

(1868) 08 CAL CK 0024
In the Calcutta High Court

Kumara Asima Krishna Deb	Vs	APPELLANT
Kumara Kumara Krishna Deb		RESPONDENT

Date of Decision : 08-08-1868

Acts Referred:

Citation : (1868) 08 CAL CK 0024

Final Decision : Dismissed

Judgement

Sir Barnes Peacock, Kt., C.J.—It was stated by Mr. Newmarch that the grounds of appeal had been drawn up before the decree in the case had been signed by the Court or seen by the appellants or their counsel. I mention this, because the decree has just been put into my hands, and it appears that there is a finding in that decree, which does not appear warranted by the judgment, viz., that the plaintiff and his brother as co-heirs are entitled in equal shares. Probably, there was a mistake in drawing up the decree in saying that the two sons take equal shares. We do not now declare that the two sons are entitled to equal shares of their father's estate. We confine ourselves to the two grounds which have been taken in appeal. The learned Judge has gone very fully into the case. He has pointed out various sections of the will, of which I think the 1st and 22nd are the most material. There is no doubt that this will, if construed according to English Law, would be void under the law relating to perpetuities. The question is, is it valid under the Hindu Law? A case, *Goberdhone Bysak v. Sham Chand Bysak* (Bourke, 282) was referred to; in which I was supposed to have laid down that the rule of the English Law against perpetuities was not binding in case of a Hindu will. I certainly never intended to lay that down as a general proposition. All that I meant to say was, that the English Law against perpetuities could not be engrafted upon a Hindu will. Whether the Hindu Law warrants the creation of a perpetuity, either by will or a deed of gift, inter vivos must depend upon the Hindu Law alone, and not upon the Hindu Law supplemented by English Law. In the particular case it had been declared by the Privy Council: "That it ought to be declared that, according to the true construction of the will, the property granted to the idol is effectually granted for the benefit of the testator's four sons and

their offspring in the male line as a joint family, subject to the performance of acts, business, ceremonies, and festivals, and to provisions of maintenance in the will contained, and that the surplus income, after answering the performance of such provisions, is in like manner well and effectually given for the benefit of the four sons and their offspring in the male line as a joint family: and it appearing that Krishna Mangal, one of the sons; died leaving three sons, and that Hari Mohan died leaving no male offspring, the family continuing joint up to the death of Hari Mohan, it ought to be declared that upon the death of Hari Mohan his share of the joint estate, subject as aforesaid, passed to the respondent as widow and heir, and she is entitled to one-third of one-fourth as widow and heir."

2. The question was, whether the brothers, according to the construction of the will, were to be allowed to divide the corpus of the estate, or only to divide the surplus. At page 281 said, "they claim to have a partition of the whole estate, real and personal, of Ramdas, the testator. They do not even ask to have a sum set apart to provide for the expenses of the idol and religious and other acts and ceremonies. They ask to have a six-anna share of the estate allotted to them upon such partition to be held in severalty. We have already decided they are not entitled to a six-anna share; but it remains to be considered whether they are entitled to have any partition at all of the real and personal estate, or whether their right to hold in severalty is not confined to their share of the net proceeds and over plus, the same being annually adjusted. Upon this point we do not understand the Judicial Committee to have pronounced any opinion. Their Lordships declare that, according to the construction of the will, the property granted to the idol is effectually granted for the benefit of the testator's four sons and their offspring in the male line, as a joint family, subject to the performance of acts, business, ceremonies and festivals and to provisions for maintenance in the will contained, and that the surplus income, after answering the performance of such provision, is in like manner well and effectually given for the benefit of the four sons and their offspring in the male line as a joint family. They do not say that the estates were granted to the sons. At page 291 I said "the inconvenience and anomaly (that of engrafting the English Law of perpetuities upon Hindu Law) would be very great under any circumstance; but the inconsistency, though not so apparent now, will become glaring when the Supreme Court and the Sudder Court are amalgamated. It is said that the testamentary power of a Hindu is unknown to the Hindu law, and is founded upon local custom recognized and sanctioned by judicial decisions. But those decisions are based upon the assumption that the power is given by Hindu Law and although the power is limited to those placed in which a particular school of Hindu Law prevails, and is modified according to its doctrines, it is still the Hindu Law which we have to administer in the same way as the Courts administer the Common law when they hold that lands in Kent descend according to the custom of Gavelkind."

3. If we are to read and give effect to the will of Hindus, according to the light

and policy of the English Law, the intentions of nearly every testator will be frustrated.

4. The Judicial Committee appear to us to have determined the question of perpetuity: that question was raised in the suit brought by Jagatsundari (8 Moore I.A., 66). Sir J. Colvile, in his judgment in that case, gave effect to the rule against perpetuities. The Privy Council did not expressly refer to the question, but reversing the decree commenced by stating that it is not improper to observe that with reference to the testamentary disposition of Hindus the extent of this power must be regulated by the Hindu Law.

5. That case, it must be remembered, was decided with reference to the construction of a will of which the first object was the maintenance of an idol, and there are many cases, both in the Mohammedan and in the Hindu Law, in which religious endowments have been upheld. They are cited in Morley's Digest, Title Religious Endowments, p. 13. In Paragraph 14, cases are pointed out in which bequests of property for pious purposes were upheld. One of those cases is the case of *Mullick v. Mullick* in the Privy Council, in which the judgment was pronounced by Lord Wynford (1 Knap, 247). The remark which was made by Lord Wynford in delivering judgment in that case, is one in which I cordially and entirely concur. "The interest," he says, "of sovereigns as well as their duty will ever incline them to secure, as far as in their power, the happiness of those who live under their government, and no person can be happy whose religious feelings are not respected. If this were a case between Europeans and Hindus, we would not take a step, without the assistance of some of the persons from India who are acquainted with the usages of that country with regard to the ceremonies that ought to be observed and the rites that ought to be performed on the death of opulent natives, for we should fear, lest by the judgment which we might advise His Majesty to pronounce, the feeling of the people of Hindustan might be wounded."

6. Cases have been decided in which it was held that the management only of lands granted as a religious endowment, passed, and that they are not held as private property.

7. I make these remarks for the purpose of providing against any misunderstanding of the case of *Bysak* to which I have already referred, or of any remarks which I may make in the case. The remarks in the case to which I have referred apply to a case of an endowment for an idol.

8. The will, in the present case, gives the residue of the property, which is the subject of dispute, to the grandson and his successors, upon trust that the profits of the estate are not to be beneficially used during a period of ninety-nine years, but are to be laid out in the purchase of fresh estates and the formation of a fund for the payment of the Government revenue upon it, and this provision is to be extended, as I understand, in perpetuity, if the Hindu Law allows.

9. I have stated that the surplus property was devised to the grandson. I ought

not to have used that expression, but ought rather to have said that the property was directed to be made over to him when he attained the age of twenty-one years; and that he should then assume the office of trustee and continue to discharge the same during his lifetime agreeably to the trusts of the will. I make this correction, because it was held by Mr. Justice Norman in his judgment that there was no gift of the property to the grandson.

10. I am not aware of any rule of the Hindu Law, by which grants inter vivos, or gifts by will, in perpetuity, are expressly prohibited; but it appears to me to be quite contrary to the whole scope and intention of Hindu Law, and that there are no means according to the Hindu Law by which such gifts or grants can be effected. The Hindu Law, so far as I am acquainted with it, makes no provision for trusts. There is nothing in the Hindu Law at all analogous either to trusts of the English Law or to the fideicommissa of the Roman Law, which were probably the origin of trusts in the English Law. It is stated in the Institutes of Justinian by Sandars, page 337, that at first fideicommissa were of little force, for no one could be compelled against his will to perform what he was only requested to perform. When testators were desirous of giving an inheritance or legacy to persons to whom they could not directly give either, they then entrusted them to the good faith of some persons capable of taking by testament; and fideicommissa were so called, because their performance could not be enforced by law, but depended solely upon the good faith of the person to whom they were entrusted. Afterwards the Emperor Augustus having been frequently moved by consideration for certain persons, or because the request was said to have been made in the name of the Emperor" B safety or on account of some striking instance of perfidy, commanded the consuls to interpose their authority. Their intervention being favoured as just by public opinion gradually assumed the character of a regular jurisdiction, and trusts grew into such favour that soon a special proctor was appointed to give judgment in them, and received the name of fideicommissarius.

11. Now, without the intervention of trusts, there are no means by which a perpetuity can be carried into effect. If the estate in question had been given to the grandson, not upon trusts, but with a direction or condition annexed to the gifts, that he should not use the rents of the estate which were given to him, but that during his life he should expend the rents in the purchase of new estates, and that afterwards his heirs should continue to do the same for a period of ninety-nine years or for a longer period, the condition would have been repugnant and void. I will not refer to the authorities upon that subject, because they are clearly pointed out by Mr. Justice Norman in his judgment. He also refers to two Hindu cases in which it was held that a trust upon condition by a Hindu would be void.

12. Such being the state of the law, it appears to me that putting out of the question the case of religious endowments, the consideration of which is wholly unnecessary in the present case, a devise by a Hindu upon trusts which would be

void as a condition, is void in the shape of a trust. I entirely agree, therefore, with Mr. Justice Norman that the trusts for accumulations in this case are wholly void according to Hindu Law.

13. The only remaining question is whether, assuming the trusts to be void, there is a gift to the grandson, and whether he is entitled to hold the estate absolutely for his own use, because the trusts cannot legally be carried into effect. Mr. Justice Norman has held that there was no devise to the grandson, and that he was merely appointed a manager. He says: "The Advocate-General contended that Kumara Agima Krishna has a mere power of management, and that the will contains no gift to him. I am of opinion that this contention is well founded, there is no gift to him in express terms, the conditions on which he is to hold are inconsistent with the definitions and nature of property. I think that there is nothing in the face of the will from which a gift can be implied. In English wills, an intent to give an estate in fee simple to trustees is sometimes implied from language showing that they are to execute trusts which require an unlimited power of alienation but the rule in England is that trustees take no greater estate by implication than is required for the purpose of the trust. In the wills of the Hindus, it appears to me that the giving of large powers of management by a father to one of his sons or to any other members of the joint family, would not necessarily shew an intent that the manager should take an absolute and separate estate, if such manager has no power to appropriate the profits at his own pleasure. Here the testator has not made any effectual disposition of the beneficial interest in the residue of his estate. The result will be that his heirs, according to Hindu Law must be declared entitled to the interest undisposed of after the payment of, or making provision for, the charges and legacies mentioned in the will."

14. I have already read the 22nd paragraph of the will which merely directs that when the grandson, or, in the event of his demise, his successor attains the said "age of twenty-one years," then the whole of my estate, whether self-acquired or hereditary, shall be made over to him, and the Official Trustee shall be discharged. He will assume the office of trustee of this my will, and continue to discharge the same during his lifetime agreeably with the trusts of this my will. He will also assume the management of my household affairs during the term of his natural life.

15. I am inclined to agree with the learned Judge that there was no devise to the grandson, and that he was merely appointed a manager for purposes which was contrary to the principles of the Hindu Law. If there was a gift to him, as trustee for the purposes of those trusts, it appears to me that it would be a gift which is not sanctioned by the Hindu Law, and cannot be upheld, and consequently that the residue of the estates must pass to the heirs at law.

16. But even if the will should be construed, as containing an express devise to the grandson, it appears to me to have been the intention of the testator that the grandson was not to take any beneficial interests, and that the trusts being void,

the grandson would not take absolutely freed: he would not take at all.

17. In the case of the Mayor of Gloucester v. Osborn and another (1 H.L., Ca. 272) a testator gave to his executors beneficially, in equal proportion, all his property which he might not dispose of subject to his debts, and any bequests which he might afterwards make. He afterwards made a codicil in these words: "In a codicil to my will I gave to the Corporation of Gloucester ? 140,000. In this I wish my executors would give ? 60,000 more to them for the same purpose, as I have before named. I would also give my friends (several were named with large legacies) and I confirm all their bequests, and give the rest of my property to the executors for their own interest. No other codicil was produced. It was held, that the purpose of both the legacies must be held to be the same, and that both failed for uncertainty of the purpose.

18. The Lord Chancellor in the course of the argument said, "what is the meaning of 60,000 more?" "Does not the addition show some prior gift?" The counsel said, "the recital that the testator had given the ? 140,000 does not operate to give effect to it as a gift." Suppose the purpose with which both sums are clearly connected was unlawful or impossible or subject to conditions which the Court would not enforce, such supposition shows at once the danger of holding the recital to operate as a gift.

19. Lord Lyndhurst in delivering the judgment in the absence of the Chancellor said: "The former codicil is not produced, no account is given of it, and we have, therefore, no means of ascertaining the purpose for which the gift was made, or to what it is to be applied. In the same sentence in which the legacy is given, and immediately after the words of gift, the gift is stated to be for a purpose which the testator had denned, but which is wholly unknown and cannot be discovered. How then could the legatee be allowed to take the legacy for his own use? The purpose is a qualification of the legacy; it is an essential part of it; and till this is ascertained, it is wholly uncertain what the legatee is to take, whether for his own benefit or for the benefit of others, and, for whom, whether for private or for public or charitable objects. It is, therefore, I think clear that if the legacy had been to an individual, it must have altogether failed; what the testator intended; whom he meant to benefit, does not appear and cannot be ascertained."

20. In this case, it is clear that the testator did not intend the grandson to take for his own benefit. He intended him to take for a special purpose; and the trust not being sanctioned by the Hindu Law, it appears to me that it cannot be held that the trustee was to take for his own use; but that according to the Hindu Law the heirs at law have not been deprived of their inheritance.

21. For these reasons, it appears to me, that the judgment of Mr. Justice Norman must be affirmed with costs, to be taxed according to Scale No. 2.

Markby, J.

22. I have come to the same conclusion as the Chief Justice on both points, and I concur with his judgment on all material particulars.

23. The first ground of appeal in this case seems to me to have been drawn under some misconception as to the nature of the decree. All that has been declared is, that the testator has not made any effectual disposition of the beneficial interest in the residue of his estate, and that subject to the payment of, or making provision for, the charges and legacies mentioned in the will and capable of taking effect, and subject to the result of the inquiries thereby directed, the plaintiff and the defendant, Kumara Upendra Krishna, as the heirs, according to Hindu Law, of the testator, are entitled in equal shares to the interest undisposed of by the said will. All that we have now to decide is, whether the decree is impeachable upon the grounds taken.

24. The scheme of the will may, for my present purpose, be shortly stated thus; Kumara Asima Krishna, on his attaining a certain age, is appointed trustee and manager of the testator's property, and provision is made for keeping up a succession of trustees and managers by appointing other members of the family as occasion may require. Certain sums by way of maintenance are directed to be paid to certain members of the testator's family, and the surplus is to be invested in the purchase of land. This is to continue for ninety-nine years. "After which the then trustee and manager, or every one of his successors, shall have full power either to observe the conditions of the said will, and renew the same, or to adopt others in their lieu. Should the conditions of this will be approved and renewed by their trustee or manager, he shall not be required to take the consent of his co-sharers thereto, but in the event of his altering them, he must be guided by a majority of votes amongst the male descendants in the male line of my generation. It is, however, (the testator proceeds to say) my express wish and direction that the trusts declared in this will, should be perpetual, if Hindu Law permits, and no trustee and manager of my estate will have power to abrogate the provisions contained in this will respecting my estate."

25. In the view that I take of this case, it is not necessary to say whether supposing the direction to keep the property for the purposes of accumulation for ninety-nine years is valid, there is then a valid disposition of the property so accumulated, it will be sufficient for the purpose of the present case (in the view that I take of it) to consider the validity of a testamentary disposition, the effect of which is that the income of a portion of the testator's property or a portion of the income of the testator's property (whichever way you choose to take it) can be enjoyed beneficially, by no person whatever, for a period of ninety-nine years. I consider that such a testamentary disposition of property by a Hindu is void, and the grounds on which I place my judgment are as follows:

26. It is pretty well agreed that wills were in former times nearly unknown to Hindus. Our Courts have decided that they possess testamentary capacity, to some extent. That is now unquestionable. But what we have to consider is the extent of the testamentary capacity, and this leads me to look to the reasoning

on which the decisions confirming the testamentary capacity are founded. There was at first a considerable struggle upon the subject, and it would be difficult even now to find satisfactory decisions directly in support of the doctrine. When the question arises, it is more common to say that it is too late to question the doctrine than to signify any approval of it. The argument which appears to have prevailed when the matter was first under discussion was that a man could do by testament that which he could do by alienation in his life time. It is evident that the strongest opponents of the testamentary capacity thought it useless to attempt to draw any distinction between these two things, testamentary alienation, and alienation during life. Now, though I am bound to accept as established law, that Hindus have some testamentary capacity, and wherever the extent of that testamentary capacity has been defined by authority, to accept that definition. I am not bound to accept reasoning which I consider vicious, and, when a fresh question of the same kind arises, to carry on the inquiry upon a principle which I consider erroneous. I, therefore, consider myself at liberty to question the opinion of those Judges who have considered that the power of testamentary alienation is identical with, or necessarily or universally coincident with, the power of alienation by living persons. Without adopting fully the well-known and forcible expression of Mirabeau, that these two things are as different as life and death, I still maintain that it is quite possible, and that instances have occurred in which the two have not co-existed. Most societies which have allowed alienation at all, have ultimately sanctioned testamentary alienation to some extent; but in nearly all, where the law has followed an independent course of development, a period has existed, during which the right of alienation by living persons is fully established, but testamentary alienation has not yet been thought of.

27. The error of the reasoning of Colebrooke, and other Judges who adopted his opinion, consisted in considering two things, which their experience had always found coincident, as necessarily connected.

28. I do not consider that in this case we have any thing to do with the question whether the power to deal with his property in the manner in which the testator has dealt with it exists, if exercised by him during his lifetime, and so as to operate upon his own interest; the question is, can a Hindu by will thus operate upon the interest of his successors?

29. The only argument I have heard in favour of such a power existing, is, that the exercise of it is nowhere expressly prohibited by the Hindu Law. It seems to me that such an argument on such a point, is worth nothing. Who ever heard that the measure of law in any country, is express command or express prohibition? Still less is it so here, where we are commanded to look, not only to the laws but to the laws and usages, in dealing with questions regarding Hindus and Mohammedans. In no system of law with which I am acquainted, are the rights of property accurately defined, but those rights, whether primary or derivative, are not for that reason unlimited. The limits are to be sought in the

habits and usages of the people. Of course, if a principle of law is established, and another principle of law, hitherto unused, follows as a necessary consequence from the former one, the nonuser of the referred principle is of no sort of consequence. But the position which I assume now, is that there is no established principle of Hindu Law which necessarily involves the existence of testamentary alienation to the extent now claimed.

30. It appears to me that when a question arises whether the will of a Hindu exceeds his testamentary capacity (supposing the question not to be concluded by authority) is to enquire whether testamentary alienation to the extent claimed is a usage amongst Hindus, so long and generally established as to shew that it is a part of the Hindu Law.

31. I feel authorized to adopt the method of inquiry which, on principle, I consider to be the right one, because it is that which was adopted in a recent case by the Privy Council. In the case of *Surjmnani Dasee v. Denobandhu Mullick* (6 Moore's I.A., 526), they rest their affirmation of the testamentary capacity entirely on the established usage.

32. Nor have I any difficulty in arriving at a conclusion on the information before me. I have not the least doubt in the world that such a will as that now under consideration, is of purely European origin; that the idea of making such a will was never heard of till we came into the country; that long after we came into the country, the idea of making such a will was never entertained by Hindus, and that down to the present moment, far from there being any established usage to make such wills, it is extremely rare still to find wills made at all, out of Calcutta.

33. I observe that in the case I have already referred to, the Privy Council say that the power to dispose of property by way of remainder upon an event which is to happen (if it all) immediately on the close of a life in being, has long been recognized in practice in Bengal. Of course, I am not now questioning the decision of the Privy Council that such a power does exist, nor has that decision any direct bearing on the present case. But my own conclusions from the information before me, are so widely different, that I think it right to state (which I should not otherwise have thought it necessary to do) apart of the grounds on which I form my conclusion.

34. Had wills of any kind, certainly had wills of at all a complicated character, been common in Bengal, it seems to me impossible that they could not have borne their natural fruit in the shape of litigation. And the cases in which documents of a really testamentary character have come before the Courts from any other part of Bengal except Calcutta are extremely few. On searching the Indexes, I find in Marshall's, Hay's, and Sutherland's Reports, which cover the proceedings of this Court on the Appellate Side for the last six years, four cases of so-called wills of Hindus: *Baboo Kuldeb Narayan Sahi v. Musst. Umakumari* (Mar., 357); *Giridhari Das v. Nandkishor Dutt Mohant* (2 Hay, 633); *Saraswati Dasi v. Purna Chandra Boy* (4 W.R., 55); and *Tin Cowri Dasi v. Hurihur Mookerjee*

(8 W.R., 308).

35. In the case in Hay's Report, the document which is called a will, is really only an appointment by a Mohant of his successor. The case in Marshall is a very curious one, and shows how little the testamentary power is understood amongst Hindus. The deceased had a desire to alter the succession to his property; but evidently both he and his mookhtear were quite unaware that he could do so directly by will. He, therefore, executed a power of attorney in favour of his mookhtear, empowering him to apply to the Collector for a mutation of names, so as to carry out his object, and as it appears to me, intending that this application should be made while he was yet alive; and this was actually done, the application being made three days, before the so-called testator's death. The case of Tin Cowri Dasi v. Hurihur Mookerjee (8 W.R., 308) arose out of a Calcutta will of the simplest possible kind. In the case of Saraswati Dasi v. Purna Chandra Roy (4 W.R., 55), the document professes to be a permission to adopt, which it is, and it is only so far testamentary, inasmuch as it takes the management of the property to some extent out of the hands of the widows, and gives bequests to the managers. I consider this last to be the only instance, in these Reports, of a true will executed out of Calcutta.

36. In Carrau's Index of the Sudder Dewany Adawlut Decisions from 1792 to 1855, I find four cases having reference to so-called wills of Hindus. In Eshan Chandra Rai v. Iswar Chandra Rai (1 Sel. S.D.R., 2) the document is described as a deed of gift executed shortly before the donor's death. In Srinarayan Rai v. Bhya Jha (2 Sel. S.D.R., 23), the testamentary act was the adoption of a son by a lady on her death-bed, and declaring him malik of all her property, moveable and immoveable. In Musst. Abea v. Iswar Chandra Ganguli (2 Sel. S.D.R., 290), the document was a deed of gift executed and acted upon during the lifetime of the parties. The report of the case of Mukhun Lal v. Burial Mohant (S.D.R., 1853, 489), does not show what the nature of the document was, but assuming it to be a true will, this would, with the first, which is also doubtful, make two more instances.

37. In Morley's Digest, four additional cases are mentioned as bearing on the subject of so-called wills of Hindus in Bengal. That of Kishen Govind v. Ladlee Mohan Thakur (2 Sel. S.D.R., 309) is purely a case of a deed also. At the most three doubtful cases are thus added to the list.

38. Thus taking in all the unknown and doubtful cases, eight cases on the subject of Hindu wills out of Calcutta are all that I have been able to discover since 1792.

39. Six cases of testamentary dispositions by Hindus in Bengal are reported by Moore as having come before the Privy Council in the last thirty years.

N.W.P.--Rewan Persad v. Musst. Radha Bibi (4 Moore I.A., 137).

Calcutta.--S.M. Surjamani Dossee v. Denobandu Mullick (6 Moore I.A., 526, and 9 ib., 123).

Dacca.--Sonatan Bysak v. S.M. Jagatsundari Dossee (8 Moore I.A., 66).

Mofussil.--Golab Kunwari Bibi v. Iswar Chandra Chowdhry (8 Moore I.A., 447).

N.W.P.--Nana Narayan Rao v. Hari Panth Bhao (9 Moore I.A., 96).

Mofussil.--Musst. Bhooban Mayi Debi v. Ram Kiskore Ackarj Chowdhry (10 Moore I.A., 279).

40. Two of these come from the N.W. Provinces, one from Calcutta, one from Dacca, and two from other parts of Lower Bengal.

41. I have also, upon this point, consulted my learned colleagues, Mr. Justice L.S. Jackson and Mr. Justice Dwarkanath Mitter, whose long and varied experience gives to their opinion very great weight, and they inform me that genuine wills of Hindus which alter the succession, are, out of Calcutta, still rare. I have also made inquiries amongst Hindus of great professional experience in the law, and their opinion is to the same effect.

42. That testamentary alienation is far more common in Calcutta, I have no doubt, and also that wills there made, are much more complicated in their provisions than those of the provinces. But where a custom prevails exceptionally in a well-defined district only, it is I think right to infer either that it is one peculiar to the district or that it is an abuse. I have never heard it suggested that there was any custom of making wills peculiar to Hindus in Calcutta. It must, therefore, be an abuse, if it in any way exceeds the power as exercised in Bengal generally. Of course, such wills swell the general list of instances, and must be, therefore, taken into account, but the effect of such instances will be greatly diminished, if there be circumstances which explain how it is that testamentary alienation, which is elsewhere rare, is common in Calcutta. That there are such circumstances, no one can doubt. The wills of Hindus in Calcutta are in any but their very simplest form of undoubtedly English origin, in this sense, that the Hindus have learned from us the habit of making such wills, and the usage in Calcutta is not a Hindu usage, but an English usage adopted by Hindus. Not that even in Calcutta, have I any reason to suppose, that such wills as that now under consideration, are common. I believe that they are of very recent origin, and probably owe their existence to some discussions which have taken place in this Court and in the Privy Council, and which have been misunderstood. That they will become common, if the testamentary capacity is affirmed to that extent, I think not unlikely.

43. I observe also that the Privy Council (Mussumat Bhoobun Moyee Debia) still speak somewhat doubtfully of the power of a Hindu to make such substitutions as had been declared valid in Surjamani Dossee's case (6 Moore, I A., 526). It may be, therefore, that further inquiry has led their Lordships to doubt the entire correctness of their former information as to the usage of Hindus.

44. I have put the case on what I conceive to be the true ground, namely, the usage of the people in respect of testamentary alienation, and not of alienation

of living persons, but I would add that I should arrive at precisely the same result, were I to enquire what is the usage of the people in respect of alienations of the latter kind.

45. From the confusion already pointed out between deeds of gift by living persons and wills in the Indexes here, I have had to examine a great number of cases of the former kind, and I find no semblance of an attempt to dispose of property by alienation during lifetime in such a manner as this testator has thought proper to dispose of it by will. I believe such a gift of property, whether made by deed or will, would be equally foreign to the general habits, ideas, and usages of Hindus, and an excess of the rights of property as recognized generally in India, I have no hesitation in holding it to be void.

46. After the Chief Justice's own explanation of the case of *Goberdhon Bysak v. Sham Chand Bysak* (Bourke, 282); it is hardly necessary for me to say any thing upon it. But I may remark that I have from the first understood the observations of the Chief Justice in that case to amount to this: That it being assumed to be a principle of Hindu Law that a gift can be made to an idol which is a *caput mortuum*, and incapable of alienating, you cannot break in upon that principle by engrafting upon it the English Law of perpetuities. With that I perfectly concur.

47. Upon the second ground of appeal which raises the question, whether in the event of the failure of the trusts for accumulation the defendant is entitled to the property for his own use and benefit, I think that he is not. The whole scheme of the will was conceived with a certain object, which object has failed, and assuming that there is a devise to the grandson, at all, which Mr. Justice Norman doubts, still I think it is clear that the testator did not intend that he should take any beneficial interest, beyond the prescribed sum for maintenance during the ninety-nine years. Of course, the question how far the devise, if any there be, may hold good for the purpose of carrying out the intentions of the testator by payment of legacies, is not under consideration. I agree the decree should be affirmed, and the appeal dismissed with costs.