

(1871) 09 CAL CK 0003
In the Calcutta High Court
Case No : Regular Appeal No. 235 of 1870

Srimati Bramamayi Dasi, Representative or the late Krishna Kishor Ghose APPELLANT

Vs

Jages Chandra Dutt and Others RESPONDENT

Date of Decision : 05-09-1871

Acts Referred:

Citation : (1871) 09 CAL CK 0003

Judgement

Norman, Offg. C.J.

1. The first question we have to decide seems to be concluded by the decision of this Court in the case of Ganendra Mohan Tagore v. Upendra Mohan Tagore 4 B.L.R., O.C., 103. Sir Barnes Peacock was of opinion that a Hindu could not under any circumstances make a gift by will to an unborn person or persons. Even if under the Hindu law there could be a gift to any unborn person, there can, I think, be no doubt that, as the law stood, prior to the passing of Act XXI of 1870, the unborn son must have taken immediately at the expiration of the life-interest of the prior taker. The direction in the will of Ram Mohan that, "on the death of either of my four sons leaving lawful male issue, such issue shall succeed to the capital or principal of the respective shares of his or their deceased father or fathers," in my opinion conferred an interest which vested in the issue immediately on the decease of the father. The expression "to be paid or transferred to them respectively on attaining the age of twenty-one years" is a mere attempt to defer the period of payment to or the enjoyment by such issue. Each of the son's sons would then succeed to, or take, immediately on the death of his father, the capital of, or an absolute interest in, his share. The case resembles in this respect the English cases of Sidney v. Vaughan 2 Brown's Par. Cases, 254 and Chaffers v. Abell 3 Jur., N.S., 577. If a different construction were put upon the will, the gift to the issue would have been void, because by Hindu law an estate cannot remain in suspense or abeyance and without an owner. The testator attempts to make a gift over in the event of the issue not attaining the age of twenty-one years. The event upon which the gift over is to take effect is,

"if either of the four sons die leaving male issue, and the whole of such issue shall afterwards die under the age of twenty-one years and without male issue, in such case the share or shares of my said sons so dying shall go and belong to the survivors of my said sons and my said two grandsons Rajendra Dutt and Mahendra Nath Dutt for life and their respective male issue absolutely after their death in the same manner and proportions as is hereinbefore described respecting the original shares." Now even, if the words "male issue" be construed as meaning "sons," it is clear that the event on which this gift over is to take effect may be very remote. A son might be born to one of the testator's sons forty years after the death of the testator. The death of such a son's son, at the age of twenty years, might constitute the event upon which, according to the terms of the bequest, the property would go over to the surviving children of the testator for their lives or their issue absolutely. During all that time, i.e., the duration of a life in being at the time of the death of the testator, and a period which may extend to twenty years and eleven months afterwards, it would be utterly uncertain who would be the person to take on the happening of the event. Before the passing of Act XXI of 1870, I believe that there is no case in which it has been held that a Hindu testator could make a gift to take effect at a period more remote than the expiration of a life in being (1).

2. But Baboo Rames Chandra Mitter contended that the words "male issue" could not be construed as meaning "sons." To apply a test, if a son of the testator to whom a son had been born who pre-deceased him, died leaving a grandson, if the term "male issue" is to be restricted to sons, under the first alternative, the surviving sons and their issue would take to the exclusion of such grandson. But it certainly could not be said that such grandson did not fall within the meaning of the term "male issue," as that expression is generally understood: and it would be repugnant to the feelings of a Hindu ancestor that he should be excluded. In *Jarman on Wills*, vol. 2, p. 92, a case is given where a similar point arose in England--*Ross v. Ross* 20 Beav., 645 Construing the words "male issue" as "descendants issued from his loins," suppose a son of the testator had issue, a son, a grandson, and a great-grandson, each of whom might of course be born after the death of the original testator. The son, grandson, and great-grandson would be the male issue of the son. Suppose, after the death of the son, the son's son, son's grandson, and son's great-grandson were to die all under the age of twenty-one years, it is clear that, while the great-grandson survived, it could not be said that "the whole of the male issue" of the son had died under the age of twenty-one years. It therefore follows that the gift over upon the death of the whole of the male issue under twenty-one years, &c., contemplates an event which may happen at a period indefinitely remote. Until the event happened, it would be wholly uncertain who would be the person intended to take under the limitation in the will. The son, the grandson, and the great-grandson would have successively taken an absolute interest in the estate. Each in succession after attaining his full age of eighteen, might have sold or disposed of the whole or any part of his share. Each in turn could have defeated any

intention and any direction of the testator with respect to the property. The attempt to direct the course of the devolution of the property, after it had so completely passed out of the reach and control of the testator, is clearly futile. The case bears, on this point, a strong analogy to *Bhoobun Moyee Debea v. Ramkishore Acharj* 10 Moore's I.A., 279.

3. I think it clear that the gift over on the whole of the male issue of a son of Ram Mohan dying without issue under the age of twenty-one was invalid.

4. I have endeavored to show that, on the death of Uma Charan, Srinath took an absolute interest in the share which belonged to his father.

5. The next question which arises is as to the share of Shib Das, who died in April 1861. On the death of either of the testator's sons, without leaving any "male issue," his share is "to go to and belong to the survivors of my said sons and my said two grandsons Rajendra Nath Dutt and Mahendra Nath Dutt for life and their respective male issue absolutely after their death in the same manner and proportions as hereinbefore described respecting their original shares."

6. It should be observed that, looking at the context, and with reference to the manner in which the original shares are given, it appears that the testator does not give the property amongst the surviving sons for their lives, but to the surviving sons and the living male issue of the deceased sons as a class,—the surviving sons to take for their lives, the issue of the deceased sons absolutely. Giving to the word issue the natural sense, the effect would be that the "male issue" of the deceased sons might include persons who would probably not be in a position to take by descent as heirs of the testator, as, for instance, grandson's grandsons might exclude many others who might be the testator's heirs according to Hindu law. Therefore, on the death of a son without issue, the class indicated would not take by descent. They must take, if at all, by gift. The case of *Ganendra Mohan Tagore v. Upendra Mohan Tagore* 4 B.L.R., O.C., 103 is a distinct authority, by which we are bound, that a gift by a Hindu to a person not ascertained or capable of being ascertained at the time of the death of the testator cannot take effect. The gift, therefore, so far as it is a gift to the unborn male issue of the sons and grandsons of the testator must fail. Now it is a well-settled rule in construing wills, founded upon excellent reasons, and which has been adopted in the 102nd section of the Indian Succession Act, 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. Upon that principle, I think, we are bound to say that the gift over on the death of Shib Das wholly fails.

7. On the death of Shib Das, it appears that his mother, Shama Sundari Dasi, the widow of Ram Mohan, who is still living, was his heir according to Hindu law. If, therefore, the gift over fails, on the death of Shib Das, his share went to Shama Sundari. But even if the gift over on the death of Shib Das, is not invalid, there is another reason why the plaintiff has failed to prove that, in the life-time of

Shama Sundari, Kali Das could take the share of Shib Das in the property comprised in this suit. Lot Poroi and the putni talook Nouggi were acquired out of the surplus income or profits of the joint property after the death of Ram Mohan. The case of Sreemutty Soorjeemoney Dossee vs. Denobundoo Mullick is a distinct authority that, under circumstances similar to those in the present case, the accumulations of the surplus income of the joint property of a Hindu family go to the heirs of the person out of whose income it was accumulated. The property purchased after the death of Shib Das, may have represented accumulations made during his life-time, and if so, as well such accumulations as the property by which they are now represented, would belong to the heirs of Shib Das, and would not be affected by the will of Ram Mohan.

8. For these reasons we think that it is not shown that Kali Das was entitled to more than 4 annas 2 gandas and 2 krants.

9. The decree of the lower Court will be modified accordingly.

10. The appeal of the plaintiff will be dismissed, and the cross-appeal of the defendants decreed with costs.

11. In the absence of the heirs of Kali Das, we do not of course decide whether, as to the whole or any part of the property, Kali Das took more than a life-interest.

Ainslie, J.

I concur in the decree proposed to be made by the learned Chief Justice. It seems to me clearly established by the judgment in Ganendra Mohan Tagore v. Upendra Mohan Tagore 4 B.L.R., O.C., 103 cited by him, that under the Hindu law, unmodified by Act XXI of 1870, there existed no power to make a gift to a person unborn at the time of the testator's death, and that there was no rule corresponding to that now embodied in section 101 of Act XXI of 1870 under which the resting of an estate could be deferred for the life-time of a person living at the testator's decease, and the minority of some person who should be in existence at the expiration of that period, and to whom, if he attained full age, the thing bequeathed was to belong. The testator Ram Mohan Dutt has assumed that he could by will control the disposition of his property for a period not exceeding twenty-one years from the death of the persons named in his will who were living at his death; and if this were conceded, I see nothing in the will to make the bequests void; but unless this is conceded, the will fails for the reasons assigned by the Chief Justice, and, therefore, I do not think it necessary to consider at length what the provisions contained in it are, and how the word "issue" is used. I may say briefly that I understand that it has been in one place used in a limited sense, and not in its most comprehensive sense, for the testator talks of issue of before mentioned issue; and from the context it seems to me clear that the before mentioned issue must be limited to issue living at a particular time.

(1) The gift over would clearly be void under the 101st section of the Indian Succession Act, which enacts that "no bequest is valid whereby the vesting of the thing bequeathed may be delayed beyond the life-time of one or more persons living at the testator's decease, and the minority of some person who shall be in existence at the expiration of that period, and to whom if he attains full age" (eighteen years), "the thing bequeathed is to belong," per Norman, J.