

(1946) 08 CAL CK 0005
In the Calcutta High Court
Case No : Suit No. 1769 of 1937

Kanai Lal Ghosal and Others

APPELLANT

Vs

Kumar Purnendu Nath Tagore and Others

RESPONDENT

Date of Decision : 02-08-1946

Acts Referred:

Citation : (1946) 08 CAL CK 0005

Judgement

Das, J.—(after stating the facts summarised above)—The deed is, in form, a deed of trust. There is no direct gift to the beneficiaries. The transfer is to the trustees for the benefit of the cestuique trust. It is, however, well settled that that which cannot be done directly may not be done indirectly through the intervention of a trustee. If the dispositions cannot be supported as gifts, they cannot be upheld as trusts. Therefore, the validity of the dispositions made by the deed has to be considered in the light of rules relating to gifts. The deed of trust was executed before the enactment of the Hindu Disposition of Property Act, 1916 and before the Transfer of Property Act had been amended. By sec. 2 of that Act as it stood at the date of the execution of the deed none of the provisions of the several sections in Chapter II of the Transfer of Property Act affected any rule of Hindu law. Chapter II is headed "Of transfer of property whether movable or immovable." The sections dealing with gifts to unborn persons, rule against perpetuity, vested interest, contingent interest and so forth did not then affect any rule of Hindu Law relating to gifts inter vivos. By sec. 129 of that Act none of the sections in Chapter VIII headed "of gifts" except sec. 123 affected any rule of Hindu Law. The first thing to consider, therefore, is as to how the gift in question stands in Hindu Law as administered in Bengal at the date of the deed.

2. Vijñaneswar in his commentary on Chapter II, Sloka 27 of Yajñavalkya defines gift as consisting of the extinction of one's property and the generation of another's property. A gift implies four elements—a donor, a donee, a property and a formal act which transfers the right of the donor to the donee. As to the formal act, according to Mitakshara, there must be an act of renunciation by the donor evidencing the intention of divesting himself of ownership and an acceptance by

the donee. According to the Mitakshara School of Hindu Law the gift is not complete unless there is an acceptance by the donee. This view is not accepted by Jimutavahana, the author of the Dayabhaga. In Chapter I paragraph 21 Jimutavahana says: "..... in the case of donation, the donee's right to the thing arises from the act of the giver; namely, from his relinquishment in favour of the donee who is a sentient person." In the next paragraph the argument is further elaborated by saying that property is not created by acceptance, for then it would follow that the acceptor was the giver. This divergence of views between the two schools as to the necessity of acceptance was not apparently noticed by the learned Judges who decided the cases of Dharmadas v. Nistarini I. L. R. (1887) Cal. 446 and Lakhimani v. Nityananda I. L. R. (1892) Cal. 464, where it was held by this Court that to constitute a valid gift there must be an acceptance by the donee. The indigenous Dayabhag law in this behalf has thus been modified by judicial decisions.

3. A further question was whether delivery of possession of the property given was necessary. In Harjiban v. Naran (1867) 4 Bom. H. C. R. 31 and Bank of Hindusthan v. Premchand (1868) 5 Bom. H. C. R. 83, it was held that delivery of possession was imperative but in Bhdskar v. Saraswati (1892) I. L. R. 17 Bom. 486., it was held otherwise. This divergence of judicial opinion is now set at rest by sec. 123 of the Transfer of Property Act which is expressly made applicable to a gift by a Hindu. In this case Salilendra's deed was registered and trustees took possession.

4. I have already quoted a portion of paragraph 21 of Chapter I of Jimutavahana referring to the donee as " a sentient person." It is pointed out in Sastri on Hindu Law, 8th Edn., Ch. XVI, S. 3, SS. V, p. 786 that on a correct translation of that passage it will appear that it did not require that the sentient being must be in existence or be present at the time and the place of the relinquishment. As the Dayabhaga did not insist on acceptance of the gift by the donee, the existence of the donee cannot logically be said to be essential. Be that as it may, it is now settled by the well-known case of Tagore v. Tagore L.R. I. A. Suppl. 47 : (1872) 18 W. R. 359 that a Hindu cannot make a gift in favour of a person who is not in existence, either in fact or in contemplation of law, at the time when the gift is to take effect. Therefore whatever the indigenous Hindu Law may have been, it is now firmly established that no Hindu can make a gift to an unborn person.

5. Relying on the above principle and applying the rule in Leake v. Robinson (1817) 2 Mar. 363. the earlier decisions of this Court [e.g., Saudamini v. Jogesh I. L. R. (1877) Cal. 262, Kherodmony v.. Doorga I. L. R. (1878) Gal. 455 and Rajomoyee v. Trailakha I. L. R. (1901) Cal. 260] laid down that in the case of a gift to a class some members of which were not in existence at the date of the gift and could not take, the whole gift failed. This principle, however, has been considerably modified since the decision of the Judicial Committee in Bishen Chand v. Asmaida Koer (1883) L. R. 11 I. A. 164 and has been practically abrogated by a Special Bench of this Court in Bhagabali v. Kali Charan I. L. R.

Cal. 902 : (1905) 9 C. W. N. 749 which was affirmed by the Judicial Committee in *Bhagabati v. Kali Charan* L. R. 38 I. A. 54; I. L. R. 38 Cal. 468 : (1911) 15 C. W. N. 393. Indeed Mr. Das who appears for the Defendants has not contended before me that because Mohon and Madhab were not in existence at the date of Salilendra's deed, the whole gift must fail on that ground.

6. The ancient Hindu Law recognised conditional gifts. Manu, Ch. VIII 5, laid down that " should money be given for a purpose by one man to another who asks it, the gift shall be void if the money is afterwards not used in the manner stated." The question whether a person in existence at the date of the testator's death might become entitled upon a future contingency to receive an additional benefit was raised and decided in the affirmative in *Soorjeemoney Dossee v. Denobundoo Mullick* (1862) 9 M. I. A. 123. In delivering the judgment of the Board, Knight Bruce, L. J., made the following observations:

Whatever may have formerly been considered the state of that law as to the testamentary power of Hindoos over their property, that power has now long been recognised, and must be considered as completely established. This being so, we are to say whether there is anything against public convenience, anything generally mischievous, or anything against the general principles of Hindu law in allowing a testator to give property whether by way of remainder, or by way of executory bequest (to borrow terms from the law of England), upon an event which is to happen, if at all, immediately on the close of a life in being. Their Lordships think that there is not; that there would be great general inconvenience and public mischief in denying such a power, and that it is their duty to advise Her Majesty that such a power does exist. Such powers have been long recognised in practice. The law of India, at least the law of Bengal, has long been administered upon that basis, and the very mode in which this suit has been framed, and the manner in which it was conducted in India, are evidence, if evidence were wanting, that such is the general opinion entertained in Bengal. Their Lordships, therefore, being of opinion, as has already been stated, that according to the true meaning of this Will the property was given over upon an event which was to take place, if at all, immediately on the close of a life in being at the time when the Will was made, and seeing that that event has happened, consider that the testator, in making this provision, did not infringe or exceed the power given him by the Hindu law, and that the clause effectually gives the corpus of the property to the surviving sous immediately on the death of that son who died without leaving the male issue.

7. This was, however, a case of a disposition by Will and not a case of gift *inter vivos* and there was a gift over. I now come to a case of conditional gift *inter vivos*. In *Bhooban Mahini v. Harrish Chunder* L. R. 5 I. A. 138 : I. L. R. (1878) Cal. 24 the donor granted a talook to his sister by a sanad. The operative part of the sanad ended with the following sentences: " Being in possession of the lands and paying rent according to the Tahut Jamma, do you and the generations born of your womb successively (*santan srenikrame*) enjoy the same. No other heir of

yours shall have right or interest." At the date of the sanad the sister had one child, a daughter. The sister retained undisputed possession of the talook during her life-time and by her Will devised it to her daughter and grandson. On the sister's death the heir of the donor took possession of the Talook. The sister's daughter and grandson sued for possession. It was held by the Judicial Committee on construction of the sanad that the earlier words conferred an absolute estate on the sister and that the concluding words "no other heir of yours, etc." made the absolute estate defeasible in the event of a failure of issue living at her death.

8. Sir R.P. Collier in delivering the judgment of the Board observed as follows:

Upon the best consideration which their Lord-ships have been able to give to the meaning of these negative words, it appears to them that they may be read as referring to the time of the death of Kasiswari that their effect is to make the absolute estate before given, defeasible in the event of a failure of issue living at the time of her death, in which event the estate was to revert to the donor and his heirs. That there is nothing in such a condition repugnant to Hindu law appears from the decision of this tribunal as to an executory devise in the case of *Hoorjeemony Dassee v. Denobundoo Mulliek* (1862) 9 M. I. A. 123. as explained in the *Tagore L. R. I. A. Suppl. 47: (1872) 18 W. R. 359* case.

9. It will be observed that in this case there was no gift over and if the sister died having no issue then living, her interest would have ceased and the estate would have reverted to the donor or his heirs. Therefore by this gift the donor did not wholly relinquish his interest because there was the possibility of the thing given reverting to him or his heirs, and strictly speaking, according to the strict notions of ancient Hindu Law the gift would be bad. The decision of the Judicial Committee, however, modified the rigour of the indigenous Hindu Law in this respect also.

10. In *Manjamma v. Padmanabhayya* I. L. R. (1889) Mad. 393. a Karar executed to the father of one Sitaram after reciting that the executant had handed over certain property to the father provided that the property should be delivered to Sitaram on his attaining majority and proceeded as follows:

If the said Sitaram shall have descendants neither your male descendants nor any one else shall have any interest in any of the property herein mentioned. If the said Sitaram happened to be without descendants the male offspring of my daughter, Kaveramma, your wife, shall enjoy the property equally tout no others shall have any interest therein; such is the Swatantra Karar executed of my free will and pleasure.

11. Sitarama attained his majority but died without issue. His elder brother sued for possession of the property under the above clause. It was held that since the Plaintiff was a person capable of taking subject to the life-interest, at the time when the gift was made, he was entitled to succeed. The possibility of reverter to the heirs of the donor was referred to in the judgment. This was a contingent gift

inter vivos and held valid.

12. The validity of a gift over on the happening of a contingency given by a Will was also recognised in *Randal Mukherjee v. Secretary of State* (1881) L. R. 8 I. A. 46, *Kumar Tarakeswar Ray v. Kumar Sashisekhareswar* (1883) L. R. 10 I. A. 51. and *Kristoramoney v. Narendra Krishna* (1888) L. R. 16 I. A. 29. *Lakshminarayana Nainar v. Villiamma I.* L. R. (1910) Mad. 250 was a case of an arrangement inter vivos. There by a razinama filed in Court it was agreed that certain properties should be held and enjoyed in common by R and P and that R becoming issueless the entire properties should belong to P. R having subsequently sold the properties to L, died issueless. It was held following *Bhoobun Mohini's* case L. R. 5 I. A. 138 : I. L. R. (1878) Cal. 24 and *Kristoramani's* case (18) that the gift over on R dying without issue was good and therefore the alienation by R was invalid beyond his life-time.

13. A donatio mortis causa which is a form of conditional gift, is recognised in Hindu Law. See *Strange on Hindu Law*. Vol. I, page 216, 426 Mayne, 10th Edn. 867 and *Visalatclimi v. Subbu Pillai* (1871) 6 Mad. H. C. R. 270 and *Upendra v. Nabni* (1869) 3 B. L. R. (O. C.) 113. and other cases cited in Mayne.

14. In *Gadadhar Mullick v. Official Trustee of Bengal* L. R. 67 I. A. 120 : (1940) 44 C. W. N. 513 there was a bequest to a person in existence at the time of the testator's death which was, by its turn, to take effect at the close of a life in being but only upon the happening of an uncertain event. It was held that it was not necessary to the validity of the bequest that a prior interest taking effect immediately on the death of the testator should have been bequeathed by the Will. Sir George Rankin who delivered the judgment of the Board reviewed the earlier authorities in detail. This judgment clearly establishes that a prior bequest was not necessary to support a contingent bequest. The argument that the estate would remain in abeyance until the happening the contingency was met by the reply that in such a case there should be merely a partial intestacy and only so much of the interest as was not given to the legatee would vest in the heir of the testator on his death. Sir George Rankin observed that the analogy between gifts and Wills at Hindu Law had been recognised in the earlier cases only as regards the property which may be disposed of and the person who is capable of taking and that the analogy went no further. It appears to me that the references to strict notions of a gift under the Hindu Law and the rigour of that law were intended to be references to the indigenous Hindu Law relating to gift, and not to Hindu Law of gift as administered by Courts in British India and the Judicial Committee. I do not read this case as overruling or in any way impairing the authority of *Bhuban Mohini's* case L. R. 5 I. A. 138: I. L. R. (1878) Cal. 24 and the other cases I have mentioned above. If the Hindu Law of gift as administered by Courts recognise, inspite of the requirements of renunciation prescribed by the indigenous Hindu Law, the validity of conditional gifts, gifts of limited interest, gifts over on defeasance of a prior gift, contingent bequest without a prior bequest to support it, reverter to the donor on failure of the

condition reasonable directions for accumulation, power of appointment and so on, I do not see why a contingent gift to a living person inter vivos without a prior gift supporting it should not be upheld. There can be no question of the estate being in abeyance, for the estate so far as it is not given will remain in the donor just as on a contingent bequest without a prior bequest a qualified interest will vest in the heir as on partial intestacy. Whatever interest is given by the contingent gift completely goes out of the donor who only retains the residual interest or possibility of reverter which possibility, I have shown, does not vitiate a conditional gift on the ground of the strict notions of ancient sages requiring complete relinquishment. Nor does the requirement of delivery of possession militate against gifts subject to a condition precedent because of sec. 123, Transfer of Property Act. I do not see why retention of a partial or residual interest in the donor until the happening of the contingency should invalidate a gift to a living person on a contingency which must happen, if at all, during the life-time of the living man. I can see no differences between a condition precedent and a condition subsequent in law as regards its validity. In my opinion if the donee is a living person capable of taking, a gift to him contingent on his attaining a particular age made in accordance with sec. 123 of the Transfer of Property Act does not offend against the Hindu Law of gift as understood and administered by the Courts although it may not be strictly in accordance with the indigenous rule of Hindu Law of gifts. The reasonings which were adopted by Knight Bruce, L. J., in Soorjeemony's case (1862) 9 M. I. A. 123 and the reasonings set out in the judgment of the Board delivered by Sir George Rankin in Gadadhar Mullick's case) L. R. 67 I. A. 129: (1940) 44 C. W. N. 513 . appear to me to be equally applicable to a contingent gift inter vivos without a prior estate to support it. The Hindu Law of gift in its original state has been modified in many respects as shown above and the development of the Hindu Law of gift has proceeded on the same lines as the development of Hindu Law of Wills. The ancient texts cannot now be set up to turn back and reverse the forward flowing current of judicial decisions. I see no public mischief or inconvenience in upholding a gift inter vivos to a living person contingent on his attaining a particular age, which contingency must happen if at all during his life-time. Bearing in mind the above principles I proceed to examine the provisions of the deed before me and apply thereto the principles discussed above.

15. I have already mentioned that at the date of the deed Salilendra had two sons and three unmarried daughters. I have also pointed out that the intention of the settlor, as it appears from the deed, was to provide for all children born and to be born. In so far as he intended to confer benefits on unborn children he transgressed the limits of the power of disposition permitted to a Hindu under the Hindu Law as administered by the Courts. Therefore, the trust in favour of "all the sons of the settlor who shall attain the age of twenty-one " in so far as it purports to confer any benefit on the sons who were not in existence at the date of the deed, must fail by reason of the rule of Hindu Law that the donee must be in existence at the date of the gift. There is, however, nothing in Hindu Law

which invalidates the whole gift in respect of all members of the class. It has not been contended by Mr. P. R. Das that the gift in so far as it confers benefits on the living members of the class, namely, to Nirabendu and Kanai who were in existence at the date of the deed, is also bad under the Hindu Law. Nirabendu and Kanai being persons living at the date of the deed, they must attain the age of 21, if at all, during their own lives and consequently the gift to them cannot be said to be bad for remoteness which is repugnant to Hindu Law. What Mr. Das contends is that the gift, considered as one to Nirabendu and Kanai, was a contingent gift, contingent on their respectively attaining the age of 21 years, and that as neither of them attained that age at the date of the death of the survivor of the settlor and his wife, the gift must fail for otherwise the estate will remain in abeyance until the happening of the contingency. I have not been referred to any judicial decision laying down a principle similar to the artificial rule of the English real property law that every contingent gift must be supported by a prior estate and that the contingent gift must vest during the continuance of the particular estate which supports it or *eo instanti* that such particular estate determines. For reasons stated above the gift to Nirabendu and Kanai who were, as members of the class, in being at the time contingent upon their attaining a particular age without a prior interest being given to another person during the second period does not, in my opinion, offend against the rules of Hindu Law of gift as modified and administered by the Courts.

16. Mr. Das, however, founded his arguments on the analogy of the principles embodied in secs. 21 and 23 of the Transfer of Property Act. As I have said those provisions which are contained in Chapter II of the Act did not at the date of this deed affect any rule of Hindu Law. A discussion of the provisions of the Transfer of Property Act, therefore, appears to me to be unnecessary. As, however, the provisions of the Transfer of Property Act have been discussed in argument at considerable length I consider it right to express my views thereon.

17. Mr. Das argues that the gift in favour of "all the sons of the settlor who shall attain the age of twenty-one years " in so far as it is a gift to the sons who were not in existence is bad under Hindu Law and so far as it is a gift to the sons who were in existence at the date of the deed is a contingent gift within the meaning of sec. 21 of the Transfer of Property Act. It is submitted that the Court should not do violence to plain words in order to convert a contingent interest into a vested interest and that it is only where the words of the deed are ambiguous that they are to be read so as to give the donee a vested rather than a contingent interest. (Jarman on Wills, 7th Edn., Vol. II, page 1371). Learned Counsel contends that the expression " who shall attain the age of twenty-one years" is one of the commonest possible forms of expression used for creating a contingent interest. A contingent interest thus created can only become a vested interest, according to sec. 21, on the happening of the specified uncertain event, namely, on their attaining the age of 21 years. What, then, is the point of time when the specified uncertain event must happen in order that the gift may take effect? Mr. Das then refers me to sec. 23 of the Transfer of Property Act for the

answer to the question. He argues that in the present case the intermediate or preceding interest ceased to exist on the death of the settlor, his wife having predeceased him. None of the sons attained the age of 21 years by that date and, therefore, the contingent interest failed and a resulting trust arose in favour of the settlor.

18. Mr. Sanyal for the Plaintiffs reminds me of "the golden rule" of construction laid down by Lord Esher, M. R., in *Re: Harrion, Turner v. Hellard* [1885] L. R. 30 Ch. D. 390 at 393., namely "that when a testator has executed a Will in solemn form, you must assume that he did not intend to make it a solemn farce, that he did not intend to die intestate when he has gone through the form of making a Will." Adopting the language of Art. 259 of Vol. XXXIV of Halsbury's Laws of England (2nd Edn.). Mr. Sanyal argues that when a settlor has executed a deed and the deed shows an intention of the settlor to dispose of the whole of his interest but, as regards the interest created, the deed admits of two constructions, according to one of which the deed operates as a complete disposition of the whole, but according to the other the deed leaves a chasm, the Court should take the words in the former sense. He relies on the case of *Bickersteth v. Shanu* L. R. [1936] H. C. 219 (P. C.) for the general principle that the Court leans in favour of vesting. Mr. Sanyal then analyses the deed as follows: the dominant intention of the settlor is to make provision for his wife and children; he provides for the maintenance of himself and his wife for their lives and of his sons until they attain majority and of his daughters until their marriage and a year after that event; he provides for the marriage of his children; these expenses are to be met out of the income as well as cut of the corpus; then there are powers of appointment and in default of appointment, gifts to the sons who shall attain the age of 21 years; the division or distribution of the corpus can only be made on the termination of the previous trusts, i.e., maintenance, marriage, etc., then there is a gift over in favour of the daughters and finally there is a gift over to the settlor himself. Relying on the general principles of construction and his analysis of the relevant provisions of the deed Mr. Sanyal advances two arguments which I now proceed to consider.

19. Mr. Sanyal does not seriously dispute that the language used by the settlor in the clause constituting the gift to the sons taken by itself obviously implies two contingencies, namely, the omission of the settlor or his wife to exercise the power of appointment reserved to them and the attainment by the sons of the age of 21 years. The first contingency has been fulfilled by reason of the settlor and his wife dying without having exercised that power and need not be discussed any more. As to the second contingency Mr. Sanyal contends that it is only an apparent contingency and on a true construction of the deed the gift in effect creates a vested interest with possession and enjoyment postponed till after the attainment of the requisite age and subject to be divested on their dying before attaining that age. The contention is that the provision for the maintenance, education and marriage of the sons in the earlier part of the deed has to be read along with the ultimate gift and that the two clauses read

together confer a vested interest on the donees. In order to bring about this result it is not necessary that the whole of the income must be given to the donee. Mr. Sanyal has also referred me to a number of English cases in support of his contention beginning with *Hanson v. Graham* [1801] 6 Vesy. Jr. 239. and ending with *In re: Ussher, Poster v. Ussher* [1022] 2 Ch. 321. I do not consider it profitable or necessary to examine those decisions in detail for I find that the principle is embodied in the exception to sec. 21 of the Transfer of Property Act in the following terms:

Exception-Where, under a transfer of property, a person becomes entitled to an interest therein upon attaining a particular age, and the transferor also gives to him absolutely the income to arise from such interest before he reaches that age, or directs the income or so much thereof as may be necessary to be applied for his benefit, such interest is not contingent.

20. Sec. 21 of the Transfer of Property Act including the exception corresponds with sec. 120 of the Indian Succession Act (1925). There are 13 illustrations to sec. 120 of the Indian Succession Act, of which the last two are illustrations of the exception. The wording of the exception and the illustrations clearly indicate that the income must be of the same fund and must be directed to be paid throughout the period upto the particular age upon the attainment of which the donee or legatee will be entitled to the property given to him. The case of *Davis v. Fisher* [1842] 5 Beavan 201 does not establish, as contended by Mr. Sanyal, that the income need not be paid for the whole period. In that case the bequest was to trustees in trust for A for life and after his death in trust for the children of A as they severally attained 25 years, the income being applied during their respective minorities by their guardian for their maintenance, etc. Lord Langlate, M. R., adverted to this aspect of the matter at pages 211-212 where he held that in effect the income was given for the whole period but that during the minorities it was to be applied by the guardian. I have already analysed the provisions of Salilendra's deed. According to that analysis the settlor contemplated two periods, vis., (i) from the date of the deed upto the date of death of the survivor of the settlor and his wife and (it) from the death of the survivor of them until the trusts were fully carried into effect. The provision for maintenance, etc., was to be operative upto the death of the survivor of the settlor and his wife. Some of the sons may attain majority and may marry before the death of the survivor. Such sons will not be entitled to anything from the date of his majority or marriage upto the death of the survivor. Even during the second period, i.e., after the death of the survivor the sons or some of them may not attain majority or may not be married but there is no provision for payment of maintenance or marriage expenses during that period. It is clear, therefore, that under this deed the income is not given absolutely to the sons right up to their respective age of 21 years. There may conceivably be a gap when they will not get any part of the income. Again on the death of the survivor the properties will have to be ascertained and the trustees will stand possessed of those properties so ascertained for the sons. The income of those properties so ascertained has been

given to the sons for their maintenance, etc. Therefore the income of the same fund cannot be said to have been given to the sons. The decision in *Dadachanji v. Ratan Bai* L. R. 52 I. A. 95: (1924) 29 C. W. N. 629 appears to me to be in point. Therefore, this case does not, in my opinion, fall within the exception to sec. 21 of the Transfer of Property Act.

21. There is a third answer to this branch of Mr. Sanyal's contention. In England the principle embodied in the exception to sec. 21 which I am now considering has been extended to a gift to a class, e.g., *Fox v. Fox* L. R. [1920] A. C. 286. cited by Mr. Sanyal. The question is whether the Indian Legislature has adopted the extension of principle of the exception to a gift to a class. Sec. 21 which corresponds to sec. 120 of the Succession Act and the illustrations to the last mentioned section throw considerable light on the meaning of the section. As pointed out by the Judicial Committee in *Sopher v. Administrator-General* L. R. 71 I. A. 93 at p. 102: (1944) 48 C. W. N. 585 the sections must be read and construed in connection with the illustrations to be found in the Act. The illustrations to sec. 120 clearly indicate that that section is concerned with bequest to a specified person. The exception to that section has no reference to a bequest to a contingent class which is dealt with by sec. 121 of the Indian Succession Act. The illustration to sec. 121 of the Indian Succession Act shows that the exception to sec. 120 of the Indian Succession Act does not apply in the case of a bequest to a contingent class, for inspite of a provision for maintenance in the illustration to sec. 121 of Indian Succession Act, the legacy does not constitute a vested interest. The observations of Farran, J., in *De Souza v. Vaz* (1867) I. L. R. 12 Bom. 136 at p. 145- 146. appear to be in point. On a parity of reasoning, I apprehend, the exception to sec. 21 of the Transfer of Property Act will not be applicable to a gift to a contingent class which is governed by sec. 22 of that Act. The provision in the present case which I am considering is in favour of " all the sons of the settlor who shall attain the age of twenty-one years in equal shares." I have already stated that the objects of the settlor's bounty were not only the children who were in existence at the date of the deed but also those who may thereafter be born. Therefore the clause I have quoted above constitutes a gift to a contingent class within the meaning of sec. 22 of the Transfer of Property Act and that being so the exception to sec. 21 of that Act does not apply to this case and the provision for payment of the income does not operate to make the gift vested in interest. The fact that the gift can take effect only as regards members of the class in being at the date of the gift does not make the gift any the less a gift to a class. That circumstance only limits the ambit of the class.

22. The second branch of Mr. Sanyal's arguments is founded on the gift over clauses. His contention is that the dominant intention of the settlor as recited in the deed is to benefit his children. In the operative part the trusts after the decease of the settlor and his wife or the survivor of them, i.e., the trusts for what I have called the second period, in the absence of any appointment by the settlor or his wife, are in favour of:

- (1) all the sons of the settlor who shall attain 21 years;
- (2) If there shall be no sons, all the daughters of the settlor who shall attain 21 years;
- (3) If the settlor's wife and all her children shall die without issue during the life-time of the settlor, the settlor absolutely ?

23. It is argued that these gift-over clauses indicate that the sons take a vested interest subject to be divested on their dying before attaining that age and further that the settlor has clearly indicated under what circumstances the properties will revert to him. The express provision that the trust will revert to him only if his wife and all her children shall die without issue during his life-time shows, according to Mr. Sanyal, that it is his intention that it should not revert to him in any other circumstance. In other words this express direction negatives the idea of any resulting trust and, therefore, to give effect to his intention it must be held that the sons take a vested interest subject to being divested on their death before 21 years and if all sons die before 21 years the gift over in favour of the daughters takes effect and the daughters take a vested interest subject to being divested on their dying before 21 years and on all daughters then dying before 21 years the gift over to the settlor takes effect absolutely. Mr. Sanyal has in support of his contentions relied on several English decisions which may now be briefly considered.

24. In *Bree v. Perfect* [1844] 1 Coll. 128. the testatrix directed the fund, after the death of the life-tenant B, to be "divided among such of her children as should be living at the time of her death, as they respectively attained the age of twenty-one" with a gift over "if B should die without leaving issue." It was held by Knight Bruce, V. C. (as he then was) that the children of B took a vested interest. I may only say that the expressions "to be divided" and "as they respectively attained the age of 21" may have suggested that only the division and enjoyment was postponed but not the vesting. Be that as it may, the authority of this decision has been doubted by the Court of Appeal in *In re: Edwards, Jones v. Jones* I. L. R. [1906] 1 Ch. 570.

25. The case of *Riley v. Garnett* [1840] 3 Deg. & Sm. 629. was not a case of a gift over clause being called in aid of the construction of a preceding contingent bequest. In that case the bequest was in trust for Mary Ann Elisha for life and from and after her death in trust for "all the children of the said Mary Ann Elisha, by the said Petter Elisha begotten or to be begotten, who, being a son or sons, shall attain the age of twenty-one years or, being a daughter or daughters, shall attain that age or be married, share and share alike, as tenants in common and not as joint tenants, and their heirs and assigns for ever." Knight Bruce, V. C. held that it was a devise to all the children minor or not minors, living at the death of Mary Ann Elisha subject to the contingency of their estate being divested upon their death during minority. I find it difficult to appreciate this decision. Indeed this decision has not been followed in *In re: Eddel's Trusts*

[1871] L. R. 11 Eq. 559. In any case there was no gift over on a contingency and this decision, therefore, has no bearing on the question I am now considering, namely, the effect of a contingent gift-over clause on them preceding bequest.

26. In *Browne v. Browne* [1857] 3 Sm. & Giff 568. the devise, as summarised in the head note, was " to trustees to the use of A for life, remainder to all and every his child or children who shall attain 21. as tenants in common in fee and if only one such child, for such only child in fee simple. But in case A should die without leaving lawful issue, then to B for life with remainder over."" Sir John Stuart, V. C., adverted to the supposed distinction between words of contingency in a gift when applied to the description of a person and those when applied to the description of an event and held that the former had no stronger or uncontrollable force than the latter. The Vice-Chancellor's view was that a gift in a Will expressed in language apparently importing a contingency whether applied to the description of the legatee or the description of the event may be controlled and qualified by the terms of the next limitation or by other expressions in the Will so as to justify the construction that the devisee takes an immediate, although defeasible, estate. Sir John Stuart held that *Festing v. Allen* (1842) 5 Hall 573 was irreconcilable with the decisions of the House of Lords in *Randall v. Doc* (1817) 5 Dow 202. Construing the language of that Will the Vice-Chancellor was satisfied that the testator intended that no child should take an absolute and indefeasible estate till 21 if a son or till 21 or marriage if a daughter and also that he intended the gift over to take effect only in case of failure of the devise to the child or children who should live to answer the description. Accordingly, it was held that upon the death of A, leaving an only child, an infant, such child took an estate in fee simple, vested but liable to be divested in the event of his dying under 21. This case certainly supports Mr. Sanyal's contentions. This decision was, however, dissented from by Wood, V. C., in *Holmes v. Prescott* [1864] 33 L. J. Ch. 264.. In that case the Vice-Chancellor expressed the view that there was a difference between a contingency created by the use of the words " at " " if " or " when " and that prescribed by the use of the words " to such as shall attain " or " all who shall attain," the former referring to the time of enjoyment and not to vesting and the latter as part of the description of the taker referring to vesting so that until that age is attained there is nobody in whom the estate can vest. Vice-Chancellor Wood expressed the view that *Festing v. Allen* (1842) 5 Hall 573 was a well considered decision. *Festing v. Allen* (1842) 5 Hall 573. was approved by the Court of Appeal in *Cunliffe v. Brancker* [1876] L. R..3 Ch. D. 393. and in *Packing v. Barnett* [1880] 49 L. J. Ch. 665.. Malins, V. C., who was Counsel in *Browne v. Browne* [1857] 3 Sm.& Giff.568 had to accept *Festing v. Allen* (1842) 5 Hall 573. as good law. Therefore the observations of Malins, V. C, in the case of *Jull v. Jacobs* [1876] L. R. 3 Ch. D. 703 at 713 doubting the correctness of *Festing v. Allen* 5 Hall 573 (1842). do not assist Mr. Sanyal.

27. The case of *In re: Edwards, Jones v. Jones* I. L. R. [1906] Ch. 570 cited and relied on by Mr. Das appears to me to be in point. The relevant provisions in the

Will in that case were as follows:

3. I give all my property, both real and personal, to my trustees in trust for my children or child who being sons shall attain the age of twenty-one years or being daughters shall attain that Age or marry, and if more than one in equal shares as tenants in common.

4. In the event of my death without leaving any children surviving me, I give all my property between my brothers and sisters, namely Peter Evan Jones, William Thomas Jones, Margaret Sarah Jones, and Agnes Ada Luff, in equal shares as tenants in common.

28. The testatrix died in child-birth leaving a son who survived his mother only a few hours. The Court of Appeal held reversing Buckley, J., that the child did not take a vested interest at birth and that the gift over did not take effect and that there was an intestacy. The appeal Court construed the Will and held that clause 4 did not affect clause 3 in any way.

29. To summarise, there is no doubt that in England Courts have adopted two rules of construction, namely, (i) that the gift of the income of the same fund, until the contingency happens to the very person who will on attaining a particular age take the estate, makes the gift of the estate apparently contingent upon attainment of that age a vested interest and (ii) that a gift over upon the failure of a prior gift may have the effect of converting the prior gift apparently contingent upon attaining a particular age into a vested interest subject to be divested on the death before that age. The first rule of construction has been embodied in the exception to sec. 21 of the Transfer of Property Act which corresponds with sec. 120 of the Indian Succession Act, 1925. I have already held that the exception to sec. 21 does not apply and does not affect the present case. As regards the second rule of construction there is no difficulty when the prior gift is subject to one contingency and the gift over is to take effect on the failure of that very contingency, e.g., when the gift is to A if or when he attains 21 and in case he dies before that age to B. But difficulty arises where the gift over does not fit in with the original gift, as where the original gift is subject to one contingency and the gift over is to take effect on another contingency, e.g., when the gift is to A for life and after his death to his children if or when they attain 21 and in case A dies without leaving a child to B. In some cases the gift-over clause like the above has been read as "without leaving such a child" so as to accord with the contingency attached to the first gift. In some cases it has been read strictly as in *In re: Edwards, Jones v. Jones* L. R. [1906] 1 Ch. 570 It is impossible to reconcile the different decisions of the English Courts. The tendency of the modern decisions in England, as stated in *Jarman on Wills*, 7th Edn., Vol. II, p. 1393 is to construe plain words according to their proper meaning, without regard to a gift over imperfectly expressed. It is stated in *Jarman*, p. 1356 note (p), that later cases therein referred to have virtually overruled *Browne v. Browne* [1857] 3 Sm. Giff. 568. and *Riley v. Garnell* [1849] 3 Deg. & Sm. 629. on which Mr. Sanyal has relied.

30. In the case now before me the gift is to " all the sons of the settlor who shall attain the age of twenty-one years " but the gift over to the daughters is only " if there is no son " and the ultimate gift over to the settlor is only " if Sushilabala and all her children shall die without issue during the life-time of the settlor." It is clear, therefore, that different contingencies are attached to the prior gift and the gifts over. If I am to bring the first gift over into line with the prior gift to the sons I shall have to add the word " such " before the word "son" in the gift-over clause as was done by Malins, V. C., in *Kidman v. Kidman* [1871] 40 L. J. Ch. 350. but which was disapproved by the Court of Appeal in *In re: Edwards, Jones v. Jones* L. R. [1906] 1 Ch. 570 to which I have referred. Even if I do so will it give effect to the real intention of the settlor? Can it be said that the settlor intended that, on the death of all the sons before 21 but one of them leaving a son. the gift to the sons will be divested and the gift over to the daughter will take effect to the exclusion of the grandson? The second gift over is to take effect, only when the children die without issue. So that will have to be added also. It is futile to speculate on the intention of the settlor. The best course is to take the language used by the settlor as I find it and to arrive at his intention as best as I may. It is an unprofitable exercise to attempt to reconcile the English decisions or to try to interpret this ill-drawn deed in the light of the language used in different English cases. In my opinion the gift-over clauses do not modify the earlier clause. Further this rule of construction, namely, the gift over modifying the prior gift, has not been adopted by the Transfer of Property Act or the Indian Succession Act while those Acts have adopted the other rule of construction in the exception to which I have referred. I think it is safe to confine myself to the Transfer of Property Act. I do not find that the Transfer of Property Act or the Succession Act has adopted the second rule of construction referred to above and I do not see why I should import them. I am content with holding that this case falls within sec. 22 of the Transfer of Property Act and the exception to sec. 21 has no application and there is nothing else in the Act which will convert the gift to a contingent class into a vested interest. The interest will become vested only on the sons attaining the prescribed age.

31. Mr. Das then passes on to sec. 23 of the Transfer of Property Act and contends that none of the sons having attained the prescribed age at or before the death of Salilendra when the prior trusts came to an end, the gift to the sons failed and there was a resulting trust in favour of the settlor. Mr. Sanyal, on the other hand, argues that sec. 23 has no application, for here the gift is not to any specified person, time is specified for the happening of the uncertain event, and there is no gift of any intermediate or precedent interest in the same thing;

32. It has been said that the rule enunciated in sec. 23 of the Transfer of Property Act is a rule of law and not a mere rule of construction. It should, however, be remembered that referring to sec. 111 of the Indian Succession Act, 1865, which is now reproduced in sec. 124 of the Succession Act, 1925, and which corresponded to sec. 23 of the Transfer of Property Act the Judicial Committee in *Bhupendra Krishna Ghose v. Amarendra Nath Dey* I. L. R. (1915)

Cal. 432 at 440 (P.C.) observed as follows:

Sec. 111 embodies the rule enunciated in *Edwards v. Edwards* [1852] 15 Beav. 361. The rule of construction laid down in that case has been considerably modified by later English decisions. The Indian Act, however, has given it statutory force..... Their Lordships think that it should be applied only to cases strictly coining within its scope.

33. In that case time was mentioned for the occurrence of the specified uncertain event and consequently sec. 111 was not applied. Bearing these observations in mind I proceed to consider the relevant sections of the Transfer of Property Act. Sec. 21 of that Act defines contingent interest and indicates when the interest vests. I have already pointed out, by reference to sec. 120 and the illustrations thereto, that those sections are concerned with gifts or bequests to a specified person upon certain contingencies. I have also pointed out that the exceptions to those sections have no reference to gifts or bequests to a contingent class which is governed by sec. 22 of the Transfer of Property Act and sec. 121 of the Indian Succession Act. The illustration to sec. 121 of the Indian Succession Act clearly indicates that the Indian Legislature has not thought fit to extend the principle of the exception to sec. 21 of the Transfer of Property Act and sec. 120 of the Indian Succession Act to a gift or bequest to a contingent class. Sec. 23 appears to me to be a corollary to sec. 21 imposing a further qualification as regards the time of vesting. Sec. 23 expressly refers to a contingent gift to a specified person.

It has no reference to a gift to a contingent class. Sec. 23 corresponds with sec. 124 of the Indian Succession Act. Although the expression " specified person" is not used in sec. 124 the illustrations to that section clearly indicate that the contingent bequests contemplated by that section must be to a specified person. It is true that there is a recital in the deed enumerating the persons who constituted the settlor's family but the deed shows, as I have said, that the settlor intended to provide for all his children born or unborn as a class. The fact that the gift fails in respect of the unborn children and takes effect in favour of those who were in existence does not make the gift any the less a gift to a contingent class. The ambit of the class is only shortened or reduced. The fact that sec. 23 is a corollary to sec. 21, the use of the expression " a specified person " in sec. 23, the reasoning for which the exception to sec. 21 is not applicable to a gift to a contingent class which comes within sec. 22, necessarily leads me to hold that sec. 23 ought not to be applied to a gift to a contingent class falling within sec. 22. I have already explained that the trusts declared by the deed of Salilendra are divided into two periods. At the end of the first period the provisions for maintenance, etc., cease to be operative. On the death of the survivor the properties have to be ascertained. The trust in favour of the sons is an immediate gift of the properties so ascertained. There is no intermediate or precedent interest in respect of properties so ascertained. The reasoning adopted by the Judicial Committee in *Dadachandji v. Ralan Bai* L. R. 52 I. A. 95: (1924) 29 C.W.N. 629. to which I have already referred, in construing the exception to

sec. 107 of the old Succession Act now replaced by sec. 120 which corresponds with sec. 21 of the Transfer of Property Act appear to me to be equally applicable in construing sec. 23. For reasons stated above I have come to the conclusion that sec. 23 of the Transfer of Property Act has no application to the present case. It has not been suggested that the gift in favour of " all the sons of the settlor who shall attain twenty-one years of age" in so far as it enures for the benefit of those sons who were in existence at the date of the deed fails by reason of any other provision of the Transfer of Property Act.

34. In my judgment alike under the Hindu Law as administered by Courts of law and under the Transfer of Property Act the gift in question so far as it confers a benefit on those sons and daughters who were alive at the date of the gift and formed the contingent class was good. I therefore answer Issue No. 1 as follows:

(a) The gift in favour of the sons who were not in existence at the date of the deed, was void but the gift to the sons who were in existence was good. Nirabendu one of such sons having attained the age of 21 the gift in his favour took effect but his interest devolved on his brothers as heirs on his death and Kanai on attaining the age of 21 took a vested interest in the whole of the estate left at the date of the death of the survivor of the settlor and his wife. I should here record the fact that Kanai through his counsel has expressly agreed to share the estate equally with his brothers the Plaintiffs, Mohon and Madhab.

(b) No.

35. Before passing on to the next issue it will be convenient to deal with a new point raised by Mr. Das in course of his argument. This point is not raised in the written statement or in the issues and ordinarily I would not have allowed him to raise this point at this stage. Seeing, however, that the question raised is purely one of law I have allowed him to argue the same. It is contended that the entire trust in so far as it relates to premises No. 3/1A, Nalin Sircar Street is void. According to the definition in sec. 3 of the Indian Trusts Act, a trust is an obligation annexed to the ownership of a property and under sec. 6 the trust property must be indicated with reasonable certainty and except in certain cases the trust property must be transferred to the trustee. The trustee as pointed out by the Judicial Committee in *Chhatra-kumari v. Mohon Bikram L. R. 58 I. A. 279 at 297: (1931) 35 C. W. N. 953* is the owner of the property. To the like effect is the decision in the case of *Maulavi Kamiruddin Khan Vs. Badrun Nisa Bibi and Another, ..* Finally, Mr. Das refers me to sec. 8 of the Indian Trusts Act which provides that the subject-matter of a trust must be property transferable to the beneficiary and that it must not be merely beneficial interest under a subsisting trust. Founding himself on these sections Mr. Das points out that at the date of the deed Salilendra was not the owner of premises No. 3/1A, Nalin Sircar Street. The land stood in the name of the executors of Cally Kissen Tagore and the house was under construction. Salilendra's right was only a beneficial interest under the trust created by the Will of Cally Kissen Tagore. It was purely a right to " go for the trustees " as Mr. Das expresses it. Salilendra, however, purported to

transfer the property which was not his and which he could not in law transfer. The right of Salilendra to the different legacies under the Will of Cally Kissen Tagore was a vested right. That vested right is property which could be transferred. It was certainly beneficial interest according to the definition in sec. 3 but I do not consider that it was " a merely beneficial interest" such as is contemplated by sec. 8. Salilendra directed his trustees to receive the legacies from the estate of Cally Kissen Tagore and directed them to hold the same after having received them upon certain trust. The case of Pestonji Jalbhoy Chichgar Vs. Jalbhoy Jehangir Chichgar, , cited by Mr. Sanyal appears to me to be in point. I do not see that the testatrix in that case had any more vested rights than Salilendra had at the date of his deed. Further, I do not see any difference in Salilendra's right to the legacy fund of Rs. 7,50,000 or Rs. 2,50,000 and his right to get a house. All the legacies to which he was entitled appear to be equally vested. Further, the executors of Cally Kissen Tagore conveyed the premises No. 3/1A, Nalin Sircar Street on June 8, 1915, to the trustees " as such," which I apprehend means upon the trusts declared by Salilendra's deed. The trustees including the Raja accepted that transfer as trustees and thereby acknowledged the obligation attached to their ownership. They obtained leave of the Court to sell that property on the basis that it was a trust property. For all these reasons it appears to me that there is no substance in this point raised by Mr. Das. *****

36. On a consideration of the evidence before me and the surrounding circumstances I cannot but hold that the Raja failed to take the care that is expected of a trustee in the matter of the execution of the trust. The close relationship between the Chatterjee trustees and the settlor and his sons may well have induced the Raja to leave the management to them. That may be the explanation for the conduct of the Raja but can be no justification for the dereliction of his duty as a trustee. The receipt of the money by Chatterjee & Co., was receipt by the trustees. The conveyance acknowledges receipt of the money. There is no evidence that the Raja only joined for the sake of conformity. The Raja knew that the Chatterjee trustees who were also his relatives were in a bad way financially. He did not take any precaution to ensure the safety of the money. I, therefore, answer Issue No. 2 in all its parts in favour of the Plaintiffs.

37. Re. Issue 3:-No evidence has been led on this issue. Even if Salilendra instigated the breach of trust, that fact will not protect the trustees against the other beneficiaries. This issue must be answered in the negative.

38. Re. Issue 4:-Mr. Das's contention is that this suit is barred by limitation. It is obvious that to succeed he must first get sec 10 of the Limitation Act out of his way. This he seeks to do in two ways. In the first place, he says, the gift to the sons was bad and there was, therefore, a resulting trust in favour of the settlor. The sons of the settlor inherited this from the settlor as on intestacy. On the failure of the trust in favour of the sons, the trustees held the property not in trust for any specific purpose but as constructive trustees. The present suit by the sons is, therefore, not a suit against a person in whom property has become

vested in trust for any specific purpose. The argument is that a resulting trust is not within sec. 10 of the Limitation Act. Reliance is placed in support of this contention on certain cases beginning with *Kherodemoney Dossee v. Doorgamoney Dossee* I. L. R. (1878) Cal. 455. and ending with *Khaw Sim Tek v. Chuah Hooi Gnoh Neoh* L. R. 49 I. A. 37: (1921) 86 C. W. N. 495. In the view I have taken on issue No. 1 as to the validity of the trust in favour of the sons and as to this trust being an express trust and there being no resulting trust it is unnecessary for me to discuss these cases. Suffice it to say that on my findings on issue No. 1, this branch of Mr. Das's argument must be rejected.

39. In the next place Mr. Das argues that the present suit is not for following the trust properties in the hands of the Raja. He refers to the allegations in paragraphs 8 and 9 of the plaint and contends that the gist of the present claim sounds in damages for negligence, the measure of damages being the sum of Rs. 75,000. I do not accept Mr. Das's reading of the plaint as correct. The allegations in paragraph 8 of the plaint are self-contained and disclose and constitute a complete cause of action and the prayer for a decree for Rs. 75,000 is founded on that main or primary cause of action. Paragraph 9 only anticipates the defence and purports to meet that defence in advance. The negligence and default therein pleaded is not obviously meant to be founded on as the main or primary cause of action but only to defeat the defence and at least to be an alternative claim. What is pleaded there is intended only to deprive the Defendants of the possible defence to the Plaintiffs' claim formulated in paragraph 8. Strictly speaking it may be bad pleading but having regard to the fact that pleading by way of reply to the written statement is not usually filed, this form of pleading by anticipation is not at all unusual in our Court. This alternative claim is not founded on test but on a breach of trust. The suit is not an action on test based on negligence but an action for a breach of trust. In my judgment there is no force in this branch of Mr. Das's argument and I hold that this suit is protected by sec. 10 of the Limitation Act.

40. Assuming that I am wrong in my findings on issue No. 1 and that this is a case of a resulting trust and consequently sec. 10 has no application, the case, it is conceded, is governed by sec. 120. Mr. Das argues that the resulting trust was in favour of the settlor. His right to sue accrued either when the consideration moneys were received in 1919 or 1921 or when the two properties were purchased in Gurudas's own name in 1920 or when Gurudas mortgaged them in 1920 and 1921 or at the latest when, at the trustees' meeting held on September 13, 1921, the settlor came to know, from Gurudas's statement, that the properties stood in Gurudas's own name. Time began to run against Salilendra from one of these dates. The settlor having died, his cause of action devolved upon his heirs, and therefore, the minority of the heirs could not stop the limitation running. It appears to me that there is an initial fallacy in this line of reasoning. The gift was to "the sons who shall attain the age of 21 years." The preceding trust ceased on the death of Salilendra and the argument is that the sons not having attained 21 at or before that point of time the gift failed

under sec. 23 of the Transfer of Property Act. It must be conceded that the sons had time up to the last moment of Salilendra's life to attain the specified age. Their failure to attain that age was eo instanti with the death of Salilendra. This failure gave rise to the resulting trust. The result must, in point of time, follow the event which caused it. The failure to attain the age of 21 years at the moment of the death of Salilendra being the cause of the resulting trust, the resulting trust must arise at the moment next after the moment of Salilendra's death and Salilendra being then dead the resulting trust could not be for his benefit but must enure for the benefit of his legal representatives under sec. 83 of the Indian Trusts Act. If the resulting trust arose initially in favour of the sons of Salilendra, as I shall hold if it is a case of resulting trust at all, then the cause of action accrued to the sons and heirs jointly. If the cause of action accrued to the sons and heirs of the settlor there could be no "right to sue" within the meaning of Article 120 until there was an accrual of the right asserted in the suit and its infringement, or at best a clear and unequivocal threat to infringe the right, by the Defendants against whom the suit is instituted, as laid down in *Bolo v. Koklan* L. R. 57 I. A. 325 at 331: (1930) 34 C. W. N. 1169 and reiterated in *Annamalai Chettiar v. A. M. K. C. T. Muthukerappan Chettiar* L. R. 58 I. A. 1: (1930) 35 C.W. N. 145 . Further as all the sons of the settlor except Nirabendu were minors at the time and as Nirabendu alone could not give a full discharge to the trustees time did not, under sec. 7 of the Limitation Act, run against any of them until Madhab, the youngest attained majority in 1936. The present suit was filed on November 17, 1937, and consequently under sec. 8 of the Limitation Act the suit is well within time. The cases of *Ahimsa Bibee v. Abdul Kader Saheb* I. L. R. (1901) 25 Mad. 26, *Nabin Chandra Barta v. Chandra Madhab Barua* A. I. R. (1916) (P. C.) 148. and *Jawahir Singh v. Udai Prakas* A. I. R. (1926) (P. C.) 16. cited by Mr. Sanyal appear to be in point. I, therefore, answer this issue in the negative.

41. Re. Issue No. 5.-This argument of Mr. Das on this issue is founded on the proceedings and decrees in Suit No. 2414 of 1923 against his co-trustees in which the present Plaintiffs had also been impleaded. I have already indicated the nature of that suit and reliefs claimed therein. The argument is that that suit was one for the administration of the trust; one of the questions was as to what the trust estate consisted of; the Raja prayed for retirement from office which he could do only on rendering his accounts. It is pointed out that it was not a suit by one trustee against his co-trustees only for the recovery of moneys defalcated by them but was one for general administration. The beneficiaries were necessary parties and as such made parties, and it was open to them to raise the question that the Raja was legally liable to render account and the estate consisted of, amongst others, what was due by the Raja as well. Even if they had not been made parties, they could at any time come in and take advantage of the suit and the preliminary decree. They might and ought to have made their claim in that suit. They appeared in the suit and the reference by their guardian-ad-litem and even by Counsel on the last day of the reference. They are, therefore, not

entitled now to make any claim against the Raja or his estate. This argument ignores the very important statement in paragraph 13 of the plaint in that suit where the Raja as Plaintiff categorically stated that he asked for no relief against the beneficiaries Defendants. In view of this paragraph, each and all the prayers in that plaint must be read as directed against the trustees Defendants only. The Raja did not claim any relief as against the beneficiaries. This must imply that in that suit he did not claim to be relieved, as against the beneficiaries, of his liability, as trustee, to render accounts. Therefore it must follow that he continued to be so liable, inspite of that suit. There was no issue or contention raised in that suit as between the Raja and the infant beneficiaries. It is true that a receiver had been appointed in that suit and the preliminary decree (Ex. 2e) ordered that the trust estate be administered by the Court and certain accounts be taken. By the final decree (Ex. 2i), however, the Raja was not discharged from further acting as a trustee and on the contrary a decree was passed in his favour as trustee for certain sums against the trustee Defendants who were discharged. The Official Receiver was also discharged. This final decree clearly shows that the trust was not in fact administered by the Court as the preliminary decree purported to direct and that the suit was, or was in effect converted into, a suit by one trustee against his cotrustees for the recovery of moneys defalcated by them. In the face of this final decree it is impossible to hold that the suit was or was regarded to be an ordinary administration suit. In view of the pleadings and this decree it is impossible to hold that it operates by way of res judicata. It is not a question of the present Plaintiffs challenging that decree on the ground of fraud or collusion. The correct position is that that decree does not touch the present Plaintiffs at all. In view of the allegations in paragraph 13 of the plaint in that suit, it is preposterous for the Raja or his legal representatives to contend that the Plaintiffs are in any way concluded by the proceedings in that suit. I accordingly answer this issue against the Defendants.

42. Re. Issue No. 6:-This issue relates to the legacy of Rs. 50,000 which, under clause 58 of Cally Kissen Tagore's Will, Salilendra was entitled to get at the time therein mentioned. Under clauses 63 and 65 of that Will a house of the value of Rs. 75,000 had also to be purchased or built for Probhabati Debi and her three sons including Salilendra. The recitals in the deed of trust show-and it also appears from the receipt (Ex. 1a)-that the three sons of Probhabati had requested the cexecutors of Cally Kissen Tagore to buy or build for them three separate houses of the value of Rs. 25,000 and that the latter had agreed to do so. The recitals also show that Salilendra and his brothers selected a large plot of land No. 3, Nalin Sircar Street which was bought by the executors of Cally Kissen Tagore. That plot of land was divided into three parts and Salilendra selected one of such parts for himself. The construction of the building for Salilendra on that part was commenced according to a plan prepared by him, but it was apparent that it could not be completed with the balance left out of Rs, 25,000. Accordingly, Salilendra by his letter dated Pous 11, 1315 B. S., requested the executors and trustees of Salilendra to deduct the excess amount that might be

required out of his legacy of Rs. 50,000 under clause 58 of Cally Kissen Tagore's Will. In fact the deed shows that at the date thereof Rs. 8,342-11-6 had been advanced by the executors and trustees in excess of Rs. 25,000 for the purposes of the building. By the deed of trust Salilendra transferred to the trustees, amongst other things, "all that undivided share of the settlor now vested or in reversion in the several funds hereinbefore mentioned (after deducting such payments already and to be made on behalf of the settlor as aforesaid) now in the hands of the executors of the said Babu Cally Kissen Tagore and particularly described in Schedule B hereunder written." Item 3 of Schedule B comprises " All that the share in the legacy fund represented by the three and a half per cent. Government promissory notes of the face value of rupees two lacs fifty thousand reduced by the several amounts already paid thereout by the said executors of the late Babu Cally Kissen Tagore at the request or on behalf of the settlor." It is, therefore, impossible to say that Salilendra's interest in the legacy fund of Rs. 2,50,000 was not part of the trust estate. It was made a part of the trust estate as effectively as any of the other properties but subject to the arrangement that the excess over 25,000 spent on the house would be deducted out of this fund. To put the same thing in other words, the legacy of Rs. 50,000 less any sum that had been advanced and any sum that might thereafter be advanced for the purposes of the house formed part of the trust properties.

Issue 6 (a) is answered accordingly.

43. The estate of Cally Kissen Tagore paid out the legacy of Rs. 50,000 in full. The total sum equivalent to G. P. Notes of the face value of Rs. 16,400 was spent for the house over and above Rs. 25,000 as shown by receipts Ex. 1a and 1b. A total sum equivalent to G. P. Notes of the face value of Rs. 9,900 was taken for meeting the costs of the marriage of the eldest daughter" of the settlor. (Ex. 1c, 1d, 1e and 1g). Receipts (Ex. 2f and 1h) show a payment of a sum which is equivalent to G. P. Notes of the face value of Rs. 1,200 on account of the personal expenses of Salilendra. All these payments make up the total of Rs. 27,500 leaving a balance of Rs. 22,500. On September 26, 1920, the executors and trustees of Cally Kissen Tagore made over to the trustees of Salilendra's deed 3 1/2 per cent. G. P. Notes of the face value of Rs. 22,500. So far as the estate of Cally Kissen Tagore is concerned the legacy of Rs. 50,000 in G. P. Notes has been paid in full. Issue 6 (b) is answered in the affirmative.

44. The receipts I have mentioned clearly show that the trustees and Salilendra received the moneys covered thereby As regards the sum of Rs. 16,400 there is no difficulty, for that sum was deducted on account of the house. The sum of Rs. 9,900 should not have been spent in the marriage of the daughter for the deed fixes the limit at Rs. 6,000. It is difficult to say whether stridhan of the daughter is or is not to be included in Rs. 6,000. Nor should the trustees have, strictly speaking, allowed Salilendra to take Rs. 1,200 unless it was for his pocket expenses under the deed. At this distance of time it is not easy to make up accounts on the basis of actual expenses incurred and the exact value of the G.

P. Notes at the then market-value. I, therefore, allow credit for the whole of Rs. 27,500. The G. P. Notes of the face value of Rs. 22,500 were received by the trustees. There is no evidence that the Raja signed the receipt Ex. D1 only for the sake of conformity. The Plaintiffs are, therefore, entitled to follow the same and hold the Raja and his estate liable therefor unless it is accounted for.

45. Re. Issue J:-I have already mentioned that out of the consideration money of Rs. 75,000 the Defendants have shown payment of Rs. 5,500 to Muktakeshi Debi. I am also prepared to give the Defendants credit for Rs. 2,000 on account of interest thereon. That leaves a balance of Rs. 67,500 in favour of the Plaintiffs. As regards the legacy of Rs. 50,000 in G. P. Notes I have already given the Defendants credit for an amount equivalent to G. P. Notes of the face value of Rs. 27,500. The Plaintiffs are entitled to follow the 3 1/2 per cent. G. P. Notes of the face value of Rs. 22,500. It is claimed that two other daughters of the settlor had to be married. The income of Rs. 1,50,000 was only Rs. 333-5-4 per month. It is reasonable to assume that that sum was not sufficient to meet the marriage expenses. I am, therefore, prepared to give the Defendants credit for Rs. 12,000. It is well known that 3 1/2 per cent. G. P. Notes are now being redeemed at par. The Plaintiffs are entitled to get 3 1/2 per cent. G. P. Notes to-day. So taking the value thereof at par and deducting Rs. 12,000 thereout a balance of Rs. 10,500 remains due. The two balances of Rs. 67,500 and Rs. 10,500 make up Rs. 78,000. This sum is less than the total principal sum of the decree the Raja obtained against his co-trustees.

46. If the gift in favour of the sons was good in law, only Nirabendu and Kanai became entitled to this money. Nirabendu's share devolved on his death on his brothers. Kanai, however, has expressed his willingness to share the whole fund with his brothers and has asked for a decree in favour of all the Plaintiffs. If the gift was bad and there was a resulting trust in favour of the heirs of the settlor then all the Plaintiffs will be entitled to this money. I, therefore, pass a decree in favour of all the Plaintiffs for Rs. 67,500 and Rs. 10,500 aggregating to Rs. 78,000. There has been considerable delay in payment of the money to the beneficiaries. It is true that the Raja was advised not to pay until the rights inter se of the Plaintiffs were decided by the Court. The Raja should, however, have paid the money into Court and the money might have earned some interest. At one time I thought the Plaintiffs would be entitled to interest from the date Rs. 75,000 and G. P. Notes of the face value of Rs. 22,500 had been received by the trustees. On a consideration of the whole circumstances I have come to the conclusion that it will be reasonable to give the Plaintiffs interest from the date of suit at 3 1/2 per cent, per annum simple up to the decree. The Plaintiffs will get the costs of this suit, certified for two Counsel. The decree will carry interest at 6 per cent, per annum. The decree must be limited to the estate of Raja Prafulla Nath Tagore.