Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Purna Sashi Bhattacharji and others v. Kalidhan Rai Choudhuri and others, from the High Court of Judicature at Fort William in Bengal; delivered the 4th May 1911.

PRESENT AT THE HEARING:

LORD MACNAGHTEN.
LORD ROBSON.
SIR ARTHUR WILSON.
MR. AMEER ALI.

[DELIVERED BY MR. AMEER ALI.]

This is an Appeal from a Judgment of the High Court of Bengal, dated the 14th of March 1906, reversing a decision of the Subordinate Judge of Tipperah; and the only point for determination turns upon the construction of a document executed in 1868 by two brothers, Krishna Kishore Chowdhuri and Naba Kishore Chowdhuri, subject to the Dayabhaga School of the Hindu Law, by which they purported to provide for the permanent devolution of their respective properties in the direct male line, including adopted sons, with the condition that in case of failure of lineal male heirs in one branch the properties belonging to that branch should go to the other, subject to the same rule; and only in the absence of male descendants in the direct line in either branch were the properties to go to female heirs or their descendants.

[26] J. 51. 125.—5/1911. E. & S. A

Krishna Kishore died in June 1868, leaving him surviving, besides a son named Ananda Kishore and a daughter Durga Sundari, his brother Naba Kishore and their mother Kalitara. Ananda died in 1872 without any issue and Kalitara in March 1901.

The Plaintiffs, who are the sons of Durga Sundari, instituted this suit on the 29th of July 1901 against Naba Kishore, claiming as next reversioners to Ananda, their maternal uncle, the properties which originally belonged to Krishna Kishore and after him to Ananda, and which had since come into the possession of the Defendant (Naba Kishore).

Naba died shortly after the institution of the suit, and his sons, the present Respondents, were then brought on the Record in his place as his legal heirs and representatives.

The Plaintiffs' case is that, notwithstanding the rules laid down by the two brothers in the Instrument of 1866, which they contend to be invalid under the Hindu Law, on the death of Ananda Kishore the properties descended to his grandmother Kalitara, who held them as a life-tenant until her death, and that on her decease Ananda Kishore's estate devolved on them as his next reversioners.

The Defendants' contention is that under the Instrument of 1866, on the death of Ananda Kishore, the properties forming the subject-matter of the present litigation passed to Naba, and on his death to the Respondents in this Appeal.

It appears that in 1862 one Tripura Sundari, the widow of Ishwar Chandra, paternal uncle of Krishna and Naba, conveyed to them jointly her interest in the properties belonging to her deceased husband; the Plaintiffs claim to recover in this suit the share of Krishna in these properties also. Tripura, who was joined as

Defendant to the action, died after the trial in the First Court.

With regard to the main issue in the case, viz., the construction of the Instrument of 1866, the Subordinate Judge held in substance that the provisions therein contained regulating the perpetual descent of the properties of the two brothers in the lineal male line were in contravention of the rules of Hindu Law, and were, consequently, invalid; and that the Plaintiffs were entitled to recover the properties in suit, save certain items regarding which there is no question in this Appeal. He accordingly made a decree in favour of the Plaintiffs, but disallowed their claim for account against the Respondents.

The High Court on appeal came to a different conclusion. It considered that, under the circumstances that had actually happened, Ananda Kishore had obtained under the Instrument in question an absolute estate defeasible in case of death without male issue.

The real gist of the Judgment is contained in the following passages: —

"Turning then to the questions what might be the exact "estate which Ananda Kishore obtained upon the death of "Krishna Kishore, and to whom the estate devolving upon "him would go upon his death without any male issue, it "seems to us that if we could confine our attention simply "to paragraphs (1) and (3) of the Will we should have to "hold that Ananda Kishore obtained an absolute estate of "inheritance, and that even if he died without male issue, "as he did in this case, his legal heirs, whether male or "female, would succeed. But reading those paragraphs "with paragraphs (2), (4), and (8), as they must be so read "in order to ascertain what the true intention of the testators "was, we think that though he obtained an absolute estate, "yet such estate was defeasible in case of his death without "male issue, with a provision in that event for his widow "and daughter."

And again: —

"It may no doubt be said that there was no gift in this "case by Krishna Kishore and Naba Kishore in favour of "any of their descendants, and that the document merely

"declares their rights in future and that such rights
"must therefore be regulated by the ordinary Hindu
"Law. But it will be observed that so far as Krishna
"Kishore was concerned, his son Ananda Kishore was then
"born and it may well be taken that he had before his
"mind that individual at least; and hence the bequest
"should be taken to be in favour of Ananda Kishore and
"such other sons as might be born to him thereafter and
"their male descendants. We are concerned in this case
"with Ananda Kishore alone and the estate left by him;
"and so far as he was concerned, as already indicated, it
"may be taken that there was a valid gift in his favour
"subject to the limitations prescribed."

Their Lordships regret they cannot concur in the view expressed by the learned Judges of the High Court as to the meaning and intent of the parties executing the Instrument. It is called a Will, but the preamble states the object for which it is executed.

"Whereas," it says, "body is mortal, it is
"impossible to say what may befall at what time,
"and as ruin may ensue from disputes relating
"to the shares arising in future amongst son,
"daughter, daughter's son, and childless widow,
"unless some rules are regularly framed, and it
"has accordingly become necessary to prescribe
"a set of rules in that behalf, and hence the
"rules mentioned below are laid down; these
"shall become operative and come into force on
"our death."

This preamble may rightly be regarded as the key to the policy of the document, and so far as it goes there does not appear to be any intention on the part of the executants to make any gift. The whole purpose in view was to keep the property in the lineal male line, and with that object rules were framed to prevent its devolution to female heirs and male heirs connected through them.

The first paragraph declares that the executants, their sons, grandsons, and "other heirs" shall take the properties "in the manner stated

"below," that is, subject to the restrictions imposed in the document, "in equal shares" and that none will have the power of making the shares unequal.

Paragraph 2 is in these terms :—

"If one of us two, or his son be living and the othor or "his son be not living, then the said surviving person or "his son shall get all the moveable and immoveable "properties left by the deceased, with rights of ownership. "A sonless widow or daughter or daughter's son shall have "no sort of right or title to and any concern whatever with "that property, but shall only get, during their life time, "food and clothing, &c., as is provided in the 5th para-"graph."

Paragraph 3 declares that the sons and grandsons of the executants shall have full power to deal with the properties "left by them in any "way they wish in their rights as full owners."

Paragraph 4 provides that only on failure of male progeny in the direct male line of either of the executants, widows, or daughters, or daughters' sons are to get shares "according "to the *Shastras*."

Paragraphs 5 and 7 make provisions for the maintenance of widows and daughters.

Paragraph 6, which relates to the guardianship of any minor son left by either of the executants, is immaterial.

Paragraph 8 defines the word *putra*, used in the document, that—

"It shall mean son, son's son, son's son's son, and "adopted son and his son, &c., being male issues, and the "words written in this will are to be taken in their plain "sense, and not in any distorted far-fetched sense."

And they declare finally that—

"The rules that we two uterine brothers prescribe by "this will as between ourselves shall continue to prevail, "and be operative down to our sons, grandsons, &c., "successively."

Throughout the instrument there is no indication of an intention to make a gift to any person; whilst paragraph 4 clearly shows that

the "sons and grandsons" who took the properties left by the executants acquired them as "full owners." There was no restriction on their powers to deal with such properties " in any way they wished." But, although they acquired the estate as absolute owners, it was not to descend in the legal channel according to the prescriptions of the Hindu Law, but in accordance with the rules framed by the executants with the avowed object stated in the preamble. It was only on the indefinite failure of male issue in both branches that the female heirs or their descendants were to receive the shares prescribed for them in the *Shastras*.

This is the general policy of the Instrument. It was clearly intended to vary the rule of Hindu law, and to control the devolution of the properties until the indefinite failure at some remote period of the male line of both brothers. That such an attempt to alter the mode of succession prescribed by law is illegal is enunciated in the clearest terms in the Judgment of this Board in the *Tagore Case*. As their Lordships there observe :—

L.R.I.A., Supp. Vol., p. 47.

"Inheritance does not depend upon the will of the " individual owner; transfer does. Inheritance is a rule laid " down (or in the case of custom recognised) by the State, " not merely for the benefit of individuals, but for reasons of " public policy.

It follows directly from this that a private individual, who attempts by gift or will to make property inheritable " otherwise than the law directs, is assumming to legislate, " and that the gift must fail, and the inheritance take place " as the law directs. This was well expressed by Lord Jus- " tice Turner in *Soorjomonee Dossee* v. *Denobundoo Mullick** " ' A man cannot create a new form of estate or alter the " ' line of succession allowed by law, for the purpose of " ' carrying out his own wishes or views of policy.' "

* 6 Moore's Ind. Ap. Ca. 555

The learned Judges of the High Court had present in their minds the difficulty of reconciling the acquisition by each individual male descendant of full rights of ownership in the property

that descended to him with the restraint imposed on its devolution. And, therefore, to give effect so far as possible to the intention of the executants they considered that the absolute estate Ananda acquired "was defeasible in the "event of his death without male issue." If the attempt to interfere with the course of descent according to law is to be regarded as a condition of defeasance, it was applicable not merely to the case of Ananda, but to the case of every male descendant who happened to leave no male issue; and its application might have been postponed for an indefinite period. Their Lordships are not aware of any authority to warrant such a provision. Nor is there any for the contention that under the Instrument in question there was a devise in favour of Ananda with a gift over to Naba Kishore, the uncle. As the Subordinate Judge very properly observes in his Judgment, "the "question is not whether the gift over was good "in the event which happened afterwards but "whether it was good in its creation."

It is clear from the document that if there was any idea at all in the mind of Krishna Kishore of a gift over in favour of Naba or his male descendants, it was dependent on the contingency of the indefinite failure of male issue in his own line. At the time the document was executed there is no reason to suppose that he contemplated that his son would die without issue, or that Naba would survive him. And therefore if it were assumed that a gift over was intended, it would be wholly invalid in view of the clear rule of law laid down in the *Tagore Case*.

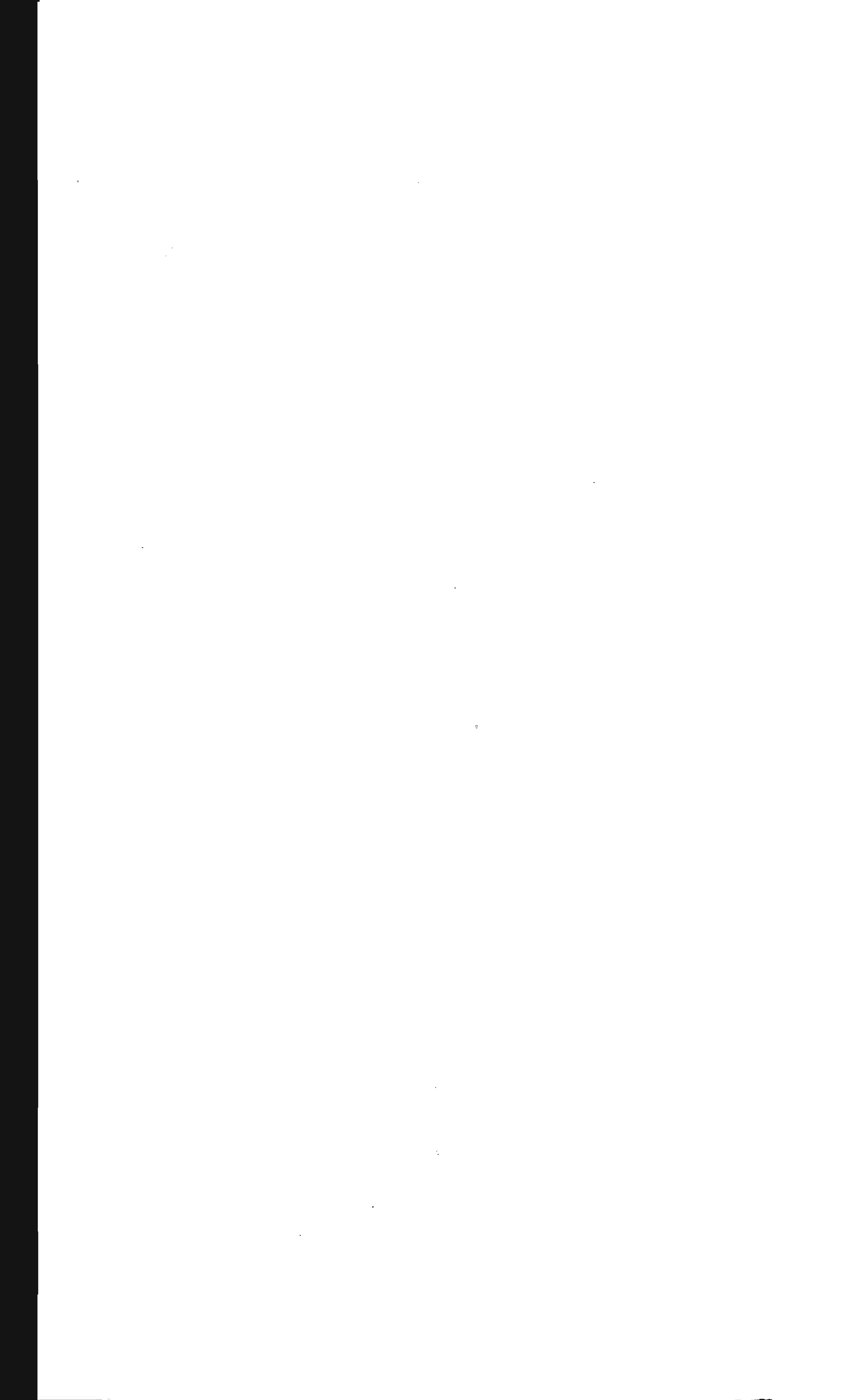
Their Lordships, however, have no doubt that the sole intention of the executants in this document, as they expressly avowed in the preamble, was to alter the rule of succession in their family which they had no power to do.

In their Lordship's judgment the Plaintiffs are entitled to a decree for the properties in respect of which their claim was allowed by the First Court. The High Court disagreed with the Subordinate Judge on the question of the liability of the Respondents to render accounts. It held that if the Plaintiffs were entitled to a decree in the action they would also be entitled to an account from the Defendants as legal representatives of Naba Kishore, their father, for the rents and issues of Ananda Kishore's estate whilst in his hands. There can be no question that this is the right view.

Their Lordships are of opinion that the Judgment and Decree of the High Court should be set aside, and that of the First Court restored, with a modification declaring the liability of the Respondents as legal representatives of their father Naba Kishore to account for the period the estate left by Ananda Kishore was in Naba Kishore's hands. There should also be a declaration that the rights of the parties which have come into existence since Tripura Sundari's death, in respect of the properties conveyed by her to Krishna Kishore and Naba Kishore in 1862, shall not be affected by the result of this case.

The Respondents will pay the costs of this Appeal and of the proceedings in the High Court.

And their Lordships will humbly advise His Majesty accordingly.



In the Privy Council.

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