

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Tarachurn Chatterji v. Suresh Chunder Mookerji and others (minors, by their next friend Thakomoni Debi), from the High Court of Judicature at Fort William in Bengal; delivered 14th May 1889.

Present:

LORD HOBHOUSE.

LORD MACNAGHTEN.

SIR RICHARD COUCH.

[*Delivered by Sir Richard Couch.*]

The Appellant (one of the Defendants in the suit) is the son of Anund Chunder, who died in 1850. The Respondents (the Plaintiffs in the suit) are the grandsons of Madhub Chunder, the brother of Anund. He died on the 14th October 1845. Madhub Chunder had a son Kali Churn who died on the 23rd October 1853, after attaining majority, and a daughter Thakomoni, the mother of the Respondents. Kali Churn left a widow Matangini, who died on the 21st December 1879. The property in suit is the share of Madhub in the joint property of himself and Anund, and the Respondents are entitled to it by inheritance if it is not disposed of by the will of Madhub, which was made shortly before his death, or by the will of Kali Churn, by virtue of one or the other of which the Appellant claimed to be entitled to the property. It was not disputed that the will of Kali Churn was genuine, and Madhub's was found to be so by

56979. 125.—3/89.

A

both the Lower Courts. The only questions in this appeal are the construction of these wills.

The will of Madhub addressed to his brother Anund, after stating that he had a half share in their joint property, and giving directions for the payment of debts and the maintenance of his wife and son and daughter, and the education of the son and other matters, says, " God forbid
 " but if my minor son should die and my
 " daughter should get married and a grandson
 " be born, then on the said grandson's attaining
 " majority you will give him half of my share
 " whatever it may be and give half to your son,
 " God forbid, but if she having no son becomes
 " a widow then you will pay her Rs. 4 a month
 " for maintenance. You shall perform the
 " Sharodia (Doorga) puja, srads of parents and
 " others, and pay perquisites and presents to the
 " spiritual guide and family priest according to
 " the circumstances and your sense, God forbid,
 " if you die before my son and daughter attain
 " majority then you may appoint attorney
 " whomsoever you may think fit. You shall
 " account for and make over whatever remains
 " of the estate after payment of debts to my son
 " when he comes of age. If you be of opinion
 " that my half share should be sold and Com-
 " pany's papers should be purchased (with the
 " proceeds) you may sell it for its proper value.
 " Further if my only son dies before he gets
 " children my wife may with your consent adopt
 " a son." It has been found by the High Court
 and is not now disputed that Tarachurn was
 born before the date of this will.

The direction to make over the estate to the son when he comes of age has the effect of a gift to him to take effect at that time, and the words " If my minor son dies " in order to be consistent with that must mean dies during minority. On the son's death after coming of age

leaving Matangini his widow Madhub Chunder's wife would not have power to adopt a son, the estate of Kali Churn having become vested in his widow. *Thayammal v. Venkatarama Aiyar*, Law Rep., 14 I. A., 67.

The will of Kali Churn is now to be considered, as if the Appellant has any title to the property it must be under that. In the official translation of it in the Record of Proceedings it is said in several places to be torn and illegible, and it was agreed before their Lordships that the statement of it in the judgment of the Subordinate Judge should be taken as correct. This is as follows, the figures 1, 2, &c., being inserted by the Judge.

“ The testator after describing the properties standing swanami and benami and in possession and out of it, and stating that his father Madhub and Madhub's elder brother Anund had jointly acquired them with their own earnings, and were in joint possession and enjoyment (dakhil voge) thereof and were performing the ceremonies and maintaining the family with the profits and their own earnings, says in the will :—

‘ As my younger uncle died leaving no issue or widow in 1248, during the lifetime of my father and the elder uncle, they remained in possession (or were possessors-dakhilkar) of all the estate. In the meantime, through the influence of evil stars they became heavily involved in debts, and before they were all paid off, my father died in Assin 1252. I was then a minor, and my mother *Srimati Debi* was my guardian in law Courts under the guidance of my elder uncle, who with his own earnings and the profits of the estate performed the ceremonies and maintained the family, myself and my mother as before, and paid off a large proportion of the debts, died in Srabun 1257, leaving his minor son Tarachurn Chatterji and my aunt, his widow, as his heirs. The said aunt through evil advice of bad men being about to divide the properties, I, on attaining my majority in 1257, made statements in some Courts with regard to some of the properties as if they were my father's self-acquired and exclusive properties, with a view to prevent the threatened division (or partition), and taking upon myself the payment of debts due, some of the creditors made arrangements with them and am gradually paying them off. But, in fact, maintaining those properties, debts, and dues still joint, I am in joint possession (dakhilkar) of the whole estate in conjunction with my said aunt, and am performing the ceremonies and maintaining the family. But I am so seriously ill now that my life is despaired of, and man is mortal and life is uncertain. I,

therefore, deem it proper to make a will of the properties
 that will fall to my share. So laying down these rules I
 make my will, that (as) ere this my mother was my guardian
 according to the anumati-patra of my father and my elder
 uncle's consent, (1) I appoint my mother (step) the exe-
 cutrix of my said whole estate. So long as my cousin
 brother Tarachurn does not attain majority, my mother in
 conjunction with my aunt shall maintain and protect my
 minor wife Matangini Debi, and perform the ceremonies and
 maintain the family as before, pay off the creditors' debts,
 conduct the lawsuits already pending in Courts or to be
 instituted hereafter, file documents, pay debts howsoever in-
 curred, take back documents and realize dues. (2) After-
 wards on attaining majority, my cousin brother Tarachurn
 becoming possessor (dakhilkar) of my share *as well as the*
share of my elder uncle, shall maintain my mother and wife.
 (3) Further, I being the only son of my father, *it is pro-*
vided in his said anumati-patra that if I die before the birth
of any issue, my mother shall adopt a son according to
Shastras. If my mother does adopt a son, well and good ;
 otherwise on attaining majority my wife shall adopt one
 of Tarachurn's sons, and shall pass her time (life) under
 the kurtaship (management and protection) of Tarachurn.
 God forbid, if Tarachurn does not get issues, then she may
 adopt a son of somebody else fit for the purpose. (4) When
 the ijmal properties have not hitherto been partitioned, they
 shall remain joint. (5) And save and except turuf Belpuk-
 huria chuck lands purchased in auction, *nobody shall have*
power to dispose of any other property by mortgage, gift,
or sale. (6) The heir for the time being shall remain in
 possession (dakhilkar) of the aforesaid whole estate jointly
 with the co-sharer and perform the ceremonies and maintain
 the family, take proper notice of my sister and cousin sister,
 and my wife shall accept muntra (spiritual or religious
 initiation) according to the kulachar (family custom) from
 my spiritual guide, or whomsoever may be living of the
 family of my guru, and shall live in my house. (7) *My mother*
and others shall cause her to perform the proper religious
 ceremonies. (8) If there be disagreement in any respect
 and she lives in her father's house, she shall get Rs. 10 per
 month for her maintenance from *my mother and others*.
 (9) If she does not adopt a son in the manner hereto-before
 provided for, there shall remain (or be) no concern (elaka)
 with and right (sattwa) to the estate and things, &c., on the
 part of my wife. (10) My clothes and raiments are left
 in the care of my mother and aunt. Tarachurn shall get
 them (paibek) when he comes of age. (11) Except those
 (clothes and raiments) the ijmal metal plates and utensils
 and those used for puja and the whole of the immovable and
 moveable estate are left ijmal. (12) My mother and aunt
 may sell the said Belpukhuria chuck lands to pay
 off debts or to purchase other properties nearer home.' . . ."

In the Lower Courts much stress appears to have been laid on the word dakhilkar, which it was contended applied to one holding by virtue of his own title, and not to a possession held on behalf of another as an executor or trustee. The ordinary meaning of the word is occupant, but the testator where he says he is in joint possession of the whole estate in conjunction with his aunt, and where (at No. 9) he says "the heir for the time being shall remain in possession of the aforesaid whole estate jointly with the co-sharer and perform the ceremonies and maintain the family," appears to give it a larger meaning. In order to see what it means in the sentence, "Afterwards on attaining majority my cousin brother Tarachurn becoming possessor (dakhilkar) of my share as well as the share of my elder uncle shall maintain my mother and wife," the context must be looked at. These are the only words that can operate as a gift to Tarachurn. The testator begins by appointing his stepmother executrix, meaning manager of his estate. So long as Tarachurn does not attain majority she is to manage in conjunction with his aunt. On attaining majority Tarachurn is to become possessor of the share, whether in the same capacity as the stepmother or otherwise is doubtful, but what follows assists in discovering the intention of the testator. He alludes to the provision in his father's will that if he dies without issue his mother should adopt a son who apparently he thinks would take the estate, and he says that if his mother does not adopt a son his wife shall adopt one of Tarachurn's sons, and if Tarachurn has no sons she may adopt the son of somebody else. That he wished an adoption to be made is apparent from the direction (9) that if his wife did not adopt a son she was to have no concern with and right "to the estate and things, &c.," and the words

at (6), "The heir for the time being shall remain in possession," seem to be intended to refer to an adopted son rather than to Tarachurn. If the intention was that Tarachurn on attaining majority was to take the estate for his own benefit, it would be giving him a direct interest to prevent the wife making an adoption, which he might do by refusing to give one of his sons and thus defeat that intention. It is more reasonable to suppose that the intention was to benefit the family of Anund by obliging the wife to adopt a son of Tarachurn than by giving the estate absolutely to Tarachurn on his attaining majority. Their Lordships are of opinion that the proper construction of the will is that it provided for the management of the property on the death of Kali Churn, and gave power to his widow to adopt under certain limitations; that on his death his widow Matangini became entitled to his estate, and on her death the Plaintiffs became entitled. This was the opinion of the High Court, which made a decree accordingly, reversing the decree of the First Court. That Court had ordered the costs of Tarachurn and another Defendant Ram Krishna Nuskur to be paid out of the estate of Kali Churn, but the High Court ordered those Defendants to pay the Plaintiffs' costs in the High Court and also in the First Court, and the other Defendants to bear their own costs in all Courts. Their Lordships think that the costs of all parties in the appeals to the High Court and in the First Court should be paid out of the estate of Kali Churn, and they will humbly advise Her Majesty to vary the decree of the High Court accordingly, and in all other respects to affirm it. This variation ought not to make any difference in the order as to the costs of this appeal, and the Appellant will pay the costs of it.
