
(1893) 07 CAL CK 0006
In the Calcutta High Court

Chukkun Lal Roy and Another

APPELLANT

Vs

Lolit Mohan Roy and Others

RESPONDENT

Date of Decision : 07-07-1893

Acts Referred:

Citation : (1893) ILR (Cal) 906

Hon'ble Judges : W. Comer Petheram, C.J.; Ghose, J

Bench : Division Bench

Judgement

Ghose, J.—This appeal arises out of a suit for the construction of the will and codicil of the late Saroda Persad Roy of Chuckdighi in the district of Burdwan.

2. The plaintiffs, Chukkun Lal Roy and Shoshi Bhusan Roy, are the nearest sapinda agnates of the deceased, and as such are his legal heirs.

3. The will bears date the 2nd Assin 1272 (1865) and the codicil the 6th Cheyt 1274 (1868). At the date of the will the testator had a wife, Rajeshury Debia, four sisters, Sukhoda, Biroda, Khiroda, and Kuloda, and three nephews, Lolit Mohan, defendant No. 1, Bepin Mohan, defendant No. 2 (sons of Khiroda), and Priambada, defendant No. 3 (son of Biroda), as also an aunt, Kadambini, all of whom were living with him as members of his family. He had had no son or daughter born to him, and though he was then only 33 years old, he thought it wise to execute the will in question. About two years afterwards, he executed the codicil and died on the day on which it was executed.

4. Under the will, the defendant No. 1, Lolit Mohan, undoubtedly took an estate, whatever the character of that estate might be. He was, when Saroda Pershad died, a minor, and his estate was managed for a time by Rajeshury Debia, the widow of the testator, and one Jogendra Nath Roy, who were appointed executors under the will; and subsequently it was, by reason of disputes between the two executors, taken charge of by the Court of Wards; and they continued to be in such charge until Lolit Mohan arrived at majority. In the meantime, viz., while the Court of Wards held the estate, a suit was instituted in the year 1875 by

Rajeshury Debia against Lolit Mohan, as represented by the Court of Wards, claiming the estate, upon the ground that the will and codicil were untrue, and that as heiress of her husband she was entitled to succeed. The said documents were, however, found to be genuine by the Court below, and by this Court on appeal; and the result was that Rajeshury's suit was dismissed

5. Rajeshury died in February 1888; and the present suit was commenced in February of the following year. The cause of action is stated to have arisen on the day Rajeshury died.

6. In their plaint, the plaintiffs say that under the will no disposition of the corpus of the estate has been made; that under it neither Lolit Mohan, nor any other person, has acquired an absolute right to the estate; and that, subject to the bequests for religious and charitable purposes and such other bequests (if any) in favour of Lolit Mohan and other relatives of the deceased, as may be declared valid, the whole estate is vested in the plaintiffs as the heirs-at-law. And they pray that the will and codicil be construed, and the rights and interests of Lolit Mohan and of all other parties, if any, respectively, under the will, be declared; that subject to such dispositions as may be determined by the Court to have been validly made by the will, the rights and interests of the plaintiffs as heirs under the Mitakshara Law of inheritance (by which the parties are governed) be declared; and further, that all necessary declarations and directions may be made, and such reliefs be granted as under the circumstances of the case may seem fit.

7. The suit is defended by Lolit Mohan upon the ground that, according to the true construction of the will and codicil, the testator has conferred on him an absolute heritable and alienable estate; that at all events the testator has conferred on him an absolute interest defeasible only in the event of his dying without leaving male issue, and that such defeasance is in favour of persons other than the plaintiffs; and further that, there being an ultimate bequest in favour of the Secretary of State, the heirs of the testator are excluded from taking any interest in the estate. The defendant also pleads that the plaintiffs are not entitled to maintain the suit, and that it is barred both by *res judicata* and the Law of Limitation.

8. The defendant No. 2, Bepin Mohan Roy, in his written statement, supports Lolit Mohan in the defence raised by him. The other defendant Priambada Roy, while denying the plaintiff's right, suggests that the suit is the result of a collusion between the plaintiff Chukkun Lall and Lolit Mohan, two of the sons of the said plaintiff having been married to two of the daughters of Lolit Mohan. As regards this suggestion, we may at once say that it is entirely without any foundation, although Lolit Mohan has no son yet born to him, and it may be possible for the two daughters of Lolit Mohan, married to Chukkun Lall's sons, to be benefited in the event of the plaintiffs succeeding in this case.

9. The District Judge of Hooghly, before whom the case was tried, has dismissed

the suit, being of opinion that Lolit Mohan has acquired under the will and codicil an absolute estate, subject only to the bequests made in the will and the charge upon the Government Promissory Notes in favour of the charities, etc., as provided in paragraph 1 of the will.

10. Against this judgment, the plaintiffs have appealed to this Court, and the defendant Lolit Mohan has, through his Counsel, objected to the charge upon the Government Promissory Notes, as declared by the Court below.

11. It may, perhaps, be convenient to dispose of, in the first place, two preliminary questions which have been raised before us by Mr. Woodroffe for the respondent Lolit Mohan. One is as to *res judicata* and the other as to limitation; both of which questions were decided in favour of the plaintiffs by the Court below.

12. As regards the question of *res judicata* the matter stands thus : As already mentioned, Rajeshury Debia, the widow of Saroda Pershad, brought a suit against Lolit Mohan for possession of the estate of her husband as his heiress-at-law, impugning the will and codicil as untrue. One of the issues that were raised in the case was, "were the will, dated the 2nd Ashin 1272, and the codicil, dated the 6th Chyte 1274, duly made and executed by the late Saroda Persad Roy, and are they good and valid in law?" The Court of First Instance held the two deeds to be genuine; and expressed an opinion that Lolit was at least entitled to a life estate, and that the widow had no right to present possession of Saroda Persad's property, and it accordingly dismissed the suit. The Sub-Judge remarked that the suit was not one for the construction of the will and codicil, and he practically declined to enter into the construction of those deeds, On appeal, a Divisional Bench of this Court agreed with the Court below in holding that the said deeds were genuine, and dismissed the appeal of Rajeshury, with but this declaration in her favour, that she is entitled to the annuity and all other rights and property bequeathed to her under the will and codicil. No question was discussed or decided as to the construction of the will or codicil.

13. The learned Counsel, Mr. Woodroffe, relying upon the decisions of the Judicial Committee in the Sivaganga case [9 Moo. I.A. 539 (603), *Amirtolal Base v. Rajoneekant Mitter* 15 B.L.R. 10 : L.R. 2 IndAp 113 : 23 W.R. 214, and a Full Bench decision of this Court, *Nobin Chunder Chuckerbutty v. Guru Pershad Doss* B.L.R. Sup. Vol. 1008 : 9 W.R. 505, has contended that inasmuch as Rajeshury, as the widow of Saroda Pershad Roy, fully represented the estate, and as the question of the validity of the will and codicil was raised in issue in the previous case, the decree dismissing her claim operates by way of *res judicata* against the suit of the reversioners. But this argument is clearly untenable, for it proceeds upon the assumption that the widow did represent the estate of Saroda Persad. Under the will and codicil, the person who represented the estate was certainly not Rajeshury. The suit was not one for the construction of the will and codicil, and all the parties interested were not parties to that suit; and it seems to me that it would be stretching the doctrine of *res judicata* to an unreasonable extent

if we were to hold that, notwithstanding the widow of the deceased did not represent the estate, and notwithstanding that the question as to the construction of the deeds was not decided, as indeed it was not necessary to be decided, in the previous case, the suit is barred, simply because the widow, the then heiress-at-law, brought the suit, and it was dismissed.

14. As to the question of limitation, I do not see how there can be any limitation in this case. If the plaintiffs sought to recover possession upon the ground that as reversioners they were entitled to such possession upon the death of the widow, they would be entitled to bring their suit within twelve years from the death of Rajeshury, which took place in February 1888 [see Article 141, Schedule II of the Limitation Act, and *Srinath Kur v. Prosunno Kumar Ghose* ILR 9 Cal. 934). The suit, however, is not for possession, but for construction of the will and codicil, and for a declaration of the plaintiffs' rights, as heirs to Saroda Persad. Now, it seems to me that, except in the few cases especially provided for in the Limitation Act (e.g., a suit to obtain a declaration that an adoption is invalid, or that an alienation by a widow is not binding on a reversioner), a suit for a declaratory relief of this nature cannot be held to be barred, so long as the right to the property, in respect of which the declaration is sought, is a subsisting right. So long as the widow was alive, the plaintiffs' right as reversionary heirs was a subsisting right. And I am disposed to think that the right to bring a suit to construe the will and codicil, and for a declaration of the plaintiffs' right, is a continuing right, and may be claimed within the statutory period (whether it be twelve years, or six years under Article 120) from the time when the plaintiff's become entitled to possession or other consequential relief. This suit having been instituted within six years from the time of Rajeshury's death is, therefore, amply within time.

15. We now come to the consideration of the will and codicil. The true construction of these documents is, I must say, by no means free from difficulty.

16. The testator, at the time of the will, had no issue born to him; but he had, as already mentioned, a wife, four sisters and three nephews, all of whom lived with him as members of his family. Of these, he had brought up Lolit Mohan, one of the nephews, and, as he says in his will, loved him as a son. There were at Chuckdighi two Sheba Thakurs, one had been established by the mother, the other by the grandmother, of the testator; and he had himself provided a charitable dispensary, and made up his mind to establish an asylum for fifty indigent and helpless persons. He was evidently anxious, as all Hindus are, that the name of his family should be perpetuated, that permanent provision should be made for his wife, sister and nephews; and that the deb sheba and the charitable institutions should be kept up for ever. With these ends in view, he says in the first place, in the introductory part of the will, that

It is very necessary that there should be some special provision to secure temporal and spiritual welfare, and suitable means providing that the work so provided for, should after my death be carried on without interruption, and the

members of my family should suffer no distress; and that hereafter, the persons who would be substitutes (sthulabhishiktogun) [in my place] should not, by destroying the property, etc., at pleasure extinguish the name of my family, and become sources of trouble, etc.

17. He then states that he is absolute owner of various properties, real and personal, and that he has been separate in estate from his agnate relatives, the descendants of his great-grandfather; and declares that all affairs shall be conducted in accordance with the directions of his will, and "that no one shall at any time be competent to act contrary thereto; whatever act (any one) does in contravention shall be wholly inadmissible. "

18. Having made these declarations in the preamble, he provides, in the first paragraph of the will, for the sheba of the two thakurs, the dispensary, the asylum for fifty indigent and helpless persons, the sradh of his parents, and the periodical religious rights; and says that he has assigned certain patni taluqs yielding a yearly profit of Rs. 9,996-2-10 for these purposes. With regard to the asylum for fifty persons to be established, he directs that "when any of them die or are removed, then other persons similarly circumstanced shall according to the judgment of the then malik (proprietor) be put in place of those who have died or have been removed." And he then enjoins that the profits of the patni taluqs "shall continue in perpetuity to be expended in the manner prescribed," and that nobody shall be at liberty to alienate or mortgage the said properties. Then follows a very important provision which runs thus:

If, for any reason, the profits of the aforesaid properties shall fall short, or owing to any unforeseen event, all these mehals or any of them should pass out of hand, the amount needed to make up the assigned expenditure shall continue to be defrayed in perpetuity in the above manner out of the interest of the Company's papers of my estate.

19. In the second paragraph, the testator declares that, during his lifetime, he should have the control over the properties assigned in paragraph 1, and all the matters connected therewith; and that after his death, that right of control shall be with his substitute (sthulabhishikto).

20. In the third paragraph, the testator says that, with the exception of the properties assigned to deb sheba, etc., he is possessed of zemindaries and other properties, yielding a profit of Rs. 50,191-80 per annum, and Company's papers for Rs. 2,40,000 yielding an annual interest of Rs. 11,000. And he directs that if he does not give these properties away, they shall be included in his estate.

21. The fourth paragraph, which is the most important part of the will, runs thus:

If by the will of God one or more sons are born to me, then after my death my son or sons shall be the proprietor (malik) of my estate; and the superintendence of the deb shebas and dispensary, and the care of the helpless people to be fed daily, and all other business shall remain with them. What shall

remain as surplus of the profits of the estate, after the monthly allowances, etc., according to the provisions of the will, have been given, shall continue to be spent, as may be necessary, according to their pleasure and that of their heirs (utaradhikaryr). If no son is born, but one or more daughters are born, then those daughters shall with sons, grandsons and so on in succession, becoming the proprietors (malik) of my estate and obtaining the superintendence of all the work, [viz.] of the deb shebas, and the dispensary, and the oversight of the helpless people to be daily fed, etc., conduct all the work. If no children are born to me, that is to say, son or son's son, or son's son's son, or daughter or daughter's son, or if at the time of my death, they are not alive, then the eldest son born of the womb of my third sister Srimati Khiroda, my nephew Sriman Lolit Mohan Roy Babaji, whom, since his birth, I have continued to love as a son, and who, remaining near me, is pleasing me by good conduct and the learning of good principles, whom I have been going on supporting--this nephew Sriman Lolit Mohan Roy Babaji, becoming on my death substitute (sthulabhishikto) in my place, and becoming proprietor (malik) of all my estate and properties, etc., shall, remaining as my substitute (sthulabhishikto) and obtaining the superintendence of the Iswar shebas, and the dispensary and the oversight of the people to be daily fed, etc., all affairs as above described, residing in my own dwelling-house in Surya Chuckdighi, the place of my ancestral abode, keeping the estate intact (lit. in place) enjoy, with son, grandson, and so on in succession (putra poutrade krama), the proceeds (upashutto) of my estate. The nephew is under age. If my death should occur whilst he is in a state of nonage, then my wife Srimati Rajeshury Debia and my father's sister's son Sriman Jogondra Nath Roy of Munirambati, becoming the minor's guardians and executors, shall, as long as he does not attain majority, discharge all the duties set down in my will. The minor, on reaching majority, shall exercise proprietorship (malikatwa) over the properties. If he dies sonless, then his wife shall receive a monthly allowance of one hundred rupees as long as she lives. If he should die leaving female offspring, then that daughter or those daughters shall receive expenses and marriage expenses from my estate. In the absence of the said nephew's son, grandson, great-grandson, etc., then, of the sons born of the wombs of my sisters Biroda and Khiroda, he who may be the eldest after the exclusion of him who may be devoid of understanding or affected with epilepsy, shall receive the charge of superintendence of my estate and properties, etc., and he, with son, grandson and so on, in succession (putra poutrade krama), becoming the proprietor (malik) of my estate and obtaining the superintendence of the deb shebas and the dispensary, and the oversight of the people to be daily fed, etc., all affairs, shall protect the estate and enjoy the proceeds (upashutto), And he shall take the interest on the Company's papers, and have them renewed, etc., when necessary.

22. In the fifth paragraph, the testator makes a provision for Lolit, in the event of any issue being born to him (the testator), and directs that he and his son, grandson, great-grandson, etc., in succession shall get an annuity of Rs. 10,000,

as also a house in Chuckdighi, and that "in the absence of his son, grandson, great-grandson, etc.," the annuity and the house shall be included in the testator's estate.

23. In the next paragraph (sixth) the testator provides for his two sisters Sukhoda and Kuloda, and his aunt Kadambini, who were childless widows, by giving each of them an allowance of Rs. 100 per month for their respective lives.

24. In the seventh paragraph, the testator provides for his sisters Khiroda and Biroda, and Priambada, the son of Biroda. To the first and her son, grandson, etc., in succession, he gives an allowance of Rs. 100 per month : to the second, Rs. 100 for life, and to the third, and his sons, grandson, etc, in succession Rs. 100. And he then directs that should there be no son, grandson or great-grandson of Biroda and Priambada, they shall get the allowance for their lives only. There are other provisions in the paragraph which are not necessary to be referred to.

25. In the eighth paragraph, the testator makes provision for his wife Rajeshury.

26. In the ninth paragraph, the will states as follows:

The person (who could be my) substitute (sthula bhishikto) keeping in hand (lit. in the estate) money sufficient for the protection of the estate out of the surplus that shall be left from the incomes of my estate after deduction of what is necessary for himself, and the amount to be expended year by year under the provisions of this will, shall expend the balance in good deeds for the purpose of enhancement of the name and glory of my family.

27. The tenth paragraph provides:

Whoever at any time becomes substitute (sthulabhishikto) [in my place] in my estate, shall sign his own name instead of mine, and get his name registered, styling himself proprietor (malik) of the estate, and observing this rule in law-suits, shall conduct affairs.

28. In the eleventh paragraph the testator exhorts his substitute (sthulabhishikto) for the time being to take care of the deb sheba, dispensary, etc., and in the next paragraph enjoins upon his substitute (sthulabhishikto) to erect a building for the poor and helpless, should he die before erecting it himself.

29. The thirteenth paragraph directs that, in the event of there being no person entitled to become the substitute (sthulabhishikto) of the persons whom the testator has declared to be his substitute (sthulabhishikto), Government will take the estate under its management and establish, out of the proceeds (upshutto) thereof, a college.

30. And in the fourteenth or concluding paragraph, the testator provides for the estate being taken charge of by the Court of Wards in the event of the two guardians of Lolit Mohan not pulling on together.

31. The codicil in the first place gives a summary of the will, and in giving this summary, and in speaking of Lolit, it says that he shall, on the testator's death, act as proprietor (malikatwa) with son, grandson, etc., in succession, of his estate, using his (the testator's) name. It then provides, in addition to provisions in the will, for a charitable school being established at Chuckdighi, and for the grant of Rs. 5,000 to the University of Calcutta, as also for certain sums being given to his spiritual guide, etc.; and it then refers to the additional Company's papers that the testator had acquired, and after saying that he was then possessed of papers of the amount of Rs. 3,26,000 directs as follows:

The person who will be my substitute (sthulabhishikto) shall possess them by drawing the interest and renewing them when necessary.

32. The question to which we have to address ourselves is, what is the nature of the estate that Lolit Mohan has obtained under the will and codicil. Is it an absolute estate--an estate of inheritance alienable at pleasure--or is it a qualified estate; and if the latter, what is the exact character of that estate?

33. In determining this question, we must, in the first place, look at the intention of the testator. Now, the objects he had in view, as is declared in the preamble, were first, that the religious and charitable institutions should be perpetually kept up; second, that the members of his family should be above any want; third, that his property should not be frittered away at the will of his substitutes (sthulabhishikto); and fourth, that the name of his family should be perpetuated. With these objects in view, he assigns, for religious and charitable institutions, property yielding an annual profit of Rs. 9,996, and provides that should there be any deficit in the profits, or if all or any of the properties so assigned, be in future lost, the amount needed shall be made up "in perpetuity" from the interest of the Government promissory notes. By this provision, he creates, as it were, a charge upon the promissory notes that he then possessed to the extent of Rs. 9,966 a year. He then grants annuities, payable out of his estate, to his wife, sisters, aunt, and nephews; some of the annuities being during the respective lives of the annuitants, while other annuities are descendible to the sons, grandsons, etc., in succession, of the annuitants; thereby also creating a general charge upon the estate in respect of the annuities. He then declares that his sthulabhishikto (substitute) for the time being shall, after his necessary expenses, and the various sums to be expended year after year, as provided by the will, reserve (keep in the estate) sufficient money for the protection of the estate, and spend the balance for the glorification of the family.

34. Bearing in mind the objects that the testator had in view, and the provisions and declarations that he has made for the due fulfilment of these objects, let us consider what he says with regard to his own issue, and his nephews, and their descendants. He speaks of them in paragraph 4.

35. It has been contended that the word sthulabkishikto, "as occurring in the preamble of the will, applies to his own issue, as well as to his nephews and their

descendants, who may succeed to his estate. It seems to me at least doubtful whether he did intend to view his own issue and their heirs in that light, although no doubt paragraphs 11 and 12 favour that idea. In speaking of his son or sons that may be born to him, he says that they shall be malik of his estate, and be superintendent of the deb sheba, dispensary, etc., and after payment of the monthly allowances, etc., as provided, the balance of the profits shall be spent as may be necessary," according to their pleasure " and that of their "heirs." The word "heirs," as herein used, and the expression that the balance of the profits may be spent, as may be necessary, according to their pleasure, are significant. In speaking of his daughters, he says that they "with sons, grandsons, and so on in succession becoming the proprietors," etc., etc., shall conduct all the work. When he speaks of Lolit, he expresses himself thus: "Sreeman Lolit Mohan Roy Babaji becoming on my death substitute (sthulabhishikto) in my place, and becoming malik of all my estate and properties, etc., shall, remaining as my substitute (sthulabhishikto), obtaining the superintendence of the deb sheba," etc., etc., "keeping the estate intact, enjoy with son, grandson, and so on in succession, the proceeds of my estate." The word "sthulabhishikto" occurs for the first time when the testator speaks of Lolit Mohan.

36. The word malik (proprietor) no doubt ordinarily implies absolute ownership, but if other expressions in the will indicate in what sense the testator meant to use that word, we are bound to give effect to that meaning. In the case of *Mahomed Shumsool Hooda v. Shewukram* 14 B.L.R. 226 : L.R. 2 IndAp 7 the Privy Council, notwithstanding the words "heir and malik" held that it was not the intention of the testator to give an absolute estate but a life-estate, though, no doubt, in arriving at that conclusion they were led by the consideration of the ordinary notions of a Hindu with regard to the devolution of property to women. The word malik, I may observe, is consistent with a life-estate, and may well be applied to a person who owns an estate for life, as well as to an absolute owner.

37. The words "putra poutrade krama" have always been understood as words of general inheritance; and if an estate, or the income of an estate, were bequeathed to a person "putra, poutrade krama" it would, no doubt, in the absence of anything showing a contrary intention, convey to him an absolute estate : and if we could confine our attention to the passage where these words occur in paragraph 4, and to which I have referred, we should no doubt have to hold that the estate which Lolit Mohan took was an absolute estate. But in construing the will we cannot confine our attention to this single passage and to the expression "malik." We must, as the Privy Council said in the case of *Mahomed Shumsool Hooder v. Shewukram* 14 B.L.R. 226 : L.R. 2 IndAp 7 consider the whole of the will: and "all the expressions must be taken together, without any one being insisted upon to the exclusion of others."

38. The testator says that Lolit Mohan, becoming malik of his estate, shall enjoy with son, grandson, etc., the proceeds "keeping the estate intact." If the words just quoted be read by the light of the preamble of the will, as to the objects that

the testator had in view, one may well see whether the testator meant to give to Lolit and his son, grandson, etc., an absolute estate, alienable at their pleasure, or merely the enjoyment of the profits of the estate during their respective lives-- [See in this connection, Shookmoy Chandra Das v. Monoharri Dassi ILR Cal. 684 : L.R. 12 IndAp 103.]

39. The word "upashutto" (proceeds), as occurring in this part of the will, does not seem to have been used in any other or larger sense than what is conveyed by the word proceeds or profits, though the word in Sanskrit may mean such profits as are referable to ownership; and this seems to be clear from paragraph 13 of the will, where the same word is used.

40. As hearing upon the question of the testator's real intention we have also to refer to--

First.--The charge, though not of a specific character, that the testator creates upon the Government promissory notes at the end of paragraph 1 for the perpetuation of the religious and charitable institutions.

Second.--The provision as to annuities for the members of his family, some of them being of a perpetual character, and the direction that they should be paid out of the estate.

Third.--The direction in the 9th paragraph, enjoining upon the "sthulabhishikto" to reserve sufficient funds for the protection of the estate, as also the direction that, deducting what may be necessary for himself, the "sthulabhishikto" shall spend the residue for the glorification of the name of the family.

Fourth.--The declaration of the testator in the codicil, referring to the Government promissory notes that he had, that the "sthulabhishikto" "shall possess them by drawing the interest and renewing them when necessary."

Fifth.--The summary of the will, as given by the testator in the codicil, which may be read as construing the will, and in which it is said that Lolit Mohan shall, on the testator's death, act as proprietor with son, grandson, etc., of his estate, using his (the testator's) name.

41. Against these considerations, however, there is the fact that, while the testator, in regard to the properties assigned for deb sheba, etc., says distinctly in paragraph 1 that nobody shall be at liberty to alienate them, no such restriction is imposed as to the rest of the estate, though what he says generally in the preamble, indicates what was running through his mind. It is quite possible that he thought it necessary to provide specially against the alienation of the properties assigned to deb sheba, etc., in order to make the religious and charitable institutions quite secure, and to bind, not only the sthulabhishiktos, but his own issue, should there be any, to whom the general restrictions made in other parts of the will would not, perhaps, apply.

42. Passing on to a later part of the fourth paragraph of the will, which relates to

the devolution of the estate upon Lolit Mohan's death, we find it stated that if he die sonless, his wife should receive a certain monthly allowance during her life, and if he should die leaving any female offspring, they shall receive their marriage and other expenses, and that, in the absence of Lolit's son, grandson, great-grandson, and so on, the estate should go to the eldest surviving nephew.

43. It was contended before us, in the first place, by the learned Counsel for Lolit Mohan, that the death of Lolit Mohan, herein contemplated, refers to that event happening during the lifetime of the testator, and that, therefore, the estate has absolutely vested in Lolit. But I think that, looking a few lines above in the same paragraph, it is plain enough that this could not have been what the testator was thinking of. He was evidently contemplating Lolit's death after the latter succeeds to the estate. As bearing upon this question, our attention has been called to *Olivant v. Wright* ILR Ch. D. 346, 703, *In re Luddy*, *Peard v. Morton* L.R. 25 Ch. D. 394, *Ram Lal Mookerjee v. Secretary of State* ILR 7 Cal. 304 : L.R. 8 IndAp 46, and *Lewin v. Killey* L.R. 13 App. Cas. 783, but I do not think that these cases enable us to put the construction contended for by the defendant in this case.

44. In the second place, the question was discussed whether the testator meant to exclude female heirs to Lolit. It was argued for the defendants that the provision made as regards the widow and daughters does not indicate exclusion of female heirs. No doubt it does not in so many words exclude them; but it seems to me that by necessary implication it does exclude them. That was the real meaning of the testator, and as observed by the Judicial Committee in the case of *Hunooman Persaud Panday v. Munraj Koonweree* 6 Moo. I.A. 411, it is to the real meaning rather than to the form of words that we have to look in construing documents in this country. And if we compare what the testator says about the widow and daughters of Lolit with what he says in the same paragraph about his own female issue, and their descendants, and if we refer to the words that he uses, indicating the event when the gift over is to take effect, viz., "in the absence of the said nephew's son, grandson, great-grandson, etc.," there can remain no doubt what his real meaning is. The will before us, so far as this question is concerned, is substantially the same as in the case of *Tarokessur Roy v. Soshi Shikhuressur Roy* ILR Cal. 952 : L.R. 10 IndAp 51 where the words were "they (the donees), their sons, grandsons, and other descendants in the male line shall enjoy the same," and which were construed as "excluding the legal course of inheritance," i.e., succession of female heirs.

45. It was next contended for the defendants that the gift over to another nephew is to take effect immediately upon the death of Lolit Mohan without leaving male issue; and that, upon that event happening, the absolute estate given to Lolit Mohan would be defeasible, and would go to that nephew. Several cases were cited in support of this view, principally the cases of *Soorjeemoney Dossee v. Denobundoo Mullick* 9 Moo. I.A. 123, *Bissonauth Chunder v. Bamasoondery Dossee* 12 Moo. I.A. 41, *Bhoobun Mohini Debia v. Hurrish*

Chunder Chowdhry ILR Cal. 23 : L.R. 5 IndAp 138, and Ram Lal Mookerjee v. Secretary of State ILR 7 Cal. 304 : L.R. 8 IndAp 46.

46. At the first blush, it may seem that the testator was only looking at the time of the death of Lolit, when the gift over was to take effect; but reading the words closely, and as they occur in the vernacular, I think that what the testator was contemplating was the failure of male issue of Lolit Mohan at some remote time. He first speaks of the death of Lolit without any son, and provides for the widow and daughters. He then speaks of the absence of Lolit's son, grandson, great-grandson, etc., and directs that, in that event, the estate should go to another nephew. He evidently did not contemplate the death of Lolit himself without leaving "son, grandson, great-grandson, etc." If he were here contemplating the death of Lolit without any male descendant, he would, I apprehend, have expressed himself in a very different manner. This will be plain on a reference to an earlier part of the same paragraph, where the testator speaks of failure of his own issue and the gift to Lolit. He was, as it seems to me, thinking of a failure of male issue in the line of Lolit at some remote time.

47. The provision that the eldest of his other nephews should succeed to the estate upon failure of the male issue in the line of Lolit, may lend colour to the argument that the testator was contemplating the failure of issue in Lolit's lifetime; but the language of the will, as I have said, is against such view. And it will be observed that the gift over is not to any particular nephew named, but to the eldest of the sons born of his two sisters, excluding such as may be epileptic and devoid of understanding.

48. As to the cases quoted before us, it will appear upon examination that the words in the wills in those cases unmistakeably refer to the death, or disqualification of the donee in being without male issue, and not to an indefinite failure of issue, as it is in the present case.

49. If, then, the testator meant to exclude female heirs of Lolit from succeeding to the estate, it follows that when he gave the estate, or the proceeds thereof, to Lolit, his son, grandson, and so on, in succession, he meant to give it to Lolit and his male descendants only. He does not indeed use the same words which were used by the testator in the case of *Kristoromoni Dasi v. Narendro Krishna* ILR Cal. 383 : L.R. 16 IndAp 29, viz., the donees, and "the heir or heirs male of their or either of their body," and which were understood by the Judicial Committee as conferring an estate of inheritance resembling an English estate in tail male, unknown to the Hindu law; but it seems to me that for all practical purposes, it is also the case here. And here, it may be useful to quote the words of the Judicial Committee in the case of *Tarokessur Roy v. Soshi Shikuressur Roy* ILR Cal. 952 : L.R. 10 I.A. 57 (58) and which were as follows:

It is true that the departure from Hindu law in the present case is not as great as in the case supposed in this passage (quoted from the *Tagore* case), or as in the *Tagore* case, where the attempt was to establish what would be called an estate

in tail male according to English law. But the attempt to confine the succession to males to the entire exclusion of females, is, though not so great, yet a distinct departure from Hindu law "excluding" in the terms of the judgment quoted the legal course of inheritance.

50. It has, however, been contended before us that, supposing that the exclusion of female heirs is bad in law, the gift of an absolute estate to Lolit Mohan, defeasible in certain events, is nevertheless good, and that if the gift over is bad the gift to Lolit becomes an absolute gift. But this argument, at any rate the first portion of it, begs the whole question we have to try in this case, viz., what was the intention of the testator : did he intend to give to Lolit an absolute estate, or only a limited estate? I have already referred to the objects the testator had in view, and the provisions he has made and the directions he has given in order to the fulfilment of those objects. He no doubt wished to exclude, as it was argued by Mr. Woodroffe, his agnate relations, and he wished to give the estate to Lolit and his male heirs; but it seems to me that, reading the will and codicil as a whole, it is very difficult to hold that he meant to give to them anything more than the enjoyment of the profits of the estate during their respective lives : he did not, I think, intend to give them the corpus of the estate. His idea was, as is evident from the will, that the estate should always remain in the family, and that the family name should be perpetuated. In short, his idea was one of perpetuity; and if we were to construe the will and codicil as giving to Lolit an absolute estate, alienable at pleasure, many of the objects the testator had in view might be frustrated. Take, for instance, the case of the Government promissory notes : if the donee were to sell these notes, the perpetuation of the religious and charitable institutions would be in great peril. No doubt, if we could separate in this case the gift itself from the various conditions attached to it, and the objects the testator had in view, we should be able to hold that the gift was intended to be a gift absolute; but it seems to me that it is not possible to do so. As bearing upon the question of intention, and upon the question whether an absolute estate was conferred upon Lolit Mohan, the learned Counsel for the defendants relied strongly upon, among others, the case of *Bissonauth Chunder v. Bamasoondry Dossee* 12 Moo. I.A. 41, *Bhoobun Mohini Debia v. Hurrish Chunder Chowdhry* ILR Cal. 23 : L.R. 5 IndAp 138 and *Raikishori Dasi v. Debendranath Sircar* ILR Cal. 409 : L.R. 15 IndAp 37 the last being the strongest on his side. But I do not think that these cases help us in determining what, upon the will and codicil, now before us was the true intention of the testator, and the estate conferred on Lolit.

51. The Judicial Committee in the Tagore case 9 B.L.R. 377 (394, 395) laid down certain principles, to which it may be useful here to refer.

The power of parting with property once acquired, so as to confer the same property upon another, must take effect either by inheritance or transfer, each according to law. Inheritance does not depend upon the will of the individual owner; transfer does. Inheritance is a rule laid down (or, in the case of custom,

recognized) by the State, not merely for the benefit of individuals, but for reasons of public policy; Domat, 2413. It follows directly from this that a private individual, who attempts by gift or will to make property inheritable otherwise than as the law directs, is assuming to legislate, and that the gift must fail, and the inheritance takes place as the law directs.

52. And later on --

If an estate were given to a man simply without express words of inheritance, it would, in the absence of a conflicting contest, carry by Hindu law (as under the present state of the law it does by will in England) an estate of inheritance. If there were added to such a gift an imperfect description of it as a gift of inheritance, not excluding the inheritance imposed by the law, an estate of inheritance would pass. If, again, the gift were in terms of an estate inheritable according to law, with superadded words, restricting the power of transfer which the law annexes to that estate, the restriction would be rejected as being repugnant, or rather, as being an attempt to take away the power of transfer which the law attaches to the estate, which the giver has sufficiently shown his intention to create, though he adds qualifications which the law does not recognise. If on the other hand, the gift were to a man and his heirs to be selected from a line other than that specified by law, expressly excluding the legal course of inheritance, as for instance, if an estate were granted to a man and his eldest nephew, and the eldest nephew of such eldest nephew, and so forth, for ever, to take as his heirs, to the exclusion of all other heirs, and without any of the persons so taking having the power to dispose of the estate during his lifetime, here, inasmuch as an inheritance so described is at legal, such a gift cannot take effect except in favour of such persons as could take under a gift to the extent to which the gift is consistent with the law: The first taker would in this case, take for his lifetime, because the giver had at least that intention. He could not take more, because the language is inconsistent with his having any different inheritance from that which the gift attempts to confer, and that state of inheritance which it confers is void.

53. Now applying these principles to the will and council before us, if we were satisfied that it was the intention of the testator to pass the estate absolutely, any restriction imposed upon the donee by way of limiting his power of transfer would be disregarded as bad. But can we view the gift to Lolit in that light? Then again is the gift in terms of an estate inheritable according to law, or is it a gift "excluding the inheritance imposed by the law"? These are the questions which present themselves before us.

54. If we could separate from the gift the passage which excludes the female heirs from succeeding, and confine our attention to the earlier passage in paragraph 4, which it is contended gives the estate to Lolit and his heirs, we should perhaps have been able to find that the estate devised is one of general inheritance subject to the conditions imposed by the testator, be those conditions good or bad. And if we could construe the provision as to the gift over as taking

effect upon the death of Lolit without male issue, we should have been able to hold that the absolute estate devised to him would be defeasible on that event. But I think we cannot separate the passage excluding females from the rest of the paragraph; for if we were to do so, and hold that an estate of general inheritance was conveyed, it would, as the Privy Council observed in *Terokessur Roy v. Soshi Shikuressur Roy* ILR Cal. 952 : L.R. 10 IndAp (5) "be in effect to make a new will for the testator, and one which, far from carrying his intention into effect, would be in direct opposition to his intention," viz., his intention to exclude females. Nor can we construe the gift over as referring to the event of Lolit's death. I have already indicated what I consider the event, upon the happening of which the gift over is to take effect, and that is, as I understand it, the failure of male issue in the line of Lolit at any remote time, and not at the time of Lolit's death, or at the close of any life then in being; and such a gift over would not be a good disposition according to the principles to be gathered from the cases of *Soorjeemoney Dossee v. Danobundoo Mullick* 9 Moo. I.A. 123 the *Tagore* case 9 B.L.R. 77), *Bhoobun Mohini Debia v. Hurrish Chunder Chowdhry* ILR Cal. 23 : L.R. 5 IndAp 138, *Ram Lal Mookerjee v. Secretary of State* ILR 7 Cal. 304 : L.R. 8 IndAp 46, and *Tarokessur Roy v. Soshi Shikuressur Roy* ILR Cal. 952 : L.R. 10. IndAp 51.

55. After the best and most anxious consideration I have been able to give to this case, I am of opinion that the intention of the testator was not to give to Lolit Mohan an estate of general inheritance alienable at his pleasure, and that the estate which Lolit has acquired under the will and codicil is only a life-estate; and further that the gift over is bad in law.

56. It being found that Lolit Mohan has only a life-estate, and that the gift over is bad, it follows that the testator has not made any valid disposition of his estate, beyond the life-estate given to Lolit Mohan, and beyond the specific bequests, and legacies made, and charges created by the will and codicil; and that, subject to such life-estate, bequests and legacies, and the charges created in favour of the religious and charitable institutions, the plaintiffs, as heirs-at-law, are entitled to succeed to the estate.

57. The result is that the decree of the Court below will be set aside; and a decree made in terms of the views we have just expressed.

58. The costs both in this Court and in the Court below will be paid out of the estate.