Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Bhagabati Barmanya (since deceased) and another v. *Kali Charan Singh and another, from the High Court of Judicature at Fort William in Bengal; delivered the* 14*th February* 1911.

PRESENT AT THE HEARING:

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

[DELIVERED BY LORD MACNAGHTEN.]

This is an Appeal from a judgment of the Calcutta High Court delivered by Maclean, C.J., affirming a decree of the District Judge of Murshidabad.

The question turns upon the meaning and effect of the will of a Hindu gentleman named Ram Lal Singh. The will was executed on the 2nd of March 1868. The testator died on the following day.

At the date of the will the state of the testator's family was this. The testator had no issue. His mother and his wife were alive and he had four sisters living. Two were childless widows. The other two had male offspring.

The will, so far as material, is in the following terms:—

"My mother, Phudan Kumari Barmanya, and my wife, "Bhagabati Barmanya, shall, as long as they live, hold "possession of all my properties, movable and immovable, "and enjoy and possess the same on payment of the collec- "torate revenue and the zemindars' rents, and by maintaining

" intact and continuing the service of the established deities
" and the ancestral rites according to the practice heretofore
" obtaining, and shall pay off my debts and realise my dues.
" They shall not be competent in any way to transfer the
" immovable property to anyone. On the death of my
" mother and my wife, the sons of my sisters, Golap Sundari
" Barmanya and Annapurna Barmanya, that is to say, their
" sons who are now in existence, as also those who may be
" born hereafter, shall, in equal shares, hold the said pro-
" perties in possession and enjoyment by right of inheritance,
" and shall maintain intact and continue the service of the
" established deities and the ancestral rights according to
" the practice heretofore obtaining."

The difficulty, so far as there is any difficulty in construing the will, is occasioned by the bequest to the after born sons of the testators' two sisters which has been taken to include nephews born after the testator's death. It may perhaps be doubted whether the will properly construed gives rise to the question on which so much argument has been expended. If an English will expressed in similar terms were before an English Court it would probably be held that the gift to after born children was confined to children coming into existence between the date of the will and the testator's death. There is nothing in the circumstances in which this will was made though the testator died the next day to render that view improbable, for he expressly provides that if he recovers the will shall hold good unless altered. " The real doctrine of the Court," says Wood, V.C., in *Mann* v. *Thompson* Kay, 643—

" Is that when children are mentioned in a will that
" means *primâ facie*, if no intervening interest be given,
" that which is considered to be the testator's meaning in
" the case of a gift to individuals, namely, those who may
" be living at the death of the testator. If the gift be not
" immediate it may be that he intends to include all those
" children who may be living at the time of distribution,
" and the Court judges of the intention in this respect
" from the whole scope of the will."

The rule is not altered by the addition of words of futurity as if the gift be to children "born and to be born" or to children "begotten and to be begotten." In accordance with this rule a gift expressed to be to a daughter and her husband and "their child now existing and also "the other children which may hereafter be "procreated" was held by this Board to be limited to children born between the date of the will and the testator's death. *Dias* v. *De Livera*, 5 A.C. 123. The fact that this rule is a rule of convenience is some reason for applying it to Hindu wills, and an additional reason may be found in the well-known doctrine of Hindu law that a gift to an object not in existence is absolutely void. But however this may be, it has been assumed throughout that the testator intended children born after his death to be included in the gift. And their Lordships propose to deal with the case on that assumption.

It will be convenient at the outset to dispose of a point suggested by the words "by right of inheritance." It was said that there was really no bequest in favour of the nephews, and that so far as they were concerned the will only declared a right of inheritance. The High Court had no difficulty in rejecting that contention, and their Lordships are of the same opinion. It is not very easy to determine the proper meaning of the expression translated by the words "by right of inheritance" The learned Chief Justice explains that the literal translation should be "as after-takers," and he adds that "it may be "that the testator used the expression in the "sense that the nephews would take with the "same incidents of proprietorship as heirs "would." Whatever the exact meaning of this doubtful expression may be, it cannot in their Lordships' opinion have been inserted for the

purpose of rendering meaningless words which had only just been used.

Apart from this point the learned counsel for the Appellant argued in the first place that there was no vesting until the death of the survivor of the mother and the widow. Their Lordships, however, think it is clear on the construction of this will that the nephews were intended to take a vested and transmitable interest on the death of the testator, though their possession and enjoyment were postponed. Whether it was the intention of the testator that on the birth of nephews after his death interests vested should be divested so as to let in such after born nephews is another question.

It was contended in the second place (and this of course was the principal contention) that the gift including, as it did, a gift to persons not in existence at the time of the testator's death was altogether void.

Upon this question there has been as the learned Chief Justice observes a conflict of judicial opinion in India. But in their Lordships' opinion the question was set at rest for all practical purposes by the judgment of Wilson, J., as he then was, in the case of *Ram Lal Sett* v. *Kanai Lal Sett* in 1886, 12 Calcutta 663.

In that case the learned Judge disposed of the cases which had been treated in India as authority for introducing into the construction of Hindu wills the rule commonly referred to as the rule in *Leake* v. *Robinson*, 2 Mer. 363. He showed that the rule was introduced into India owing to a mistaken analogy, and at the end of a judgment which leaves nothing more to be said, he stated that he should be "prepared to hold as "the general rule that where there is a gift to a "class, some of whom are or may be incapaci-"tated from taking because not born at the date

" of gift or the death of the testator as the case " may be and where there is no other objection " to the gift, it should enure for the benefit of " those members of the class who are capable of " taking."

In that conclusion their Lordships agree and they are glad to have this opportunity of expressing their entire concurrence in the judgment to which they have referred. It would serve no useful purpose to recapitulate the learned Judge's arguments. But there is one passage at page 678 to which their Lordships desire emphatically to call attention. It is this :—

" It is no new doctrine that rules established in English " Courts for construing English documents are not as such " applicable to transactions between natives of this country. " Rules of construction are rules designed to assist in ascer- " taining intention, and the applicability of many such rules " depends upon the habits of thought and modes of ex- " pression prevalent amongst those to whose language they " are applied. English rules of construction have grown up " side by side with a very special law of property and a " very artificial system of conveyancing, and the success " of those rules in giving effect to the real intention of " those whose language they are used to interpret depends " not more upon their original fitness for that purpose than " upon the fact that English documents of a formal kind " are ordinarily framed with a knowledge of the very " rules of construction which are afterwards applied to " them. It is a very serious thing to use such rules in " interpreting the instruments of Hindus, who view most " transactions from a different point, think differently, and " speak differently, from Englishmen, and who have never " heard of the rules in question."

Their Lordships will humbly advise His Majesty that this Appeal should be dismissed.

The Appellant will pay the costs of the Appeal.

In the Privy Council.

BHAGABATI BARMANYA (since deceased)
AND ANOTHER

v.

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