

(1877) 02 CAL CK 0003
In the Calcutta High Court

Soudaminey Dossee

APPELLANT

Vs

Jogesh Chunder Dutt and Others

RESPONDENT

Date of Decision : 21-02-1877

Acts Referred:

Citation : (1877) ILR (Cal) 262

Hon'ble Judges : Pontifex, J

Bench : Single Bench

Judgement

Pontifex, J.—The plaintiff in this case sues as widow of her deceased husband, Sreenath, for a partition of the estate formerly belonging to Ram Mohun, her husband's grandfather. Ram Mohun had executed a will dealing with this property. (The learned Judge read the clauses of the will set out, and continued) Under this will the plaintiff claims that, on the death of Umachurn, one of the testator's sons, his only son Sreenath, who survived him, became absolutely entitled be Umachurn's share, and that she, as Sreenath's widow, is now entitled thereto.

2. This claim is resisted by the defendants, who are willing to admit that Sreenath became entitled under the original gift, but insist that his interest was defeasible under the gift over which I have read. It is, therefore, the interest of neither party to argue that the original gift to the male issue of the testator's sons is invalid as including objects too remote, or, in other words, objects to whom, under the law as now settled, the testator could not lawfully make a devise. But though neither party has urged this objection, it was raised by me during the argument, and I apprehend that I am bound to take it into consideration.

3. Taking the gift to Umachurn and his male issue by itself, it is clear, that although his son Sreenath was born in the testator's lifetime, and, therefore, would have been a valid object of the testator's bounty, yet, as Umachurn survived the testator, he might possibly have had other male issue besides Sreenath, who would fall within the meaning of the testator's words "such male

issue shall succeed."

4. Now in deciding questions of remoteness it is an invariable principle of the English Courts to pay regard to possible and not to actual events; and the fact that a gift might include objects too remote or incapable of profiting directly by the testator's bounty is held to be fatal to its validity. The question is, however, to be considered according to the state of circumstances at the period of the testator's death, and not merely according to the state of circumstances at the date of the will.

5. I don't for one moment pretend that this rule, merely because it is a rule of the English Courts, should, if unreasonable, or inconvenient, be extended to the interpretation of the wills of Hindus. But it is to be noticed that the rule is not a rule of the strict English Common Law, because questions of remoteness applying to executory limitations as distinguished from Contingent remainders only arose for consideration after the Restoration, when executory limitations, originally devised it is said by Bridgman, were first admitted and upheld by the Courts, although an infringement on the rules of the Common Law. The rule was, in fact, established as founded on reason and convenience.

6. Now, in this particular case, if Umachurn had predeceased the testator, his son Sreenath would have been a valid object of gift, for in that case the whole class of Umachurn's male issue must have been known at the death of the testator. But, in fact, umachurn survived the testator, and at the testator's death it was quite possible that other sons in addition to Sreenath might be born to Umachurn. If any such other sons had been born, they certainly would not have been capable of taking under the testator's will. And in that case it seems to me that it would not have accorded with the testator's intentions that Sreenath should take the whole of Umachurn's share to the exclusion of his brothers. The question of the testator's intention in such a case as this was well considered by Sir William Grant, in *Leake and Robinson* 2 Mer. 363 at p. 309, and of course the question of intention is the same whether a testator be English or Hindu.

7. If then the rule to which I have referred did not apply to the construction of Hindu wills, there would have been an uncertainty from the period of the testator's decease until the death of Umachurn as to whether there was or was not an intestacy with respect to Umachurn's share. For if Umachurn had other sons, then as the testator could not have intended Sreenath to take the whole to the exclusion of them, there would have been an intestacy.

8. It seems to me that the rule is, in a special manner, applicable to and necessary for the Hindu law of devise; for I take it to be a fundamental principle of that law that the persons who are to take a testator's estate must be certain and known at the time of his death, which would not be the case if capacity to take depended on the contingency whether other persons should or should not come into existence. The rule that where there is a gift to a class, and some persons constituting such class cannot take in consequence of the remoteness of

the gift or otherwise, the whole bequest must fail, has been held to apply to Hindu wills by the late Mr. Justice Norman in construing this particular will see (8 B.L.R 11.). But it was not necessary for him in that case to decide whether the rule as to regarding possible and not actual events was also applicable, And indeed, he extrajudicially (see p. 409) stated that Sreenath took an absolute interest in the share which belonged to his father. With this last conclusion I am, for the reasons before stated, unable to agree. Nor do I think that the decision referred to by Mr. Bell of Peacock C.J. S.M. Krishnaramani Dasi v. Ananda Krishna Bose 4 B.L.R. O.C. 279 applying as it does to bequests which are not similar in terms to the bequests in Ram Mohun's will affects this question. In that case the gifts of the annuities after the decease of the first taker did not in terms comprehend a class of issue whom he should leave surviving him.

9. In the present case, in my opinion, the gifts to the male issue of such of the testator's sons and grandsons as survived him, must be held to be invalid and incapable of taking effect and, therefore, I must hold that Sreenath took nothing under the devises in the testator's will. And if the devises to the male issue are void, as including objects too remote or incapable of taking a benefit under this will, all limitations ulterior or expectant on such remote or invalid devises, are also void for the reasons given in the case of Proctor v. The Bishop of Bath and Wells 2 H. B1. 358 such reasons being equally applicable to a Hindu as to an English testator, and such reasons would of course apply more strongly to a case where an object of the prior devise--as Sreenath in this case--actually came into existence.

10. Upon those grounds I think that Sreenath, and through him his widow, would be entitled to a share in such part of the estate of the testator as by reason of the invalidity of the gifts in his will is undisposed of.

11. But the plaintiff's claim is met by another objection on the part of the defendants. They insist broadly that, according to Hindu law, a widow cannot claim a partition; and they rely on what they assert to be the fact that no reported decisions exist in which such a right has been held to belong to a widow.

12. On the other hand, the plaintiff has submitted a list of, I think, some 40 unreported cases in this Court, in which partition has been decreed at the suit of a widow. I take it that this question is very much a question of discretion for the Court in each particular case. The Court would probably refuse partition by metes and bounds to a childless widow, who was entitled to a very small share.

13. But in this case the plaintiff has daughters, and the daughters have sons, and the share of Sreenath in the testator's undisposed of estate will be considerable I think that in such a case as this a widow is entitled to a decree for partition. Otherwise she might be unable, during her life, to improve the heritage of her children.

14. It seems to me, therefore that the plaintiff will be entitled to a decree for partition, and that the only issues necessary to be raised are-

1. What sons and grandsons of the testator named in his will survived him?
2. What sons and grandsons of the testator named in his will died in his lifetime leaving any and what issue living at the testator's decease?
3. What property is the subject of partition?