Privy Council Appeal No. 4 of 1939
Bengal Appeal No. 72 of 1937

Gadadhur Mullick and others - - - - *Appellants*

v.

The Official Trustee of Bengal, and others - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 16TH JANUARY, 1940

Present at the Hearing:
LORD THANKERTON
LORD ROMER
SIR GEORGE LOWNDES
SIR GEORGE RANKIN
MR. M. R. JAYAKAR

[*Delivered by* SIR GEORGE RANKIN]

One Shib Chandra Mullick, a Hindu governed by the Dayabhaga, was possessed of considerable property moveable and immoveable, comprising a number of house properties in Calcutta and its suburbs, as well as zemindari property in the Sundarbans. He died on the 4th August, 1866, leaving him surviving a widow and an only son, Rishikesh Mullick. By his will, dated 3rd August, 1866, he appointed one Dwarkanath Bhanjoo, his son Rishikesh and the Administrator General of Bengal for the time being (who never acted) to be "executors and trustees of this my will". After providing for his widow's maintenance and residence and giving pecuniary legacies to her and to certain other persons, he disposed of the residue of his property as follows:—

> "I give devise and bequeath all the rest, residue and remainder of my property moveable and immoveable unto my Executors hereinafter named in trust as to one moiety thereof for my only son Rishikesh upon his attaining the age of twenty-one years and as to the other moiety thereof In trust for the male issue of my said son Risicase (Rishikesh) share and share alike if more than one and if only one to that only one but in case my said son should die without male issue or leaving male issue such male issue should die under the age of sixteen years without leaving male issue him or them surviving then as to that moiety In trust to be paid over to the Trustees and added to the Trust Fund known as Roopchand Dhur Trust Estate and subject to the trusts thereof and in case my said son Rishikesh should die before attaining the age of twenty-one years and without leaving male issue him surviving or to be born after his death in due course of time then as to the moiety of the moveable and immoveable estate bequeathed and devised to him In trust to be paid over to the Trustees and added to the Trust Fund known as Roopchand Dhur Trust Estate and subject to the Trusts thereof."

No question now arises as to the moiety which was given to Rishikesh (" the first moiety "), but as to the other moiety (" the second moiety ") the present appeal raises questions as to the validity and effectiveness of the gift to the Roopchand Dhur Trust Estate. It is to be observed that the will came into effect before the Hindu Wills Act of 1870 and that the validity of its provisions must be judged according to the Hindu law in force in Bengal in 1866.

On 14th August, 1866, probate of the will was granted to Rishikesh and Dwarkanath Bhanjoo, who took possession of the testator's estate. On 9th January, 1873, Rishikesh, having attained the age of 21 years died intestate, never having had a son, but leaving him surviving a widow, Purasundari, and a daughter. The appellants' averments as to what happened after the death of Rishikesh may for the purposes of this appeal be accepted and are stated in their " Case " as follows: —

> " It appears from mutation papers and cess returns exhibited in the case that after the death of Rishikesh Dwarkanath Bhanjoo continued to act as sole surviving executor till the year 1880, when he applied for mutation of names in favour of Purasundari, and in 1881 or 1882 made over the whole estate to her. The widow as heiress of Rishikesh remained in possession of the whole of the testator's residuary estate until her death, which occurred on the 11th September, 1932. During this long period of 50 years neither the plaintiff nor anyone else interested in the Roopchand Dhur Trust claimed under the will or questioned the right of the lady until the present suit of 1934."

On 27th April, 1934, the Official Trustee of Bengal (respondent No. 1) filed a suit in the High Court at Calcutta claiming as trustee of the Roopchand Dhur Trust to be entitled under the terms of the testator's will to the whole of his residuary estate: alternatively, to one half thereof. He impleaded the present appellants, who are the reversioners of Rishikesh, as persons wrongfully claiming the estate and wrongfully in possession thereof. The claim to the first moiety (which by the terms of the will was given to Rishikesh on his attaining the age of 21 years) was abandoned at an early stage of the suit. But as to the second moiety the suit succeeded before the trial Judge (Ameer Ali J.) and also on appeal to a Division Bench (Costello and Panckridge JJ.). A preliminary decree for partition was made (28th June, 1937) and affirmed on appeal (6th April, 1938).

The first question is whether the suit is barred by limitation and this defence must prevail unless section 10 of the Limitation Act, 1908, applies to the case.

> " Section 10. Notwithstanding anything hereinbefore contained, no suit against a person in whom property has become vested in trust for any specific purpose, or against his legal representatives or assigns (not being assigns for valuable consideration), for the purpose of following in his or their hands such property, or the proceeds thereof, or for an account of such property or proceeds, shall be barred by any length of time."

The appellants contend that this section does not deprive them of the protection *prima facie* afforded to them against stale claims by the appropriate articles in the schedule. They

point to the fact that under the will no right arose to the Roopchand Dhur Trust in respect of the moiety now in question until after the death of Rishikesh. Hence they deny that Rishikesh in his lifetime was ever a trustee. They maintain that, even if he was a trustee, his widow took from his surviving co-trustee Dwarkanath Bhanjoo: hence that neither she nor the appellants are to be regarded for the purposes of section 10 as the legal representatives of a trustee. To this a further argument is added that the widow received the estate from the surviving executor at a time when any claim to a legacy or a distributive share by the plaintiff had become barred by limitation.

This defence, in their Lordships' opinion fails. That the interest of the Roopchand Dhur Trust did not arise until the death of Rishikesh is clear enough, in the sense that before that date it was a contingent interest; but Rishikesh as one of the executors and trustees of his father's will had a duty in his lifetime to preserve the property of which the residuary estate consisted. There was an express trust for a specific purpose and he was under a duty to fulfil that part of it which required fulfilment in his lifetime. But when he died he ceased to be a trustee and Dwarkanath Bhanjoo became sole trustee. On the appellants' own showing Purasundari took from him and is the assign of a trustee. As it is not pretended that she gave valuable consideration, the defence of limitation is not available to her but is excluded by the terms of section 10. Had the plaintiff in 1881 or 1882 sued Dwarkanath to recover the share of residue given to the Roopchand Dhur Trust, section 10 would have had the same effect to exclude any plea of limitation raised by the trustee.

The validity of the bequest of the second moiety to the Roopchand Dhur Trust Estate must therefore be examined. The first limitation of the beneficial interest in this moiety is to the male issue of Rishikesh. This failed as he had no male issue at the death of the testator (or at any other time). There is no other disposition of the beneficial interest which could take effect in the lifetime of Rishikesh. But there is a limitation to the Roopchand Dhur Trust Estate which is to take effect in either of two events (*a*) in case Rishikesh should die without male issue (which probably means without leaving male issue), (*b*) in case Rishikesh should die leaving male issue but such male issue should die under the age of 16 years without leaving male issue him or them surviving. The former is the event which happened: the state of affairs described in (*b*) on any view of that provision did not happen. Clearly the two contingencies are independent and indeed mutually exclusive. Hence though the gift to the Roopchand Dhur Trust might be invalid had it been claimable solely on the ground of fulfilment of condition (*b*), this consideration would not in any way invalidate the gift if, in the events which happened, it was claimable under (*a*). Panckridge J. put the matter simply and correctly: "if the testator has separated the gift so as to

take effect upon the happening of any of several events, and the event which happens is not too remote, the gift over is good."

The bequest to the Roopchand Dhur Trust which has here to be considered is therefore a bequest to take effect on the death of Rishikesh without male issue, the disposition intended to have effect during the life of Rishikesh having failed. It is not disputed that had the will given an estate for life to Rishikesh and then directed that upon his death without leaving male issue it should go to the Roopchand Trust Estate, this conditional limitation would have been good. The question for decision is as to the effect at Hindu law of the failure of the testator's disposition of the interest in this moiety during the life of Rishikesh. The view taken by the learned judges in the High Court is that the gift to the Roopchand Dhur Trust Estate is good and took effect on the death of Rishikesh, who as heir of the testator took the prior interest for his own life in this moiety, such interest not having been disposed of by the will. The view contended for with much learning and ability by Mr. Pugh and Mr. Parikh on behalf of the appellants is that the gift to the Trust Estate is void at Hindu law, no interest being taken under the will by any ascertained person at the time of the testator's death. There is therefore, it is said, no possibility of relinquishment by the testator and acceptance by or on behalf of the legatee being supposed to have taken place at the time of the testator's death as required by Hindu law. The same result is contended for on a broader, if not necessarily a separate ground—that, there being no gift taking effect at the time of the testator's death, there was therefore an intestacy, and Rishikesh took this moiety as heir; with the result that it could not thereafter be divested. From the principle that on the death of a Hindu, the right of succession to his property cannot remain in abeyance, it is said to follow that where there is a will, property, unless vested by the will in a devisee or legatee immediately on the death of the testator, must go to the heir and all the provisions of the will as to the property must fail.

These arguments require that their Lordships should consider the Hindu law upon the subject of conditional limitations in order to ascertain the principles which determine the validity of a bequest which by its terms is to take effect at the close of a life in being but only upon the happening of an uncertain event. Is it necessary that a prior interest taking effect immediately on the death of the testator should have been bequeathed by the will? The history of the recognition by British Indian Courts of the testamentary power at Hindu law has been traced by Mr. Mayne in chapter XI of his well-known work and it is sufficiently plain that the Hindu will in its present form is a development since the middle of the eighteenth century. It is not, therefore, necessary at this stage to discuss whether the notion of a will is an original part of the Hindu law [cf. the judgment of Norman J. in the *Tagore* case, 4 Ben. L. R. O. J. 103, 219]. Nor can the course of the decisions be

now diverted by any conclusion that could be reached as to the true intention of the first chapter of the Dayabhaga—that is, whether it teaches, contrary to the Mitakshara, that the donee's right arises by the donor's act of relinquishment alone and does not require acceptance by the donee [cf. Sarkar's "Hindu Law," 7th ed. p. 991. Dayabhaga I 22].

The right of a Hindu in Bengal to make a will was recognised by this Board in 1856 as well established, it being stated that "the strictness of the ancient law has long since been relaxed" [*Nagalutchmee Ummal* v. *Gopoo Nadaraja Chetty*, 1856, 6 M.I.A. 309, 344]. But in a later case it was said on behalf of the Board by Lord Justice Turner that "with reference to the testamentary power of disposition by Hindoos the extent of this power must be regulated by the Hindoo law" [*Sonatun Bysak* v. *Srm. Juggutsoondree Dossee*, 1859, 8 M.I.A. 66, 85].

In 1862 the question whether a person in existence at the date of the testator's death might become entitled upon a future contingency to receive an additional benefit was directly dealt with by a judgment delivered by Lord Justice Knight Bruce on behalf of a Board which had the aid as assessors of Sir Lawrence Peel and Sir James Colvile [*Sm. Soorjeemoney Dossee* v. *Denobundoo Mullick*, 1862, 9 M.I.A. 123]. There a Hindu in Bengal had by his will given the whole of his estate to his five sons in equal shares, but had provided that if any son should die [not leaving any son or son's son] that share should not go to the widow or daughter of the testator's son so dying or to any daughter's son, but should go to "such of my sons and my son's sons as shall then be alive." One of the testator's sons having died without male issue his widow claimed his fifth share as his heir. It was held by the Supreme Court (*per* Sir Barnes Peacock C.J.) that "the limitation over was valid as an executory bequest." This Board, pressed with the observation previously made by Lord Justice Turner, considered whether the Hindu law prohibits such a provision. Lord Justice Knight Bruce said:

> "Whatever may have formerly been considered the state of that law as to the testamentary power of Hindoos over their property, that power has now long been recognized, and must be considered as completely established. This being so, we are to say, whether there is anything against public convenience, anything generally mischievous, or anything against the general principles of Hindoo law in allowing a testator to give property, whether by way of remainder, or by way of executory bequest (to borrow terms from the law of England), upon an event which is to happen, if at all, immediately on the close of a life in being. Their Lordships think that there is not; that there would be great general inconvenience and public mischief in denying such a power, and that it is their duty to advise Her Majesty that such a power does exist. Such powers have been long recognised in practice. The law of India, at least the law of Bengal, has long been administered upon that basis, and the very mode in which this suit has been framed, and the manner in which it was conducted in India, are evidence, if evidence were wanting, that such is the general opinion entertained in Bengal. Their Lordships, therefore, being of opinion, as has already been stated, that according to the true meaning of this will

> the property was given over upon an event which was to take place, if at all, immediately on the close of a life in being at the time when the will was made, and seeing that that event has happened, consider that the testator, in making this provision, did not infringe or exceed the powers given him by the Hindoo law, and that the clause effectually gives the corpus of the property to the surviving sons immediately on the death of that son who died without leaving male issue."

No question arose or appears to have been raised as to the necessity for every donee to have been in existence at the testator's death. As was later noticed [in the *Tagore* case, 4 Ben. L.R. at 193-4] it was sufficient to reject the claim of the widow without considering whether sons of any other deceased son of the testator could have claimed to participate in her deceased husband's share. But the words "remainder" and "executory bequest" which the Lord Justice "borrowed" to express his meaning were somewhat unreasonably taken as introducing the technicalities of English law into the Hindu law. The words, however, were used together for the very purpose of excluding such technicalities—the differences between contingent remainders and executory devises not being in point in connection with a Hindu will. What were those differences? They turned upon whether there was or was not a particular prior estate, whether it was an estate of freehold, whether it was conferred by the same will, whether the subsequent interest was to take effect at the natural determination of the prior estate, or before or after that event. The language of the Lord Justice disregards all such matters and contains nothing to intimate that there is any need for a conditional limitation to be "supported" by any prior estate conferred by the same will, though it is expressly restricted to dispositions which must take effect immediately at the close of a life in being. This stipulation has nothing whatever to do with any doctrine of the Hindu law and the use of the technical phrase "executory devise" is enough in itself to show that the Lord Justice is not intending to confine his remarks to estates dependent for their validity upon their relation to a prior (particular) estate. Sir Barnes Peacock, in the *Tagore* case [1869, 4 Ben. L.R. O.J., at 193-4] appreciated that the words "remainder" and "executory bequest" were used to mean "conditional limitations"; and in an unanswerable passage emphasised the absurdity of applying the English law of contingent remainders and executory devises, of springing and shifting uses, to cases governed by Hindu law which knows nothing of freehold estates. The language of Lord Kingsdown in *Bhoobum Moyee* v. *Ram Kishore,* 1865, 10 M.I.A., 279, 308, was that, though the testamentary power of disposition among Hindus had been established in Bengal, "it would be to apply a very false and mischievous principle if it were held that the nature and extent of such power can be governed by any analogy to the law of England." This observation was not required to correct anything said in *Soorjeemoney's* case but was evoked by the fact that a Judge of the Sudder Court had, in the case then before the Board, applied to a Bengalee deed the rules which he discovered in "Fearne on Contingent Remainders." Still, it

might not be candid to deny that *Soorjeemoney's* case had dealt abruptly rather than meticulously with Hindu law and was in some respects lacking in precision: hence subsequent decisions must be scrutinised to see if they restrict the freedom of bequest which it allowed.

In a case which raised a question as to the property over which the testator had power of disposition, Sir James Colvile in 1867 [*Babro Beer Pertab Sahee* v. *Maharajah Rajinder Pertab Sahee*, 12 M.I.A. 1, at 38] said:—

> "Decided cases too numerous to be now questioned, have determined that the testamentary power exists, and may be exercised, at least within the limits which the law prescribes to alienation by gift *inter vivos*."

But little can be gained by an attempt to construe narrowly this cautious observation.

In the *Tagore* case [1869, 4 Ben. L.R.O.J., 103, 1872, L.R.I.A. Supp. 47] Phear J. as trial Judge treated *Soorjeemoney's* case as authority for holding that a gift could be made by will to a person not in existence at the testator's death and for the general application of English principles of law to the limitations in a Hindu will. On appeal Peacock C.J. and Norman J. over-ruled those opinions. They went elaborately into the essentials of a gift at Hindu law with special reference to the question whether a person could take if not in existence at the date of the relinquishment by the donor. The learned Chief Justice held that on general principles of Hindu law the donee under a gift *inter vivos* must be in existence at the date of the gift and the donee under a will must be in existence at the date of the death of the giver.

He does not seem to have felt any difficulty in the case of what in English law would be called vested remainders. But he considered that on the principles of the Hindu law a gift whether *inter vivos* or by will "cannot be made in such a manner as that the donee cannot be ascertained at the time at which the property by virtue of the gift or devise ceases to be that of the donor or testator." Citing the first chapter of the Dayabhaga he observed that "there is nothing to show that after property has ceased by virtue of a gift to be that of the donor there can be any contingency or uncertainty as to the person in whom it is to vest or that the property can be so given by will as to remain in abeyance or *in nubibus* until the donee comes into existence." He doubted whether it was consistent with Hindu law that executory bequests should be sanctioned. On the other hand, he recognised that, in *Soorjeemoney's* case, by his own decision and the decision of the Judicial Committee, the conditional limitation which, by borrowing terms from English law, was called an "executory bequest" had been held valid according to Hindu law. He also recognised that upon the Hindu texts a gift may be made upon condition and that "even a gift in remainder upon condition is good." Like Norman J. he noticed verses 4 and 5 in the first chapter of the Dayabhaga where it is said that "daya" (heritage) signifies what is

given [pp. 188, 218]. From this he drew the conclusion that both in the case of a gift and in the case of inheritance property must arise immediately in the heir or donee upon death or relinquishment by the owner.

In agreement with the Appellate Bench of the High Court it was held by the Judicial Committee (*a*) that the gift of a life estate was valid even though made to a son; (*b*) that a testator cannot create an estate which is unknown to the Hindu law e.g. an estate in tail male and (*c*) that a gift cannot be made by will to a person not in existence at the time of the testator's death. The general principle governing wills was stated in the judgment delivered by Willes J. on behalf of the Board as follows: "The analogous law in this case is to be found in that applicable to gifts, and even if wills were not universally to be regarded in all respects as gifts to take effect upon death, they are generally so to be regarded as to the property which they can transfer and the persons to whom it can be transferred."

It is important that the close connection between the several branches of this decision should not be overlooked. If Hindu law, whatever may have been its earliest form, is to have regard not only to absolute or complete ownership in property but to limited interests therein—life estates followed by other life estates or by remainders—some modification may be necessary in the abstract theory of gift as applied to wills. Again, so long as it was in doubt whether an unborn person could take under a will it was difficult to recognise contingent or executory bequests in view of the absence from Hindu law of any rule against perpetuity. But those matters being settled, a provision that the taker must be in existence at the date of the testator's death would seem to preserve the essential principle of the Hindu law in a form not inconsistent with effective testamentary power. The facts of the *Tagore* case itself did not call for any more detailed treatment of executory bequests. A large number of contingent remainders had been given by the will but all of these failed and certain contingent life interests likewise failed. The original life estate given to Juttendro was held to be valid, and it does not appear to have been doubted that a Hindu could validly create contingent interests. The effect of this case upon *Soorjeemoney's* case in their Lordships' opinion was to show how the principles of the Hindu law of gift were to be applied to wills. It established, though not as a definition in all respects precise, that the scope of such principles was to determine the property which could be transferred and the persons to whom it could be transferred. The donee under a will must be such a person as was capable of taking according to Hindu law. There is nothing in the judgment of Willes J. to suggest that a person capable of taking because in existence at the death of the testator will have further difficulties to surmount by showing that he accepted at the time of the death the interest which the testator intended him to have—a condition which Peacock C.J. and others had held, with complete logic, to exclude the possibility of executory bequests. On the other

hand the judgment did contain a warning that the Hindu law of gift was not of universal applicability to Hindu wills. It need not, however, be taken as a final decision upon matters not fairly raised by the facts of that case or *Soorjeemoney's* case.

In later cases before the Board the question of the absence or failure of a disposition of the prior interest did not arise, but the references to *Soorjeemoney's* case disclose no suggestion that the gift of a prior interest is necessary. In *Bhoobun Mohini Debya* v. *Hurrish Chunder Chowdhry,* (1878) L.R. 5 I.A. 138 the sanad was held upon its true construction to give to the grantor's sister an absolute interest in certain villages defeasible in the event of a failure of her issue at the time of her death, in which event it was to revert to the donor or his heirs. In *Ram Lal Mookerjee* v. *Secretary of State,* 1881, L.R. 8 I.A. 46 the testator gave his estate in the events which had happened, to his widow for the interest of a Hindu widow and the "reversion" to his daughter's daughter Hori Dasi. Sir Robert Collier referred to *Soorjeemoney's* case, the *Tagore* case, and the case last cited, saying that since these cases it could not be disputed that "a gift by will upon an event which is to happen, if at all immediately upon the close of a life in being, to a person in existence, and capable of taking under the will at the testator's death, was good and valid under Hindu law, and consequently that it was competent to the testator, by the use of apt words, to confer an absolute estate on Hori Dasi on the death of his widow" (p. 61). In *Tarakeswar Roy* v. *Shoshi Shikhareswar* (1883) L.R. 10 I.A. 51, the will was held to give a life estate to each of the three nephews of the testator with a gift over, of the share of any nephew dying without leaving male issue, to the other nephews for life. Sir Robert Collier said that "the gift over was to persons alive and capable of taking on the death of the testator, to take effect on the death of a person or persons also then alive, and was competent according to the authority of *Sreemutty Soorjeemoney Dossee* v. *Denobundhoo Mullick* as explained in the *Tagore* case". In *Sm. Kristoromoney Dossee* v. *Maharajah Norendro Krishna* (1888) L.R. 16 I.A. 29, the same principles were re-stated with reference to the defeasance of a prior absolute interest by a subsequent event, though the ultimate result of the will was to give to the testator's half-brothers an estate for life in remainder expectant on the death of the daughter who was given the first life interest.

In 1898 in the case of *Amrito Lall Dutt* v. *Surnomoni Dasi,* I.L.R. 25 Cal. 662, 690-1, the argument for which the appellants now contend was accepted by Trevelyan J., though Maclean C.J. and Macpherson J. found it unnecessary to express any opinion on the matter. From his judgment it sufficiently appears that Trevelyan J. considered that the doctrine to which he assented was to be found in the *Tagore* case:—

> "According to that (Hindu) law there must, as I understand it, be a present beneficiary in order to make a gift valid. There may be a gift *in future* but there must also be a gift *in present.*

> The law of gifts and of wills is the same, and in order that there may be a valid gift the donor must immediately divest himself of the property in favour of some existing beneficiary, and in the same way with regard to wills there cannot be a gift to a person to come into operation at a future date unless there be a gift to a beneficiary in the interim. This is as I understand it merely what was decided in the *Tagore* case. In the judgment of that case we find the following: 'Their Lordships for the reasons stated are of opinion that a person capable of taking under a will must be such a person as could take a gift *inter vivos* and must either in fact or in contemplation of law be in existence at the death of the testator'."

With all respect to this opinion of a distinguished learned Judge, their Lordships think it is open to the objection that the passage quoted is no authority for the doctrine advanced, and their Lordships find no other passage in the judgment of Willes J. which contains such doctrine.

In *Bai Motivahoo* v. *Bai Mamoobai* (1897) L.R. 24 I.A. 93, the judgment of the Board was delivered by Sir Richard Couch. The testator had by his will devised immoveables upon certain trusts during the lifetime of his daughter Mamoo and her children: if there were no children, the property was to go to such persons as she might appoint by will. Farran J. held that the gift to Mamoo was an absolute gift: a Division Bench (Sargent C.J. and Bayley J.) on appeal rejected this view but upheld the power of appointment as valid at Hindu law provided that it was exercised during the lifetime of the tenant for life and that the appointee should have been alive at the death of the testator.

Soorjeemoney's case and the *Tagore* case were considered by the Board, and Sir Richard Couch stressed the passage from the judgment of Willes J. in the latter case where it was said that wills are generally to be regarded as gifts to take effect upon death "as to the property which they can transfer and the persons to whom it can be transferred". Sir Richard Couch's judgment continued:—

> "These appear to their Lordships to be the limits of the analogy between wills and gifts *inter vivos* which have been recognised. They are not aware of any authority in support of Mr. Mayne's contention, as they understood it, that in the present case there would not be such a transfer of possession to the person who would take by virtue of the power as is necessary to enable it to be validly exercised. It appears to them to follow, from the first taker being allowed to have only a life interest, that his possession is sufficient to complete the executory bequest which follows the gift for life. The result of the decisions is that, according to settled law, if the testator here had himself designated the person who was to take the property in the event of Mamoo dying childless, the bequest would be good. The remaining question is whether his substituting Mamoo and giving her power to designate the person by her will is contrary to any principle of Hindu law. There is an analogy to it in the law of adoption. A man may by will authorize his widow to adopt a son to him, to do what he had power to do himself, and although there is here a strong religious obligation, their Lordships think that the law as to adoption shows that such a power as that now in question is not contrary to any principle of Hindu law. Further, they think that the reasons which have led to a testamentary power becoming part of the Hindu law are applicable to this power, and that it is

> their duty to hold it to be valid. But whilst saying this they think they ought also to say that in their opinion the English law of powers is not to be applied generally to Hindu wills."

It is contended for the appellants that by this decision the Board introduced a requirement extending the analogy of gifts beyond the two matters mentioned by Willes J. and making the validity of limitations to take effect after the testator's death upon an uncertain event depend upon whether or not by his will he has interposed a life estate so as to have provided a first taker under the will whose possession is "sufficient to complete the executory bequest". The exact effect of the judgment upon this point is not altogether plain. It may be observed that, until this case, it had not at any time been held by the Board or even suggested in any of the cases before the Board that the Hindu law as to conditional limitations was to be operated by a fiction imputing to the devisee the possession of a previous taker under the will. In a well known textbook—West & Buller: "Hindu Law", 3rd ed. 1884—the learned authors had contended that an executory devise as distinguished from a remainder could not properly be received into the Hindu system (p. 217). As regards remainders they appear to have thought that these could be reconciled with Hindu legal principles if the entry or acceptance of the taker of the immediate particular estate might enure for the benefit of the remainderman. The learned authors were well aware that *Soorjeemoney's* case had permitted executory bequests and indeed were under no illusions as to the fictitious character of the doctrine which applies to wills the notion of a resignation by the previous holder and a simultaneous release of the physical detention (or delivery) to the donee (p. 218-9). Sargent C.J. in the High Court rightly interpreted these reflections as showing that both remainders and executory devises are "opposed to the strict notions of a gift", and had refused to regard that consideration as conclusive.

Whatever might be said of the *Tagore* case if taken by itself, the Board in Sir Richard Couch's judgment is noting that the analogy between gifts and wills at Hindu law is one as to which certain limits have been recognised. This would seem to mean that save as regards the property which may be disposed of and the person who is capable of taking, the analogy according to the authorities was inapplicable or at least was so far unauthorised. Their Lordships do not gather from the judgment that Sir Richard Couch intended to remove or extend the limits to which he refers or to lay down principles to govern cases of a character not then before the Board. On the contrary, he would appear by his observation about the possession of the first taker to be answering on its own premises an argument about transfer of possession and saying that the authorities do not bear it out; with the result that it becomes unnecessary to interfere with or to go beyond the limits to which he has referred.

Mr. Mayne's argument as to the impossibility of "transfer of possession" does not clearly appear from the reports, but it had reference doubtless to the fact that the

appointee might be anyone alive at the testator's death whether known to the testator or not. It may well have been thought sufficient answer to point out that this uncertainty as to the beneficiary raised no greater difficulty than was present in the case of any gift in remainder upon a condition. In any case the observation made is that " it appears to them to follow from the first taker being allowed to have only a life interest " that his possession was sufficient to complete the executory bequest; but the Board had repeatedly upheld such bequests where they took effect to divest an absolute estate. The principle upon which the Board in the end proceeded was the same as in *Soorjeemoney's* case—not that the strict original theory of the Hindu law of gift required no extension if it were to cover the case—but that " the reasons which have led to a testamentary power becoming part of the Hindu law are applicable to this power " and that " the power was not contrary to any principle of Hindu law." Their Lordships are not of opinion that *Soorjeemoney's* case has been narrowed by this later decision so as to exclude a well-known class of conditional limitations by introducing a doctrine as to the need for a particular estate to support a limitation made to commence *in futuro*.

In *Bhupendra Krishna Ghose* v. *Amarendra Nath Dey* 1913, I.L.R. 41, Cal. 642, 1915; L.R. 43 I.A. 12, the High Court at Calcutta again dealt with the question now at issue. A Hindu of Bengal had died sonless in 1907 leaving a will whereby he appointed his wife sole executrix and authorized her to adopt five sons in succession:—

> " If my said wife dies without adopting a son or if such adopted son predeceases her without leaving any male issue in such case my estate after the death of my said wife should pass to the sons of my sister Sm. Benodini Dasee who may be living at the time of my death."

The widow in 1909 adopted a son who on 11th March, 1910, died unmarried; the widow died a few days afterwards not having adopted any other son. The arguments addressed to the High Court and to this Board were exactly those urged for the appellants in the present case and turned on the fact that there was in the will no express gift of any life interest to the widow but a provision for maintenance (Rs.300 per month) and residence in the family house. Fletcher J. (pp. 646-7) as trial judge referred to *Soorjeemoney's* case saying:—

> " It is quite true that in that case the Privy Council were considering the case of an executory devise or a gift over where a previous gift had been made by the will, but there is nothing to my mind from which I can hold that their Lordships considered or meant to infer that if the testator had left a particular interest in property undisposed of, that an executory estate created by his will was *ipso facto* void."

[and again]

> " I have heard nothing in the argument to convince me that the supposed rule of Hindu law that after the succession has opened out the testator is not able to regulate the course of successions in fact exists."

Sir Lawrence Jenkins C.J. with whom Woodroffe J. agreed took the same view:—

> " The appellant based his contention on two grounds. First, he argued, that if property vests in a full owner under the ordinary Hindu law of inheritance, then the future devolution of the property from him cannot be disturbed except by a restriction imposed from the beginning. Next, he maintained that if effect were given to the bequest in favour of the sons, there would be such an uncertainty as to who would take, that the property would be in abeyance, and this would contravene a fundamental rule of Hindu law. I am not much impressed by either of these contentions. The first is founded on a fallacy, for it assumes that the complete interest in the property has devolved on the full owner. But that is the very point in dispute, for if the bequest is operative, there would be merely a partial intestacy, and only a qualified interest would vest in the widow or adopted son as the case might be. The conditional bequest would not be an attempt to give an unauthorised direction to property vested in a full owner, but simply the curtailment of the interest in that property. Nor do I think the second line of argument possesses any greater merit, for I see no ground for saying that the property would be in abeyance, or that there was any more uncertainty as to the destination of the property than in (*sic*) the necessary consequence of every contingent bequest. . . .
>
> It has been argued that the interest preceding this bequest to the defendants arose by implication under the will: but, whether this be the true view or not, I think the bequest is good. It does not infringe any rule against remoteness, nor are the legatees incapable of taking. It is true that the bequest is contingent, but that does not avoid it (section 107 and Part XV of the Succession Act). Nor was it fatal to the bequest that it was to take effect, not necessarily at the testator's death, but possibly at a future date. This view is sanctioned by the illustrations to section 107. It has never been suggested that an annuity cannot be created by a Hindu will, and yet according to Lord Cottenham an annuity of £100 is the gift of ' as many sums of £100 as the donee shall live years: ' *Blewitt* v. *Roberts* (1841) (1 Cr. & Ph. 274, 280).
>
> And so a bequest of a legacy, or of an estate on a future contingent event, would be good within the meaning of section 107 of the Succession Act: see the illustrations to that section and *Soorjeemoney Dosee* v. *Denobundoo Mullick* (1862) (9 Moo.I.A. 123, 135).
>
> But if the future contingent bequest of a sum of money, or an estate, or a farm or a fund all of which are mentioned in the illustrations to section 107, be sanctioned, why is the bequest in this will bad? It was conceded by counsel for the petitioner that if the bequest had been of a sum of money it would have been good, unless it was a sum of money that exhausted the whole estate: this it was argued, would have been a fraud on the law. In other words according to the petitioner the validity of the legacy is dependent upon its relative amount. I am unable to perceive any sound principle in this."

Delivering the judgment of the Board, Mr. Ameer Ali said:—

> " It is to be observed that the will in this case does not infringe the rules which lay down the limitations on the testamentary powers of a Hindu. The bequest is to persons who were in existence at the time of the testator's death and he does not create any estate unknown to the Hindu law."

The judgment proceeded to hold that the estate was in the widow for her life, that it could only pass to an adopted son who should survive her or to his male issue if he pre-

deceased her leaving such issue, and that the gift over was good. On this view there was a gift by the will of a prior interest during the widow's life so that the difficulty vanished.

In a recent case [*Bhupendra Mohan Roy* v. *Sm. Purna Sashi Debi,* L.R. 66 I.A. 205] the facts, in the view ultimately taken by the Board, raised the present question, but their Lordships have accepted the suggestion of the appellants' counsel that as it was not fully argued they should not regard that case as precluding the appellants' contentions upon this appeal.

Reviewing the authorities and considering them on principle their Lordships are of opinion that the rule which the Board in *Soorjeemoney's* case thought necessary to the existence of effective testamentary power and which was explained in the *Tagore* case with reference to the Hindu law of gift is not restricted by further conditions intended to meet or to placate a theory which regards immediacy of effect as a necessary feature of every disposition of property. In truth, inheritance is not donation, and a bequest is not a donation *de praesenti* between living people. It is to be recognised that the Hindu law has been greatly influenced by the notion of " relinquishment in favour of a sentient being " as the basis of a gift and of inheritance, but this principle has not, as their Lordships read the previous decisions, been allowed to arrest the development of the Hindu law of wills. The doctrine that there must be acceptance at the time of relinquishment has different values according as it is applied to gifts *inter vivos* or is extended by analogy to bequests or inheritance, though by a theory of some refinement heir and donee were once thought to be equally governed by the same principle. The theory, as has been shown from the judgment of Peacock C.J. in the *Tagore* case, is sometimes put by saying that the estate cannot remain in abeyance. " Thus it appears that property in the heir must arise immediately upon the death of the ancestor in the same manner as the property of the donee arises immediately upon relinquishment by the donor " [4 Ben. L.R. at 189]. And Mr. Mayne says of the author of the Mitakshara: " Apparently, in the view of Vijnanesvara, acceptance was necessary to complete a gift because, according to a Hindu lawyer, property can never be in abeyance. It cannot pass out of one until it is received by another " [Hindu Law and Usage, 6th ed., 1900, para. 376, page 484]. But it must needs be admitted that the rigour of this theory, even if it be not destructive of all future gifts is inconsistent with any recognition of contingent or executory bequests. It has effect (save in so far as the legislature has abrogated it: Hindu Wills Act, 1870, Hindu Disposition of Property Act, 1916), to limit the class of persons who are capable of taking under a will, restricting it to persons who either in fact or in contemplation of law are in existence at the death of the testator. But in their Lordships' judgment it does not remain as a further obstruction to the taking by such persons of a beneficial interest known to and permitted by the law. Indeed, if an estate in remainder can be limited to take effect on the natural determination of a life estate and may be so

limited upon a condition which may never be fulfilled: if a gift over on condition may be good though in defeasance of an absolute estate granted by the will, there is no principle of Hindu law to be saved by refusing to recognise a limitation to take effect upon condition in the future because it lacks "support" from a particular estate.

It cannot be disputed that if a conditional limitation is invalid, the interest, unless otherwise disposed of by the will, must go to the heir. But if limited interests are to be recognised, their Lordships see no reason to hold that because a prior interest goes to the heir as such a conditional limitation or any other limitation is bad at Hindu law.

The principle of Hindu law which prevents an estate being in abeyance is an important doctrine of the law of inheritance and it has important consequences as regards adoption. The rule is that the right of succession vests immediately on the death of the owner. Apart from the case of a child *en ventre sa mère* or of an adopted child, the estate once vested in an heir will not be divested by the subsequent birth of a person who would have been a preferable heir had he been alive at the time of the death of the last owner [*Kalidas Das* v. *Krishna Chandra Das,* 2 Ben. L.R. 103 F.B.; *Kally Prosonno Ghose* v. *Gocool Chunder Mitter,* 1876, I.L.R. 2 Cal. 295; *Nilcomul* v. *Jotendro Mohan Lahiri,* I.L.R. 7 Cal. 178].

In like manner, though the doctrine is not really the same, delivery in some sense is necessary at Hindu law to distinguish the completed gift from the mere promise. But neither of these doctrines nor yet the principle that a man cannot devise an interest of a nature and quality unknown to the Hindu law (e.g. descendible in a manner unknown to that law) conflict with the principle that where there is a will the heir can as such take only that part of the testator's property which is not disposed of by the will. "He will take by descent and by his right of inheritance whatever is not validly disposed of by the will and given to some other person". [Sir Barnes Peacock in the *Tagore* case 4 Ben. L.R. O.J. at 187.] Their Lordships are in full agreement with Fletcher J. and Jenkins C.J. [*Bhupendra Krishna Ghose* v. *Amarendra Nath Dey, supra*] in rejecting the contention that a testator's directions to regulate the devolution of his property though within the limits laid down by the law will fail if the heir takes any interest immediately upon the death of the testator. This contention is not warranted by anything in the Board's judgment in the *Tagore* case and, as Jenkins C.J. noticed, is founded on a fallacy; for it assumes that the complete interest in the property has devolved on the heir, which is the very point in dispute. Full weight must also be given on this part of the argument to the consideration that not only are testators allowed to dispose of limited interests—as Sir Robert Collier said "limited interests are common enough" [*Sm. Kristoromoney Dossee* v. *Maharajah Norendro Krishna Bahadoor* L.R. 16 I.A. 29 at 31]—but that there is no distinction in Hindu law for the present purpose between

moveable and immoveable property. On this point also the reasoning of Jenkins C.J. appears to their Lordships to have much force. Its cogency is independent of any inference which might be drawn from assumptions made by the Indian legislature in the Hindu Wills Act, 1870—an enactment passed after the *Tagore* case had been decided in the High Court but before it had been dealt with by the Judicial Committee.

The careful arguments of learned counsel on both sides in the present case have made clear different implications of the principle, so often appealed to, that an estate cannot remain in abeyance.

The result, however, is that the objections taken on behalf of the appellants to the bequest to the Roopchand Dhur Trust fail and their Lordships must humbly advise His Majesty that this appeal should be dismissed. The appellants will pay the costs of respondent No. 1.

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In the Privy Council

GADADHUR MULLICK AND OTHERS

v.

THE OFFICIAL TRUSTEE OF BENGAL, AND OTHERS

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