of the collateral.

34. No decision by the Privy Council was cited in which any other limitation has been laid down or recognised. I have previously explained that the reference in 46 I. A. 97 *Pratapsingh v. Agar Singhji* ("18) 5 A. I. R. 1918 P. C. 192 : 43 Bom. 778 : 46 I. A. 97 : 50 I. C. 457 (P. C.) to the adopted son being a continuator of the adoptive father's line does not limit to that purpose the observation, in that case, that an adopted son becomes for all purposes the son of his father and that his rights are in every respect the same as those of a natural born son, unless curtailed by express texts. The only express text, which contracts his heritable rights, relates to his sharing the heritage with an after-born natural son. Also, with respect to 60 I. A. 242 *Amarendra Mansingh v. Sanatan Singh* ("33) 20 A. I. R. 1933 P. C. 155 : 12 Pat. 642:60 I. A. 242:143 I. C. 441 (P.C.), that an adopted son is not regarded as having been born into his adoptive family as from the date of adoption but upon adoption he is regarded as one who was born in the family. At pp. 241 and 242 in 70 I. A. 232 *Anant Bhikappa v. Shankar Ramchandra* ("43) 30 A. I. R. 1943 P. C. 196 : I. L. R. (1944) Bom. 116 : I. L. R. (1944) Kar. P. C. 28 : 70 I. A. 232 : 210 I. C. 369 (P. C.) the Judicial Committee observed that neither that case nor 60 I. A. 242 *Amarendra Mansingh v. Sanatan Singh* ("33) 20 A. I. R. 1933 P. C. 155 : 12 Pat. 642:60 I. A. 242:143 I. C. 441 (P.C.) brought into question the rule of law considered in 12 I. A. 137 *Bhubaneswari Debi v. Nilkomal Lahiri* ("86) 12 Cal. 18 : 12 I. A. 137 : 4 Sar. 651 (P. C.) and stated by the Board; the above quotation from 12 I. A. 137 *Bhubaneswari Debi v. Nilkomal Lahiri* ("86) 12 Cal. 18 : 12 I. A. 137 : 4 Sar. 651 (P. C.) was cited and then it was observed "Their Lordships say nothing as to these decisions" (12 I. A. 137 *Bhubaneswari Debi v. Nilkomal Lahiri* ("86) 12 Cal. 18 : 12 I. A. 137 : 4 Sar. 651 (P. C.) and another case) "which appear to apply only to cases of inheritance and which do not seem to have proceeded on the footing that the adoptions were invalid." One more case requires reference, 23 Pat. 763 : A. I. R. 1945 Pat. 211 *Sri Chandra Choor Deo and Others Vs. Bibhuti Bhushan Deva*, , decided in 1940, before 70 I. A. 232 *Anant Bhikappa v. Shankar Ramchandra* ("43) 30 A. I. R. 1943 P. C. 196 : I. L. R. (1944) Bom. 116 : I. L. R. (1944) Kar. P. C. 28 : 70 I. A. 232 : 210 I. C. 369 (P. C.) was before the Judicial Committee, but not reported until 1945, five years later. The judgments review a large number of decisions upon the subject of adoption including I. A. Sup. Vol. 47 *Jatindra Mohan Tagore v. Ganendra Mohan Tagore* ("72) 9 Beng. L. R. 377 : I. A. Sup. Vol. 47 : 2 Suther 692 : 3 Sar. 85 (P.C.), 46 I. A. 97 *Pratapsingh v. Agar Singhji* ("18) 5 A. I. R. 1918 P. C. 192 : 43 Bom. 778 : 46 I. A. 97 : 50 I. C. 457 (P. C.), 60 I. A. 242 *Amarendra Mansingh v. Sanatan Singh* ("33) 20 A. I. R. 1933 P. C. 155 : 12 Pat. 642:60 I. A. 242:143 I. C. 441 (P.C.) and 62 I. A. 161 *Vijaysingji v. Shivsingji* ("35) 22 A. I. R. 1935 P. C. 95: 59 Bom. 360: 62 I. A. 161: 155 I. C. 493 (P. C.) in the Privy Council and I. L. R. (1937) Bom. 508 *Balu Sakharam v. Lahoo Sambhaji* ("37) 24 A. I. R. 1937 Bom. 279 : I. L. R. (1937)

Bom. 508 : 170 I. C. 393 (F. B.) in the Bombay High Court, and consider the doctrine of relation back. The view was expressed that the fiction that an after-adopted son becomes a son at a date prior to adoption was for the purpose of continuing the line and to confer spiritual benefit and it enabled the son to take the property which the father possessed at his death and, if that property had meanwhile passed by inheritance to some one else, that person would be divested; it was stated, however, that there was no warrant for extending the fiction to make him a relative of some other person upon whom no spiritual benefit would be conferred by the adoption; the doctrine of relation back was founded purely on the spiritual theory of adoption and had nothing to do with vesting or divesting of property, except incidentally. Dr. Gupta placed considerable reliance upon that part which refers to continuing the line.

35. Now that the Judicial Committee in 70 I. A. 232 *Anant Bhikappa v. Shankar Ramchandra* ("43) 30 A. I. R. 1943 P. C. 196 : I. L. R. (1944) Bom. 116 : I. L. R. (1944) Kar. P. C. 28 : 70 I. A. 232 : 210 I. C. 369 (P. C.) has disapproved 14 Bom. 463 *Chandra v. Gojrabai* ("90) 14 Bom. 463 and I. L. R. (1937) Bom. 508 *Balu Sakharam v. Lahoo Sambhaji* ("37) 24 A. I. R. 1937 Bom. 279 : I. L. R. (1937) Bom. 508 : 170 I. C. 393 (F. B.), they and those decisions which have followed, or are in accordance with them, can be ignored. If an after-adopted son's rights to property are not retrospective but commence at the date of adoption and do not relate back to his adoptive father's death which it was argued, was laid down in 7 M. I. A. 169 *Bamundoss v. Mt. Tarinee* (1858) 7 M. I. A. 169 : 1 Sar. 616 (P. C.), 4 Mad. 160 *Lakshmana Rau v. Lakshmi Ammal* ("82) 4 Mad. 160 and 21 Mad. 10 *Ganpati v. Savithriammal* ("98) 21 Mad. 10 and in *Mookerjee J.*'s observations in 9 C. W. N. 795 *Harek Chand v. Bejoy Chand* ("05) 9 C. W. N. 795 and which, it was urged, should be followed, an after-adopted son would not have been entitled to property belonging to the adoptive father or to his natural born son which had passed to or was claimed by a collateral in 46 I. A. 97 *Pratapsingh v. Agar Singhji* ("18) 5 A. I. R. 1918 P. C. 192 : 43 Bom. 778 : 46 I. A. 97 : 50 I. C. 457 (P. C.), 60 I. A. 242 *Amarendra Mansingh v. Sanatan Singh* ("33) 20 A. I. R. 1933 P. C. 155 : 12 Pat. 642:60 I. A. 242:143 I. C. 441 (P.C.), 62 I. A. 161 *Vijaysingji v. Shivsingji* ("35) 22 A. I. R. 1935 P. C. 95: 59 Bom. 360: 62 I. A. 161: 155 I. C. 493 (P. C.) and 70 I. A. 232 *Anant Bhikappa v. Shankar Ramchandra* ("43) 30 A. I. R. 1943 P. C. 196 : I. L. R. (1944) Bom. 116 : I. L. R. (1944) Kar. P. C. 28 : 70 I. A. 232 : 210 I. C. 369 (P. C.). Those four decisions by the Judicial Committee show that the doctrine of relation back from the date of adoption to the adoptive father's death must have consequence and effects other than for the purpose of continuing the adoptive father's line.

36. It is now convenient to collect together the more salient portions of the observations by the Board, with respect to an adopted son, bearing in mind what previously has been stated with regard to their meaning.

Tagore's case (1882) *Jatindra Mohan Tagore v. Ganendra Mohan Tagore* ("72) 9 Beng. L. R. 377 : I. A. Sup. Vol. 47 : 2 Suther 692 : 3 Sar. 85 (P.C.). An adopted

son "whether adopted by the father himself in his lifetime or by the person to whom he has given the power of adoption after his death.... of one to stand in the place of a child actually begotten by the father, in contemplation of law such child is begotten by the father.... may be provided for as a person whom the law recognises as in existence at the death of the testator (father) or to whom, by way of exception, not by way of rule, it gives the capacity of inheriting or otherwise taking from the testator (father), as if he had existed at the time of the testator's (father's) death having been begotten by him. Apart from this exceptional case which seems to prove the rule, the law is plain that the donee must be a person in existence capable of taking at the time the gift takes effect.

37. Pratapsingh's case (1918) Pratapsingh v. Agar Singhji ("18) 5 A. I. R. 1918 P. C. 192 : 43 Bom. 778 : 46 I. A. 97 : 50 I. C. 457 (P. C.).-

An adopted son becomes, for all purposes, the son of his father and that his rights.... are in every respect the same as those of a natural born son.... the only express text by which the heritable rights of an adopted son are "contracted" refers to the case of his sharing the heritage with an after-born natural (aurasa) son. "In every other instance the adopted son and the son of the body, stand exactly in the same position".

38. Amarendra's case (1933) Anant Bhikappa v. Shankar Ramchandra ("43) 30 A. I. R. 1943 P. C. 196 : I. L. R. (1944) Bom. 116 : I. L. R. (1944) Kar. P. C. 28 : 70 I. A. 232 : 210 I. C. 369 (P. C.).

An adopted son -

is clothed with all the attributes of a son and is from the date of his adoption regarded as having been born in his adoptive family.

39. The observations were delivered in I. A. Sup. Vol. 47 Jatindra Mohan Tagore v. Ganendra Mohan Tagore ("72) 9 Beng. L. R. 377 : I. A. Sup. Vol. 47 : 2 Suther 692 : 3 Sar. 85 (P.C.) when a Hindu could not make a gift in favour of an unborn person; but the principles enunciated in the observation are in no way affected by the subsequent change in the law. The combined effect of the pronouncements in those three cases is that an adopted son, whether adopted by the father in his lifetime or adopted to him after his death, becomes the son of the adoptive father for all purposes; is clothed with all the attributes of a son; in contemplation of law, he is begotten by the father; he stands in the place of a begotten son; he may be provided for as a person whom the law recognises as in existence at the death of the father; and is one to whom the law gives the capacity of inheriting or otherwise taking from the father as if he had existed at the time of the father's death. The concluding part of the observations in I. A. Sup. Vol. 47 Jatindra Mohan Tagore v. Ganendra Mohan Tagore ("72) 9 Beng. L. R. 377 : I. A. Sup. Vol. 47 : 2 Suther 692 : 3 Sar. 85 (P.C.) that, with the exception of an adopted son, the donee must be a person in existence capable of taking at the time the gift takes effect, was stated when a gift could not be made to an unborn person, and it emphasises the unique position at law with respect

to an adopted son's right of inheritance. The sole limitation upon that right is expressed in 12 I. A. 137 *Bhubaneswari Debi v. Nilkomal Lahiri* ('86) 12 Cal. 18 : 12 I. A. 137 : 4 Sar. 651 (P. C.), repeated in 70 I. A. 232 *Anant Bhikappa v. Shankar Ramchandra* ('43) 30 A. I. R. 1943 P. C. 196 : I. L. R. (1944) Bom. 116 : I. L. R. (1944) Kar. P. C. 28 : 70 I. A. 232 : 210 I. C. 369 (P. C.), namely, the adoption does not divest a collateral's heir of property inherited from a deceased collateral before the adoption was made. This limitation does not arise in the present case. The rights of inheritance of an adopted son can arise only because, at law, he is deemed to have been in existence at the father's death and save as above, his position, in every respect, including right to property, is identical with that of a natural born son begotten by the father. Now returning to the facts of the present case. An after-adopted son is a member of a class to whom expressly the bequest is given in the testator's will and he is one of the beneficiaries of the bequest. The sole question is whether he is in existence at a time when the bequest must vest in order to perfect the gift in his favour. Section 114 requires vesting to take place within the period covered by the lifetime of a person "living" at a testator's death and the minority of the person to whom the thing bequeathed will belong and who shall be "in existence" at the expiration of the lifetime of the "living" person. The section does not require the beneficiary to be "living" but "in existence" at the prescribed time. By the use of different wording, the section makes a distinction; if it had required the beneficiary to be "living," as opposed to "in existence," the section could and would have so provided. "In existence" must mean existence in law and be either in fact or in contemplation of law. I am unable to find any other reason for the difference in the language. It is beyond dispute that a child *en ventre sa mere* at his father's death is presumed to be in existence at that time. In I. L. R. (1945) Bom. 353 *Ramchander v. Shanker* ('45) 32 A. I. R. 1945 Bom. 229 : I. L. R. (1945) Bom. 353 : 221 I. C. 279 (F. B.) it was observed at p. 390: "The texts have clearly laid down the principle and there is no reason why an adopted son, whose adoption is deemed to date back to the death of his adoptive father, should not be treated on a par with a posthumous son."

40. The principle which emerges from the several decisions by the Judicial Committee which have been discussed is that an after-adopted son, for all purposes, including succession to and inheritance of property, is deemed to be in existence at the time of his adoptive father's death irrespective of the period intervening between the death of the father and the adoption by his widow and agreeing, as I respectfully do, with the observations in I. L. R. (1945) Bom. 353 *Ramchander v. Shanker* ('45) 32 A. I. R. 1945 Bom. 229 : I. L. R. (1945) Bom. 353 : 221 I. C. 279 (F. B.), in my view he is in no less a position, at law, as a posthumous son. It follows that a son adopted by any widow of Aniruddha, properly authorised, no matter how long it may take place after Aniruddha's death and even when such widow was not alive at the testator's death, the adopted son becomes one of the legatees of the bequest and his interest will vest within the statutory period prescribed in S. 114 since he will be "in

existence", as the section requires, at the date of Aniruddha's death. For the reasons which have been given, in my opinion the conclusions to which Das J., came, and his answers to the questions raised in the originating summons, are correct and I would dismiss this appeal. The many difficulties and problems arising in the construction of the will and the necessity for it to be construed justify an order that the costs of all parties as between attorney and client should come out of the estate. Certified for two counsel where so engaged. I desire to express appreciation to all learned counsel for their able and helpful arguments.

Ormond, J.

41. I agree. The decision in this appeal on this originating summons has to be arrived at firstly on the construction we place on the language of the will and secondly on the view we take of the law to be deduced from the Succession Act together, in a certain contingency, with a consideration of Hindu law. For convenience, therefore, I will first collectively state here at the outset the view I take in relation to various points arising on the construction of the will. It was argued that the bequest in cl. 9 of the residue was itself merely conditional. In my view, this is not so. I hold the first sentence in cl. 9 effects a complete transfer of ownership with a vesting as soon as the testator's son's son (or sons) is born or if adopted is. qualified to take a vested interest. This view is further supported by the use of the words "made over" in the later part of cl. 9. In my view the rest of cl. 9 as also cl. 10 amounts to a provision only for postponement of distribution and the provision there contained does not affect transfer of legal ownership in the residue, which has been made fully effective in the first sentence. It follows then from this that, if, (a) an only son of the appellant died before 21, or, (b) if there were several sons of the appellant and the youngest of them died before 21, or, (c) if there were several sons of the appellant and one of them (even if an adult of any age) died before the time for distribution had arrived, his share would go by inheritance to his heirs.

42. The phrase "completing the age of 21 years" means in my view "living till the age of 21 years." It appears in cl. 9 the phrase is used interchangeably with the phrase "attains the age of 21 years." It may be noted in the case of there being only one son of the appellant as provided for in the second sentence of cl. 9 the phrase "completing the age of 21 years", cannot clearly, I think, refer merely to a measure of time taken as 21 years after the date of his birth, for in that event there can be no distribution to him (on any process of "making over") if he were dead. The words must then have the same meaning where there are more sons of the appellant than one as they do in the case where there is only one son. This seems conclusively to me to show that the words cannot be a mere measure of time from the date of birth irrespective of whether the person is alive or dead. The expression "youngest" means in my view the youngest alive for the time being : not the last-born. I come to this conclusion because otherwise where there were more sons than one and the last-born died before 21, there would be no distribution at all. That cannot be the contention of a clause particularly

concerned with the method of distribution. The construction taking "the youngest" to mean the last-born would also entail this: The distribution might become barred by the death of the last-born son before 21, and yet might be revived by the birth of a later son and his survival to 21. I do not consider that can be said to be the intention of the clause in relation to distribution of the estate. In cl. 11 the words "or his wife" mean, I agree, adopted either by Aniruddha, the appellant himself, (that is necessarily in his lifetime) or by his wife Sm. Nivanani (necessarily after the appellant's death) or by any subsequent wife of the appellant, which would also be after the appellant's death.

43. Now the two main objections raised on the originating summons to the gift in cl. 9 were, firstly; that the gift was bad by reason of S. 113, and secondly, that it was bad by reason of S. 114. For a consideration of the applicability of S. 113 two further matters relating to the construction of the will need be considered. These are not matters arising precisely as to the meaning of the language of the will but are dependent rather on the general effect of the will. It is necessary to see whether the gift made in cl. 9 was "subject to a prior bequest" or not, and secondly whether the gift made in cl. 9 of the residue was "the whole remaining interest of the testator;" for these two conditions have to arise before S. 113 can apply. As to whether the gift in cl. 9 was the subject of a prior bequest I agree with the view already expressed by my learned brother that this gift was subject to the prior gift in cls. 5 and 7. In this to a slight extent we appear to be differing from the view taken by Das J. At the top of p. 31 of the printed paper book he says: "In my opinion, the provisions of cls. 5 and 11 constitute prior bequests to which the later bequest in cl. 9 is subject." I agree with the view expressed by my learned brother that the bequest in cl. 11 is not a prior bequest to which the gift in cl. 9 is subject. For the position of a son born or adopted in the lifetime of the testator it is clear that cl. 11 never comes into operation; for the position of a son adopted after the lifetime of the testator it appears to me to be more correct to say that the gift in cl. 9 is not subject in any respect to the gift in cl. 11, since the moment the son is adopted he attains the rights given to him in cl. 9 to the full extent to which they are given to him and in no manner dependent on cl. 11. It is true that in his case for a prior period of time cl. 11 may have been in operation, but that does not necessarily entail, I should say, that cl. 9 is therefore subject to cl. 11. Apart from this there is no difference in the general conclusion arrived at on this point from that of Das J. that the gift in cl. 9 of the residue was subject to a prior bequest. On the question whether the whole remaining interest of the testator is given by cl. 9 I fully agree with the view and the reasons stated by my learned brother as also the view and the reasons given by Das J. stated in the paper book from the bottom of p. 31 to the end of the first paragraph of p. 32. In this respect this point is one for which the decision follows automatically from the view of the construction of the first sentence of cl. 9 as to the meaning of that gift as to the residue, to which I have already referred; for if the gift of the residue in the first sentence of cl. 9 is a complete gift, as I have already said in my view it is, it automatically follows that there is

no remaining interest left over of the testator. It cannot be said then that the gift in cl. 9 is bad by reason of S. 113.

44. In regard to the question whether the gift in cl. 9 is bad by reason of S. 114, the position, as I see it, is this: The gift in cl. 9 of the residue is clearly a gift to a class, that is to say, to the sons of the appellant. He (Aniruddha) was a "person living at the testator's death" referred to in S. 114. There were seven possible categories of sons of Aniruddha : (1) a natural born son of Aniruddha and his wife Sm. Nivanani born in the lifetime of Aniruddha; (2) a natural born son of Aniruddha and another wife other than Sm. Nivanani born in the lifetime of Aniruddha; (3) a natural posthumous son born after the death of Aniruddha of his wife Sm. Nivanani; (4) a natural posthumous son born after the death of Aniruddha of another wife; (5) an adopted son adopted by Aniruddha to himself, that is to say, in his lifetime; (6) a son adopted to Aniruddha by his widow Sm. Nivanani-that is necessarily after his death; and (7) a son adopted to Aniruddha by another widow, a wife by a later marriage other than Sm. Nivanani; that is also after his death. The posthumous son though born in fact after his death will be treated in law for any rule of perpetuities as if born in Aniruddha's lifetime. In the 6th and 7th categories, the question might arise, subject to the view taken of the effect of adoption under the Hindu law in regard to the time of vesting, whether the gift would be bad for remoteness and would offend against S. 114. It is to be noted that the adoption which has in fact actually been effected did not fall within either of those doubtful categories. But if the possibilities at the date of the testator's death have to be looked at the last two categories might be said, subject to the view taken of the Hindu law, to offend against S. 114. Would that fact, even if the view of Hindu law was such that the vesting took place not during the lifetime of Aniruddha, have the effect of making the whole gift to the whole class, consisting of the seven categories, bad? Whatever may have been the law before 1929, now, since the amendment of S. 115 in 1929, it is expressly provided that the bequest shall be "void in regard to those persons only and not in regard to whole class"; "those persons" being persons "with regard to whom the bequest is inoperative by reason of the provisions of S. 113 or S. 114." In view of the section (S. 115) as amended it must follow, I think, that for reasons at least of all the first five categories the gift will be good, whether it is bad or not for persons falling under the 6th or 7th categories. In this respect on the question of the applicability of S. 115, I venture to agree with the views stated by my learned brother in preference to the view expressed by Das J. At page 23 line 30 of his judgment he observed:

If there be a possibility that the vesting may be delayed beyond that limit the bequest is void under this section (that is S. 114).

45. At page 29, line 26, he observed:

The hardship (that is to say the hardship of the rule against perpetuities under S. 114) is to a certain extent mitigated by the amended S. 115 where the bequest is to a class. The illustrations to S. 115, however, clearly indicate that the

members of the class the bequest; in whose favour is saved by S. 115 must be in existence at the date of the testator's death. It has been recently held by the Judicial Committee in 71 I. A. 93 *Sopher v. Administrator-General of Bengal* ("44) 31 AIR 1944 P. C. 67 : I. L. R. (1944) Kar. P. C. 238 : 71 I. A. 93 : 216 I. C. 53 (P.C.) that the sections of the Succession Act should be construed in the light of the illustrations. Reading S. 115 in the light of the illustrations thereto it appears to me that in the case of a bequest to a class the validity or otherwise of the bequest in respect of any member of that class has to be decided with reference to the date of the testator's death. I, therefore, agree with the learned Advocate-General that the defendant Arabinda not having been adopted at the testator's death he cannot claim the benefit of S. 115.

46. For the reasons already amply stated by my learned brother, I do not consider that the application of S. 115 or its saving effect is limited only to a class of persons in existence at the testator's death. From what I have said it follows on the view we have taken, the effect of S. 115 clearly is, I think, to leave the gift in cl. 9, valid for all the first five categories irrespective of any consideration of the effect of Hindu law of adoption. From what I have said, it follows that it is only if we are not correct in the view we take of the application of S. 115, that any question need arise as to the date when the interest of a son adopted after the death of Aniruddha vests in the estate which he is to inherit. That question depends on the view we take of the principle of Hindu law. As to this also I fully agree with what has been stated by my learned brother in the judgment which he has today delivered. Having had the benefit of having read before its delivery the written judgment of my learned brother I would only add that I fully agree also with it as to the additional matters there dealt with.