Privy Council Appeal No. 132 *of* 1927.
Bengal Appeal No. 4 *of* 1926.

Joydurga Dasi - - - - - - - - *Appellant*

v.

Saroj Ranjan Sinha 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 11TH JUNE, 1929.

Present at the Hearing :
LORD CARSON.
LORD BLANESBURGH.
SIR LANCELOT SANDERSON.

[*Delivered by* LORD BLANESBURGH.]

Two questions were discussed at the hearing of this appeal. The first was whether the appellant is not entitled under the will of her father to an absolute interest in a moiety of his estate. The second was whether, if under the will the interest taken by her must be limited to that of a Hindu daughter only—as is the contention of the respondents—she is not in the events which have happened, and notwithstanding an ekranama entered into on the 17th April, 1909, between herself and her sister, since deceased, entitled for the rest of her life to the remaining moiety of their father's estate, bequeathed in the first instance to her sister and now in the enjoyment of the respondents, the sons of that sister.

In the Courts in India further questions were raised by the appellant. These were decided against her and were not again ventilated at their Lordships' Board. There, the only questions discussed were those just stated—the second of them, in the form presented to the Board, being, as it seems, raised for the first time. But of this later.

The circumstances of the appellant's father referred to in his will and surrounding him at its date, are not irrelevant upon the question of construction which the appellant raises in the suit.

The testator, Mathura Mohan Pal by name, was when he made his will, on the 12th October, 1884, an old man. He was, as he put it, in a declining state of physical strength. He had no expectation of any addition to his family. He had been twice married but was a widower. No issue of his first marriage survived. By his second wife he had two daughters, the appellant and Sarat Kumari, her younger sister. Their mother had died in 1881. In 1884 they were both infants and were still unmarried. But the appellant had attained marriageable age, and the testator was, as he expressed it, trying to get her married soon, and had made up his mind after she was married to keep his son-in-law in his family. These matters are detailed by him as an exordium to his will, and, coupled with the provisions expressly confirmatory of that impression contained in the dispositive clause set forth later, indicate that at least one main purpose of his in making a will at all, if not, indeed, his only purpose, was the limited one of protecting the appellant against the danger of being deprived of any interest in his estate should she, alone of his two daughters, be married before his own decease.

That event did not, however, happen. Within three months of making his will the testator was dead. Both of his daughters remained still unmarried. The testator's expectation had not been realised. Subsequently each of the daughters found husbands, whom each in turn survived. The appellant remains a widow with one son. Her sister Sarat Kumari, also a widow, died on the 12th June 1914. The respondents are her three sons.

In her lifetime, the ekranama above referred to was entered into between the two sisters. According to the respondents' contention it was effective to dispose in their favour during the life of the appellant of the moiety of the testator's estate appurtaining to their deceased mother, and their contention further is that under the estator's will the interest taken whether by the appellant or by their mother Sarat Kumari was the interest of a Hindu daughter only.

To defeat this contention the present suit was launched by the appellant. By her plaint she claimed the alternative relief already indicated. The suit has been dismissed by both Courts before which it has come—by the Subordinate Judge of Kishnagar, and on appeal by the High Court of Judicature at Fort William in Bengal. It is from the judgment and decree of that Court dated the 19th November 1925, that the present appeal is brought.

The clause of the will upon which is rested the appellant's claim to a declaration of an absolute interest is, according to the translation favoured by her, as follows :

"After my death my said two daughters shall be my lawful heirs, and they alone shall in equal shares become owners of all my properties subject to the provisions of this Will; the (said) two daughters shall acquire all manner of rights consistent with Hindu Law, in the properties that shall be left by me. God forbid, if my death takes place after the marriage of one daughter and before the marriage of another, then the unmarried daughter shall not be entitled to claim the entire property by virtue of her not being given in marriage, nor shall she get the same; even if such a circumstance should happen, both the daughters shall inherit in equal shares. The daughters and their sons, that is to say my heirs, shall enjoy the properties etc., so long as they shall live in this house at Boalmari. Nobody shall ever by fixing the abode at any other place than this be entitled to own or enjoy the property. None shall be competent to succeed to the property who may go to live elsewhere. Nobody shall at any time be competent to remove the Sadar Cutchery at Balidanga to any other place, the Sadah Cutchery shall always remain there. Such is the injunction also from my ancestors."

Now in order to reach a final conclusion as to the true effect of this clause it should of course be read in its context already referred to, and in association also with one or two further provisions of the will to which reference must later on be made. But even by itself and in the translation favoured by the appellant their Lordships are of the opinion that the only interest thereby given to his daughters respectively in the property of the testator is the interest of a daughter as recognised by the Hindu Law. Their ownership is to be ownership which in relation to daughters is consistent with that law. Even more clearly does this conclusion emerge if reference be had to the translation of the clause made by the Court translator and included in the paper book under the Registrar's order. Its introductory words as so translated, are as follows:

"On my death these two daughters of mine are my heirs according to the Shastras. It is they who shall be entitled to all my properties in equal shares under the provisions of this Will. The two daughters shall get such rights as are enjoined by the Hindu Shastras to the properties (to be) left by me."

So much, even on a general perusal of the words. But if the clause be more critically examined and if it be read, as already indicated it should be, in connection with other relevant provisions of the will, the conclusion that the interest taken by each of the testator's daughters thereunder is one which determines with her death becomes irresistible.

It will, first of all, be noted that in the clause itself not the daughters only, but these daughters and their sons—the latter, of course, not then in being—are referred to as the testator's "heirs," and in other clauses of the will, notably in clauses 3, 5 and 6, that word is used in the same comprehensive sense.

Notable again, as if by way of contrast, is the manner in which the testator when referring in terms only to his daughters fetters their powers over the property. Clause 7 provides that if either of the daughters, elder or younger, desires to have a partition of the property effected she shall not be competent to do so. Clause 8

again is a striking confirmation of the conclusion that the interest conferred by clause 2 is a limited one only.

> "When the daughters shall attain majority, the Executors shall make over to their satisfaction the properties, etc., and everything, if they decline to accept the properties, etc., into their own hands as being incapable, the Executors shall when the daughters' sons attain majority, retire after making over everything to them to their satisfaction."

Again, a power to alienate is an essential incident of an absolute interest in property. And not only is no such power in terms conferred upon the daughters, but the prohibition against partition by them and the provision of clause 8 for the benefit of their sons indicate clearly, as their Lordships think, that the whole scheme of the will—as might have been expected from its exordium—is that the property shall remain intact after the death of both daughters for the benefit of their sons as the heirs of the testator. Accordingly the Board, in agreement with both Courts in India, is of opinion that the appellant is not entitled to the declaration of absolute ownership which she seeks.

But the testator's will as their Lordships read it would, after the death of Sarat Kumari, have left the appellant for the remainder of her life by virtue of the jus accrescendi in enjoyment of her sister's moiety as well as of her own, and it remains to be determined by way of answer to the second question raised by the appeal how far this position has been altered by the ekranama of the 17th April 1909, to which reference has already been made.

The effect of that document so far as construction is concerned is as it seems to their Lordships too clear for argument. At its date, as above appears, and as is stated therein, one sister had one son and the other sister had three sons. Each was apprehensive that on the death of one of them there would be during the life-time of the other disputes arising between the son or sons of the deceased sister on the one hand and the surviving sister on the other. The ekranama accordingly provides that if one of the sisters should die the son or sons of the predeceased should so long as the other sister lives remain owners in possession in the same manner as his or their mother had been of the one half share of the movable and immovable property left her by her father. On the death of the surviving sister the sons of both are to have such right and share as they are entitled to get under the testator's will.

It is under this ekranama that the respondents claim to remain in possession of their mother's moiety of the estate. That its provisions are apt to give them the right they claim was hardly contested before their Lordships. But it was contended that the ekranama was not binding upon the appellant at all: it was, in the event which had happened, no more than a grant in favour of the respondents, and while still a mere expectancy, of the interest in Sarat Kumari's moiety to which, under the will the appellant, by the operation of the

jus accrescendi, might become entitled on her sister's death in her own lifetime: it was accordingly void on the principle enunciated in the decisions of the Board in *Harnath Kuar* v. *Indar Bahadur Singh* (50 I.A. 69) and *Annada Mohan Roy* v. *Gour Mohan Mullick* (50 I.A. 239), with reference to the attempted disposition of his expectancy by a presumptive reversioner during the lifetime of a Hindu widow.

Their Lordships were not impressed by this contention of the appellant in support of which, as was admitted, no authority could be found.

But they do not propose further to discuss it. It was raised before the Board for the first time. It suggests, if there be anything in it, considerations of far-reaching importance upon which the Board would desire to have the benefit of the opinion of the Courts in India. Accordingly, their Lordships do not entertain it at all. And to the ekranama no other objection was taken.

In the result, therefore, the appellant has failed to satisfy the Board that the judgment and decree appealed from were otherwise than correct. Their Lordships accordingly will humbly advise His Majesty that this appeal therefrom be dismissed and with costs.

In the Privy Council.

JOYDURGA DASI

v.

SAROJ RANJAN SINHA AND OTHERS.

DELIVERED BY LORD BLANESBURGH.

Printed by
Harrison & Sons, Ltd., St. Martin's Lane, W.C. 2.

1929.