Privy Council Appeal No. 139 *of* 1927.

Oudh Appeal No. 30 *of* 1926.

Rani Srimati Krishna Kumari Devi - - - - - *Appellant*

v.

Bhaiya Rajendra Bahadur Sinha Deo and another - - - *Respondents*

FROM

THE CHIEF COURT OF OUDH, AT LUCKNOW.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 21ST FEBRUARY, 1929.

Present at the Hearing:

LORD PHILLIMORE.
LORD BLANESBURGH.
LORD ATKIN.
LORD SALVESEN.
SIR LANCELOT SANDERSON.

[*Delivered by* LORD BLANESBURGH.]

The sole question for decision on this appeal is whether a devise of the estate of Bhinga in Oudh made by the will of a former Raja of Bhinga in favour of his daughter-in-law, the plaintiff-appellant, is invalid in view of the provisions of the Oudh Settled Estates Act, 1900, to which, at the testator's death, although not at the date of his will, the devised property was subject. By a judgment and decree of the Court of first instance of the Chief Court of Oudh, affirmed in this respect by a judgment and decree of the Court of first appeal dated the 20th December, 1926, the devise has been held to be invalid. Hence the present appeal by the devisee.

The testator, Raja Udal Pratap Sinha Deo Somyaji, was the last male holder of the estate of Bhinga. He was a *Talukdar* and his name is entered in Lists 1 and 2 prepared under Section 8 of the Oudh Estates Act I of 1869, to which it will be convenient

to refer as the Act of 1869. In 1906 the Raja was desirous that his Mahal Bhinga should become a settled estate subject to the provisions of the Oudh Settled Estates Act, 1900—an Act which similarly will be referred to as the Act of 1900. He was in 1906, and he remained until his death, owner of two other Mahals —Mahal Lakma and Mahal Usraina—and also of certain furniture and moveables. Over these further properties he was then, and apparently he desired to remain, possessed of full disposing power. It was only the Mahal Bhinga that he was desirous of bringing under the restrictions of the Act of 1900, and his application to the Local Government Board related to that Mahal alone. The application—one for permission to declare that the Mahal might in future become a settled estate held subject to the provisions of the Act of 1900—was made in the same year, 1906. In final response to it, the Local Government Board by notification dated the 24th April, 1908, granted the permission asked for, and the Raja on the 21st May, 1908, by a statutory declaration made irrevocable and duly registered and published on the 5th September following, declared that the Mahal Bhinga should thereafter be held subject to the provisions of the Act of 1900. And such was its position at his death on the 13th July, 1913.

The will of the Raja in which is contained the devise of the Mahal now disputed was executed by him on the 17th and registered on the 22nd June, 1907—that is to say, while his application to Government was still in suspense.

On this circumstance has been based a contention for the appellant which, although less strongly urged than others presented on her behalf, may, not inconveniently, be dealt with at once, being, as it is, first in logical order, and involving, as it does, no other considerations than such as are peculiar to itself. The contention is that the validity or otherwise of the devise of Mahal Bhinga to the appellant must be determined regardless of the provisions of the Act of 1900, inasmuch as only at a date subsequent to the execution of the testator's will did the Mahal in any way become subject to the provisions of that Act.

Their Lordships were not impressed by this contention any more than had been either of the Indian Courts. It may, indeed, they think, be summarily disposed of by reference merely to the well-known rule that the will of this testator without, as is agreed, any intimation there to be found of any contrary intention, must in relation to the property comprised in it be regarded as speaking from his death, and its validity with reference to the devise of any particular property thereby made must depend upon the testator's statutory or other lawful disposing power over that property at that time.

In the present instance, however, their Lordships are not required, in this matter, to have recourse to general principle. The testator, and in a sense fatal to this contention of the appellant's, has disposed of it himself. Having recited at the

outset of his will that he was a *Talukdar* within the meaning of the Oudh Estates Act, 1869: that he had recently applied for permission to declare that his estate of Bhinga should in future be held under the provisions of the Act of 1900; that his application was then still pending and that permission had not hitherto been either granted or refused, the testator proceeded to declare that in exercise of *inter alia* the testamentary powers conferred upon him by the Act of 1900 (if the same should be applicable) he was desirous of providing for the devolution and application of all his property, moveable and immoveable, including his estate of Bhinga, whether the permission aforesaid should be granted or refused, and whether in the former case the statutory declaration in pursuance thereof should or should not be executed and registered. And thereafter follow the dispositions of his will, including that now in debate.

It would be difficult, their Lordships think, to frame a form of exordium more clearly indicating that, in full view of the likelihood that the Mahal Bhinga might before his death become subject to the Act of 1900, it was the testator's desire that his dispositions thereof should nevertheless, in that event, have effect to the fullest extent thereby permitted. And it is not inconsistent with this view of the words he uses that the testator may well have supposed that the effectiveness of these dispositions would in no way be impaired by the Act.

In the result, therefore, whether this first contention of the appellant's be tested in the light of general principle or whether its soundness be checked by reference to the particular terms of the testator's will, the result is the same. And it may be expressed in the words of the learned Trial Judge. The will of the Raja, so far as it devised to the appellant an interest in the Mahal Bhinga, cannot "be considered to be operative except in so far as it conformed to the provisions" of the Act of 1900. How far then was this devise conformable to these provisions? That is the question which has now to be answered.

And first as to the gift itself. Its precise effect will not be missed if it be read with this preface, viz., that the property referred to in the course of it has been previously described by the testator as "all my property and estate whatever and wheresoever situate," and that the gift in the events which have happened became operative, if it has any validity at all, upon the death on the 30th April, 1926, of the testator's widow, to whom by the clause immediately preceding, and by the same form of words, had been given an interest in the property for her life. The actual words of the gift are as follows:—

> "And subject as aforesaid . . . . *I give* devise and bequeath my said property and estate to Kumar Rani Srimati Krishna Kumari Devi, my daughter-in-law, the wife of my only surviving son and heir for and during the term of her natural life but so that she shall have no power under any circumstances by sale, alienation, mortgage or otherwise, to

dispose of or incumber the whole or any portion of my moveable or immoveable property for any period extending beyond the term of her natural life."

And the gift over may not be without importance.

"And upon her death in default of an adopted son if authorised by her husband to adopt a son I direct that my said property and estate shall descend to the person or persons then living who under the provisions of the said Act I of 1869 would be entitled to succeed thereto on the failure or determination of the limitations herein before contained."

The testator has not, it will be seen, dealt with Mahal Bhinga separately from property over which in every event his powers of disposition were unfettered. The Mahal is included in a general residuary bequest. Further, he has phrased his gift to the appellant in terms identical with the immediately preceding gift of the same property to his widow. In this, he has apparently considered himself at liberty to disregard the great difference, which, as will be seen, is made under the Act of 1900 between a testator's powers of devise of a settled estate in favour of a widow on the one hand and a daughter-in-law on the other. The draftsman may nevertheless in the result have conformed to the restrictions of the Act of 1900. But he has not been too sensible of their existence.

And at this point, in view of the provisions of that Act, to which close attention must later be directed, it will be convenient to accentuate three further things in relation to these quoted words of gift.

First, the interest taken by the appellant under them is, in the strictest sense, an interest for her life only. She is expressly debarred under any circumstances or by any form of alienation from disposing of the whole or any portion of the property for any period beyond her own life. Any lease granted by her, for example, must determine with her death.

Secondly, the appellant does not—and neither did the widow—become under the gift a fresh stock of descent of any of the property bequeathed. On the death of the widow Mahal Bhinga, according to the gift, passed to the appellant; on the death of the appellant it is to pass under the gift over to persons who must be strangers in blood to herself.

Thirdly, the destination under the gift over, on the death of the appellant, is not, putting it broadly, to the heir-at-law of the testator at his own death. The gift is, in effect, to the person or persons living at the appellant's death, who, under the provisions of the Act of 1869, would have been entitled to the testator's property had he at the same moment died intestate with reference to it. In other words, the only other testamentary gift of the Mahal, in the events which have happened, is in favour of persons unascertainable up to the moment of the appellant's death. There can under the will be no vested interest in remainder or otherwise so long as she lives. The significance of these things

or of some of them in their relation to the provisions of the Act of 1900 never unimportant may here prove to be decisive.

The purpose of that Act is not doubtful. By the Act of 1869 *Talukdars* in the position of the testator here were deemed to have acquired a permanent heritable and transferable right in their estates. Every such *Talukdar* was thereby made competent to transfer during his lifetime by sale, exchange, mortgage, lease or gift, and to bequeath by his will to any person the whole or any portion of his estates. The order of succession to his estate, on his death intestate, is, with himself as the stock of descent laid down in Section 22 of the Act.

Now, in conferring this unrestricted power of testamentary disposition, the Act of 1869 had given effect to a policy not universally approved. The Act of 1900 to some extent revised or retraced that policy. Its purpose is set forth in the preamble. It had been found expedient "to make better provision for the preservation of certain estates and other immoveable property in Oudh." The Act, however, is facultative and permissive only. It does not become operative *proprio vigore*. It merely empowers, *inter alios*, any owner in the position of the testator here to make to Government, notwithstanding any enactment to the contrary, the application which, with reference to Mahal Bhinga, this testator did submit, and it provides that, as a result of the registration of the declaration which this testator did make, the property included in the declaration becomes a settled estate subject to the provisions of the Act. And the testator's declaration here having been expressed to be irrevocable, Mahal Bhinga, under the Act, became a settled estate for all time unless for some such default of its owner, as is referred to in Section 11, the estate is hereafter excluded from the Act by the action of Government.

In marked contrast with the powers of the Raja under the Act of 1869 were his powers over the estate after it had become subject to the provisions of the Act of 1900. No alienation for any greater or larger interest or time than during his life was valid. No part of the estate nor of its profits might be held to be or have been vested in him as its owner for any larger or greater interest in time than for his life and subject to the provisions of the Act.

But nearly as it approached thereto, it would not be correct to say that under the Act of 1900 the interest of the Raja in the Mahal became no more than a mere life interest of convention. By "the provisions of the Act" just referred to there were attached to it as inherent characteristics two incidents appropriate rather to an estate of inheritance than to an estate for life. By Section 16 of the Act the Rajah, as holder in possession of a settled estate, had vested in him the power to grant leases of the Mahal or any part of it for a term not exceeding seven years, and with the consent of the Collector

for a term not exceeding fourteen years. The provisions of sub-sections 2 and 3 of the same section, inserted clearly for the protection of the successor in interest of the holder in possession of a settled estate show, as their Lordships think, plainly enough, that this leasing power is by the Act attached as an incident to the estate of such a holder for the public benefit and in the general interest, and is one to be respected as such. And the second incident attached by the Act to his estate which distinguishes it from a mere life interest, is that, as will be seen in a moment, on his death intestate the settled estate, with an exception which would not extend to the appellant, descends, as under Section 22 of the Act of 1869, from each successive owner as a fresh stock descent. In truth the interest of an owner of a settled estate is not strictly under the Act either an estate for life or an estate of inheritance. It is a statutory estate which in its incidents partake of the nature of both.

And this brings their Lordships to the section of the Act which deals with the devolution and so-called bequests of settled estates. Upon this Section depends the validity or otherwise of the devise of Mahal Bhinga in favour of the appellant, already analysed. The Section is as follows :—

> " 18.—(1) Notwithstanding the provisions of any contract or disposition to the contrary, every person for the time being entitled to a settled estate, being a male, or being a female who, under the ordinary law to which persons of her religion and tribe are subject, would constitute a fresh stock of descent if she succeeded to the estate on an intestacy otherwise than as a widow, shall constitute a fresh stock of descent for the purposes of Section 22 of the Oudh Estates Act, 1869, and on the death of such person intestate the settled estate shall descend according to the provisions of that Section.
>
> " (2) Notwithstanding the provisions of any contract or disposition to the contrary, every person for the time being entitled to a settled estate who constitutes a fresh stock of descent according to sub-section (1) shall be competent to bequeath the same subject to the provisions of the Oudh Estates Act, 1869 :
>
> " Provided that such person shall not be competent to bequeath the same except as an impartible estate to be held by one person only, and according to the provisions of this Act, or to subject the same or the profits thereof to any demand charge or incumbrance whatsoever, or to bequeath the same to a stranger so as to exclude from succession any person belonging to any of the classes specified in Section 22 of the Oudh Estate Act, 1869."

Now, as might have been expected, if their Lordships, in their exposition of the Act, have correctly interpreted its scope and purpose, this power of bequest is very strictly limited. The owner of a settled estate thereby constituted a fresh stock of descent is not to be permitted by his will to invade that part of the scheme of the Act which has been enacted in the general interest. Clearly enough he is by this section given power by his will to select as his successor to the settled estate any person, tracing through himself, who belongs to any of the classes specified in Section 22 of the Act of 1869. He may make the last of these first, if he be so minded.

But may he do anything more, and, if so, to what extent and in what way? The answer to these questions is beset by doubts of varying intensity. Take, for example, the will of this testator. The first devise of Bhinga Mahal, which in the event took effect, was to his widow for her life. Even under the Section the widow did not thereby become a fresh stock of descent. In these circumstances had the testator by that gift exhausted his testamentary power of disposition? It was the opinion of the learned Trial Judge that he had. Not only was the bequest in favour of the appellant bad for that reason: the gift over, even if it had been expressed to take effect on the death of the widow and if there had been no gift to the appellant, would, in his view, have been, as such, bad also. This aspect of the matter is not discussed by the Court of first appeal. And their Lordships also will leave a question so important undetermined until the necessity for deciding it arises. But, as a question, it remains.

The present case, however, regardless of it, can in their view be better determined by bringing the validity of the devise in favour of the appellant to the tests set by the provisoes contained in the final paragraph of the Section. Taking these provisoes in their order, their Lordships inquire, first, whether the devise of the Mahal to the appellant made by the testator is a devise of the estate to be held by her "according to the provisions of [the] Act." And in their view the answer must be in the negative. Even had the appellant been a person within any of the classes specified in Section 22 of the Act of 1869—as to this in a moment—a devise to her which did not carry with it the leasing power already described and which, by its terms, prevented her from becoming a fresh stock of descent was not, for reasons already given, a devise of an estate to be held by her according to the provisions of the Act. It is a devise of a bare life interest shorn of the incidents attached, for the public benefit, to the statutory estate created by the Act. As such, it is a devise prohibited by this proviso.

But having so far found, it would in the ordinary case be the duty of a Court of construction or administration to inquire whether within the limits of the law the manifest intentions of the testator in favour of the appellant could not be given effect to albeit indirectly. And in the present case the obvious way of giving them effect would be for the Court to say that the interest given to the appellant might be treated as a gift to her for her life of the rents and profits of the estate charged upon that estate in the hands of the first respondent, upon whom, as the testator's heir at law, the estate had devolved as an estate undisposed of during the life of the appellant. And if not also prohibited by the Act such a determination by a Court of construction or administration would, in this case, be quite in accordance with principle. But unfortunately for the appellant, the gift to her now becomes one which subjects the estate or the profits thereof to a

demand charge or incumbrance in her favour and, as such, it is a gift made unlawful or ineffective by the second proviso in the section. Accordingly the appellant's gift is defeated whether it be tested by the requirements either of the first or of the second proviso.

But in the Court of first appeal and before the Board the invalidity of the gift was rested mainly on the provisions of the third proviso, and their Lordships in deference to the judgment appealed from and to the arguments of Counsel before them feel that they ought not to close this judgment without some consideration of the appellant's position under that proviso. With reference to it, the appellant no longer contends that she is not a " stranger " within the meaning of that word as there used : she is not, in relation to the testator, within any of the classes specified in Section 22 of the Act of 1869 : she is not, under any other right, entitled to inherit, *ab intestato*, any property of the testator : she is therefore a " stranger." And upon this footing it was held in the Court of first appeal, and the view was pressed upon the Board by learned Counsel for the first respondent, that the devise to her was, for that reason alone, invalid ; the concluding words of the proviso " so as to exclude from succession any person belonging to any of the classes specified in Section 22 of the Oudh Estates Act, 1869," being merely expository of the meaning to be attributed to the word " stranger." On the other hand, it was strongly contended by learned counsel for the appellant that the proviso cannot be so read. Its words in this respect are he urged too plain to admit of any construction save this, that a devise to a stranger is not thereby prohibited unless its effect is within the true meaning of the words to " exclude from succession," putting it shortly, any of the testator's kindred. And it was contended that the gift in favour of the appellant, while it might delay the enjoyment of the estate by some one of the testator's kindred, did not and could not " exclude " such kindred " from succession " altogether.

Now, their Lordships are impressed by the difficulties which beset both contentions. They feel first of all that the words are not strong enough to prevent a valid devise of the estate being made to a " stranger " in any circumstances whatever. If, for instance, a testator was so unusually circumstanced, that he left behind him no person belonging to any of the specified classes, their Lordships can see nothing which, under the proviso, would affect in such a case the validity of a devise to a stranger otherwise unimpeachable. To them it does not seem permissible as a mere matter of construction to treat the concluding words of the proviso as being no more than a definition of the word stranger. On the other hand, they have a difficulty in interpreting the word " exclude " so narrowly as does the appellant. If the question really arose in this case the question whether that word ought or ought not to have a generous or a narrow signification attributed

to it would demand at their hand very serious consideration indeed. But the question does not arise now and, for a reason now to be stated, it can rarely if ever arise. If, as their Lordships have in effect held, a devise to a stranger, to escape destruction under the first proviso, must be a devise which constituted the "stranger" a fresh stock of descent, then such a bequest necessarily excludes, *as such*, and in the strictest sense, every person who traces his claim from the testator, under Section 22. In other words, except in the possible case of the stranger being a female who "under the ordinary law to which persons of her religion and tribe are subject would" [*not*] "constitute a fresh stock of descent if she succeeded to the estate on an intestacy." a devise to a stranger otherwise valid necessarily excludes the testator's kindred and can only be valid if there are none to be excluded. In truth, the invalidity of this devise under the first proviso so destroys it that the application to the devise of the third proviso never arises.

On the whole case, in the result, their Lordships are of opinion that the decree of the Court of first appeal should remain undisturbed, and they will humbly advise His Majesty that this appeal therefrom should be dismissed, and with costs.

In the Privy Council.

RANI SRIMATI KRISHNA KUMARI DEVI

v.

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DELIVERED BY LORD BLANESBURGH.

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