Privy Council Appeal No. 98 *of* 1931.

Srimati Indira Rani Ghose *Appellant*

v.

Akhoy Kumar Ghose, since deceased *Respondent*

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 13TH OCTOBER, 1932.

Present at the Hearing:

LORD BLANESBURGH.
LORD ATKIN.
LORD RUSSELL OF KILLOWEN.
SIR JOHN WALLIS.
SIR DINSHAH MULLA.

[*Delivered by* LORD BLANESBURGH.]

The question at issue on this appeal is concerned with the ultimate destination of the share of his residuary estate given by a Hindu testator to the elder of two sons who survived him. Did the share, on the death of that elder son without male issue, pass under a gift over to the younger son, or has it, as the absolute property of the deceased under the original gift to him in the will, devolved upon his widow, the appellant, sole heiress in his intestacy ?

The question is one of construction upon which the two Courts in India are not in accord, and when regard is had to the looseness of the phraseology adopted *passim* in the will by the testator or his draftsman it must be felt that its true meaning raises issues upon which there is ample room for divergence of view. It is comparatively easy to determine what this Indian testator meant to say. The difficulty is to be satisfied judicially that in his English language he has succeeded in saying it.

The testator, one Romanath Ghose, was a Calcutta Hindu, governed by the Bengal School of Hindu law. He died on the 26th July, 1904. He was survived by his widow and by two sons, Sidishwar Ghose and Akhoy Kumar Ghose, both of them, at his death, infants of tender years. It is not clear on the record whether or not he was actually survived by a daughter. But the true position in that matter, whatever it may have been, would not affect construction, and it is not otherwise here important. The testator had certainly a daughter at some time. One of his executors is described as his son-in-law. And in his will, as we shall see, he clearly contemplates the possibility that both daughters and granddaughters may survive him. But apart from a small sum for her marriage ceremony, the testator makes no testamentary provision for any daughter or grandaughter—a circumstance indicative of an attitude to female descendants which, as will be seen, is characteristic.

The will is dated the 30th October, 1903. By it the testator appoints as his executors and trustees, his widow and her brother, his own son-in-law, another named person, and such and so many of his sons attaining the age of 22 years as shall be orthodox Hindus of good repute. He defines in clause 2 the conditions which qualify for that description when it is used in his will, as it quite frequently is. He directs and authorises his executors and trustees to expend upon his first and subsequently remaining annual *shradhs* and upon the funeral and subsequently remaining annual *shradhs* of his wife sums of prescribed amounts, without in this instance indicating the source from which these sums are to come. He directs his executors and trustees " from and out of the income of [his] estate " to pay to his wife if she continues to be an orthodox Hindu of good repute an annuity for her life and also to defray the sums not exceeding a prescribed amount required for her pilgrimages and religious expenses and ceremonies from time to time. He directs and authorises his executors and trustees " out of the income of [his] estate " to pay an annuity to his mother for the term of her natural life. She is also to be entitled to reside in his dwellinghouse at Benares whenever she wishes to do so. He directs and authorises his executors and trustees " from and out of [his] estate " to expend the sum of Rs. 10,000 on the occasion of the marriage of each of his sons and daughters unmarried at the time of his death. And by clause 12 he directs and authorises his executors and trustees to pay a large number of pecuniary legacies and annuities " out of [his] estate," two of which are now transcribed, because reference will later be made to their phraseology :—

> " (*i*) A sum of rupees two thousand to each of my grandsons by daughter, namely, rupees one thousand at the time of their marriage.
>
> " (*j*) A sum of rupees one thousand to each of my granddaughters by daughter at the time of their marriage."

Clause 14 is the clause of the will directly relevant to the question at issue. It is convenient to set it forth textually,

together with clauses 10 and 11, which are also in point, if less immediately so :—

"10. My estate shall not be partitioned until the youngest of my sons shall attain the age of twenty-five years, but my said sons shall be properly maintained and educated out of the income of my estate. If any of my sons try to effect a partition before the time aforesaid he shall forfeit a fourth part of his legal share.

"11. In case I die without any son or grandson by son my widow shall be entitled to adopt three sons in succession, and I do hereby grant her the requisite permission to do so.

"14. Subject to the payments of the legacies and annuities aforesaid (the latter unless otherwise expressly provided being payable during the terms of the natural lives of the annuitants) as well as to the provisions hereinbefore mentioned, I devise and bequeath the whole of my estate real or personal of any kind or description whatsoever and wheresoever situate to my said executors and trustees in trust for such of my sons as shall be living at my death or come into existence within twelve months after my death and also for the son or sons of such of my sons as shall then be dead (such son or sons taking the share their or his father would have taken hereunder had they or he been then alive) provided the said sons or son's sons shall be orthodox Hindus of good repute equally as tenants-in-common and the said sons or sons of my sons taking equally per *stirpes* as tenants-in-common, but nevertheless in the event of any sons or son's sons dying without leaving lineal male issue him surviving the other of my son or sons or son's sons living at the time shall be equally entitled to his or their share of the property as he or they would inherit under the Hindu Law, but should I die without lineal male descendants the son or sons to be adopted by my wife shall inherit the whole of my residuary estate, but he shall not be put in possession until he attains the age of twenty-one years, and should any of my heirs or residuary legatees cease to be orthodox Hindus of good repute he shall forfeit a moiety of his share, which shall go to my other qualified heirs according to their respective shares."

The will very plainly is the work of a draftsman whose knowledge of the niceties of English is imperfect. In not a few instances a strictly literal construction of the words used would lead to a result possibly of zero, certainly incomplete, and that, although the meaning intended is not obscure. For instance, the use of the word "namely" in clause 12 (*i*) produces a result unintelligible, were construction there not assisted by contrasting the subsection with subsection (*j*) which immediately follows it. More particularly, however, is the lapse from accuracy of statement or reference to be found in clause 14, and almost from the beginning to the end of that clause.

Three things, however, may be said of the will, reading it as a whole.

First, the testator plainly contemplates the continuance of the trusts for an indefinite period after his death. An annuity is normally to continue for the life of the annuitant, and there are many annuities : payment for *shradhs*, remote it may be in time, is to be made. Payments, indefinite in duration, are to come out of the estate or out of its income. The testator's Benares house must be retained at least so long as his widow lives.

Secondly, the testator contemplates in more than one instance the forfeiture in whole or in part of a vested gift, should the donee cease to be an orthodox Hindu of good repute.

But, thirdly, and most pointedly of all, the exclusion of every daughter or granddaughter from any participation in residue is plainly of set purpose. Here is a predominant note in the will. As to a daughter-in-law, she is never once mentioned from beginning to end.

There were disputes between his representatives almost immediately after the testator's death, and by an order of the High Court made in March, 1905, the executrix and executors were discharged. Thereafter up to the 25th July, 1919, the estate was administered by the High Court through receivers appointed from time to time. After the testator's elder son, Sideshwar Ghose, had attained the age of 18 he applied for and on the 21st May, 1919, he obtained an order for the grant to himself of letters of administration *de bonis non* with the will annexed. By order of the Court of the 25th July, 1919, the receivers were directed to make over possession of the estate to him, and he was in possession thereof and administering it until his death. On the 13th February, 1930, he died intestate and without male issue, but leaving him surviving his widow, the present appellant, and an infant daughter. Under the Bengal School of Hindu law, by which he, like his father, was governed, his widow is the sole heiress to his property; failing her, Sideshwar's daughter would have been sole heiress.

Akhoy Kumar Ghose, the testator's younger son, survived Sideshwar, and, in view of the third of the contentions put forward by the appellant, and later to be discussed, it is important to note that at Sideshwar's death both he and Akhoy had attained the age of 25, the age mentioned in clause 10 of the will.

When Sideshwar died the question arose whether the gift over of his share of residue under clause 14 still remained operative, and whether, if it did, the words of destination were, in the event, capable of carrying over the share to Akhoy, who alone claimed it. On the view that the gift over did take effect and in his favour, Akhoy applied for and on the 30th May, 1930, obtained probate of the will, and thereupon took possession of the entire estate, claiming that the widow of Sideshwar, even if his sole heiress, had no interest whatever in it.

The widow refused to accept that position, and on the 3rd July, 1930, she instituted against Akhoy in the High Court of Judicature at Fort William in Bengal the suit out of which the present appeal arises. Therein she claimed a declaration that in the events which had happened and on a true construction of the testator's will Sideshwar had at his death become absolutely entitled to his equal half share of the residuary estate, subject to proportionate provision thereout for the pecuniary legacies and annuities already referred to. She asked also, perhaps somewhat irregularly in a suit relating only to the estate of the testator,

for a declaration that on the death intestate of Sideshwar his half share devolved upon herself, and there was a claim for consequential relief.

The suit came on for hearing before Mr. Justice Buckland, exercising the ordinary civil jurisdiction of the High Court, and on the 22nd December, 1930, the learned Judge came to the conclusion that the plaintiff was entitled to the relief for which she asked. And he so declared.

On appeal by the defendant, Akhoy, to the Divisional Bench of the Court, the learned Judges there, on the 2nd April, 1931, allowing the appeal, rejected the plaintiff's claim to a half or any share in the *corpus* of the estate of the testator. They reserved, however, to her the right to apply to the Judge on the original side of the Court, to whom the matter was remitted, to deal with claims of detail made by her and upon which there had so far been no adjudication by that Court.

The present appeal to His Majesty in Council is from that judgment of the 2nd April, 1931. The plaintiff-appellant's desire is to have the decree of Mr. Justice Buckland restored. It only remains to state that on the 21st May, 1931, during the pendency of the appeal, the defendant Akhoy died, and his estate is now represented by the respondents, the executors of his will.

The appellant's contentions in support of her appeal were threefold and alternative. The first was that the terms of clause 14 of the will, in so far as the gift over is concerned, are governed by the provisions of Section 124 of the Indian Succession Act 39 of 1925, the terms of which it may be recalled are as follows :—

> "Where a legacy is given if a specified uncertain event shall happen and no time is mentioned in the will for the occurrence of that event, the legacy cannot take effect, unless such event happens before the period when the fund bequeathed is payable or distributable."

Expressing the contention in terms of the event which has happened the appellant's argument was that upon the true construction of clause 14 Sideshwar's death without leaving lineal male issue him surviving was confined to his death in the lifetime of the testator, an uncertain event with no time mentioned in the will for its occurrence ; that in terms of the will the original gift to him was payable or distributable on the death of the testator, and that accordingly the gift over—the "legacy" of the section—could not, if the section was to be obeyed, take effect. In other words, the original gift to Sideshwar became at the moment of the testator's death, and as a result of the section, absolute and indefeasible.

This contention had commended itself to the learned trial Judge, Mr. Justice Buckland. He accepted the view that it was justified by the judgment of this Board in *Norendra Nath Sircar* v. *Kamal Basini Dassi* (23 I.A. 18), which he treated as governing the present case. Their Lordships, in agreement with the

Divisional Bench, are of opinion that no such conclusion is warranted by that judgment, and ultimately the learned Judge's view was not, before them, seriously maintained.

Death in the case cited was clearly on the will confined to " death " in the testator's lifetime. In the present case, however, notwithstanding the appellant's original contention to the contrary, it is clear, their Lordships think, that the death of a son or son's son referred to in this will is the death of one who has taken something under the original gift contained in it; that is to say, it is a death which must take place after that of the testator. This distinction between the cases is, for the present purpose, vital. It is true that in each the event remains uncertain. In the present case, it not being a case of death *simpliciter*, it might even after the death of the testator never have happened at all. But was it an uncertain event with reference to which it could be said that " no time is prescribed in the will for its occurrence " ? The answer must, their Lordships think, be in the negative. The two first illustrations attached to Section 124 make clear what may be only implicit in the actual wording of the section, namely, that it does not apply if a period is specified in the will within which the contingent event is to happen, or, putting it otherwise, that the section only applies, if without doing violence to the terms of the will, it can be held, as a matter of words, that the occurrence of the uncertain event prior to " the period when the fund bequeathed is payable or distributable," is alone within the contemplation of the testator. If the terms of the will make that construction of his words impossible, the section then does not apply.

It will suffice in exposition of this statement to refer to the first of the illustrations attached to the section :—

> " A legacy is bequeathed to A., and in case of his death to B. If A. survives the testator the legacy to B. does not take effect."

In the case illustrated it is possible without doing violence to the words to refer the specified death of A. to his death in the lifetime of the testator. And so much being possible, the section requires that A.'s death shall be so referred.

But does not the illustration equally plainly connote that it would have become the illustration of a case to which the section had no application if, instead of being worded as it is, it had run :—

> " A legacy is bequeathed to A., and in case of his death before or after that of the testator to B.,"

a case in which the legacy to B., on the testator's very words must take effect just as certainly if A. survived the testator, as if he predeceased him. In other words, A.'s interest in the legacy, B. surviving, is cut down to a life interest, and Section 131 of the Act becomes relevant as an enabling provision. That section, it will be recalled, is as follows :—

> " A bequest may be made to any person with the condition superadded that in case a specified uncertain event shall happen the thing bequeathed shall go to another person.".

The section is made subject to, amongst others, Section 124. Freed from the operation of that section, as, in their Lordships' judgment, for reasons already given, the present gift is, there seems to them, as there seemed to the learned Judges of the Divisional Bench, no reason why Section 131 should not here have full effect, unless, indeed, some other objection to the efficacy of the gift over can be found. And in her remaining contentions the appellant sought to find two.

The first of these proceeded on the footing that the gift over had taken effect. Thereupon the submission was that on the terms of that gift properly understood there was no effective destination of Sideshwar's original share to any person, and that accordingly, on the well-authenticated principle of *Home* v. *Pillans*, 2 My. & K. 15, the original absolute gift to him remained.

This conclusion was reached as a result of the construction placed by the appellant on the immediately relevant words of clause 14 of the will, repeated now for convenience of reference :—

> " But nevertheless in the event of any sons or son's sons dying without leaving lineal male issue him surviving the other of my son or sons or son's sons living at the time shall be equally entitled to his or their share of the property as he or they would inherit under the Hindu law."

Reading these words without assistance in construction from any other provision in the same clause, learned Counsel, in an elaborate argument, insisted that the words " him surviving " are the key words to what follows : that the share being disposed of is still the share of " him," the deceased son or son's son : and that " his or their share " of the property to which the " other " of the testator's son or sons or son's sons living at the time are to be entitled equally grammatically must be, and, in fact is, the share of the deceased which *he or they* would inherit *from him* under the Hindu law. From this the next step was easy. That share was no share at all, because the only person to take any interest in Sideshwar's property under the Hindu law is the appellant, Sideshwar's widow. Failing her, his daughter. The gift over accordingly had on the death of Sideshwar no effect. Indeed, if the construction suggested be sound, the gift over on the death of any son or son's son leaving a widow or a daughter, can never have any effect, and the testator's purpose in providing that a son's or son's son's share is to go over on his death without leaving lineal male issue him surviving might never be attained. On this construction the share of the deceased could not go over if he left a widow or daughter him surviving, a result entirely outside the testator's scheme of distribution and, so far as it might be operative to confer benefits either upon one or the other quite contrary to his intention.

To their Lordships this appears to be peculiarly a case, similar to those referred to by Lord Macnaghten when delivering the judgment of the Board in *Norendra Nath Sircar's* case (*supra*), in which care must be taken lest the wills of people speaking a

different tongue, trained in different habits of thought, and brought up under different conditions of life, are interpreted by the application to them of a too rigid construction of the English language. Particularly must this consideration be in mind if it appears that a rigid construction leads to such consequences as have just been indicated.

Here, however, in their Lordships' view, the appellant's construction of the will does not survive examination. A conscious intention on the part of a testator to dispose of property in the hands of another person under a gift from himself is not lightly to be imputed. Less likely is it that the persons to take under that disposition, and as on an intestacy of the first donee, would be described in terms of relationship not to the donee but to the testator himself.

And this more general criticism of the appellant's construction is reinforced on closer examination of the actual words of the testator, showing as it does that he is here doing none of the things thereby imputed to him. Three very helpful aids to the true meaning of the words employed are supplied by reference to the same words in other parts of clause 14, where their signification is unambiguous.

First, as to the words "him surviving." This, it then becomes apparent, is the testator's phrase to convey a meaning which another draftsman, better instructed, would express by the use of such words as "them respectively surviving." The word "he," in this way three times used in the last branch of the clause, justifies this statement:—

> "But should I die without lineal male descendants the son or sons to be adopted by my wife shall inherit the whole of my residuary estate, but *he* shall not be put in possession until *he* attains the age of twenty-one years, and should any of my heirs or residuary legatees cease to be orthodox Hindus of good repute *he* shall forfeit a moiety of his share."

Further examination of the clause discloses another mannerism of this testator in using the word "or" where, to convey the same meaning, a more competent draftsman would inevitably use the word "and." It may be gathered from other parts of the clause that where the testator describes the donees under the gift over as "the other of my son *or* sons *or* son's sons living at the time," another draftsman better versed in English would in each place have used the word "and" to convey his meaning.

Again the signification of "and" *must* be attached to the word "or" in the phrase immediately preceding the gift over:—

> "Provided the said sons *or* son's sons shall be orthodox Hindus of good repute . . . and the said sons *or* sons of my sons taking equally *per stirpes*."

The sons and the son's sons in each case referred to, take, *all* of them, a share under the immediately preceding gift. Yet the testator's word is "or." This use of the word in place of "and" is again seen, although perhaps less appositely, in the

bequest at the commencement of the clause of " the whole of my estate real *or* personal of any kind *or* description whatsoever.

And now, assisted in construction by this dictionary supplied by the will itself, their Lordships cannot doubt that the words " him surviving " in this clause should be read as the testator's equivalent for such words as " them respectively surviving ": that the " other " of the testator's sons or son's sons to take are confined to sons or son's sons who, *like the deceased,* were original takers under the previous gift: that by the words " his or their share of the property " the testator is referring, not to any share to be *taken* under the gift over, but to the share in his (the testator's) property by the will originally *given* to the deceased son or son's son. In other words, on their true construction the effect of the testator's words of destination is as follows:—

In the event of any of my sons or son's sons [to whom a share of residue has been given] dying without male issue them respectively surviving the other of my son and sons and son's sons living at the death of the deceased [and being also sons or son's sons entitled to a share of residue under this my will, and entitled also to inherit from me under Hindu law] shall take in equal shares the property comprised in the original gift to the deceased.

That to their Lordships seems to be an exact paraphrase of the words of the will, in their true signification, and, as so paraphrased, the words convey the share to a destination sufficiently clearly described and in no sense obnoxious to Hindu law. Whether this accrued share of an original taker would or would not be subject to defeasance like his original share: whether the son or son's son would " inherit under Hindu law " because he was beneficiary under the testator's will, or because he could qualify on intestacy, are questions which need not delay their Lordships now, for the gift on either view would be equally valid according to Hindu law, and Akhoy, who in the event is the only claimant to Sideshwar's share, fulfils all qualifications. Accordingly, in their Lordships' judgment, this second contention of the appellant also fails.

Her third contention was first made in argument before their Lordships' Board. It is not raised by the appellant's printed case. It was not given as a reason in her application for leave to appeal to His Majesty in Council. It is not mentioned in any of the judgments of the Courts below. Based as it is on a view of the will entirely contrary to that upon which the appellant had hitherto proceeded, namely, that the period of distribution of residue was the death of the testator, their Lordships cannot think that any reference to the point if, in India, it was made in argument, was seriously made.

In these circumstances, it is with some hesitation that they deal with it at all. Had they felt disposed favourably to entertain it they would in fairness to the respondents have hesitated to pronounce against them without in the first instance obtaining the views of the Divisional Bench upon its soundness. They

think, however, that the contention fails, and as it is by the appellant that it is only now raised they will dispose of it. Alternative to the appellant's other two contentions, it is that on the true construction of the will, while there may have been a vesting in interest of Sideshwar's share at the death of the testator, there was an actual vesting in possession under clause 10 of the will on the attainment by Akhoy of the age of 25, in no sense displaced by Sideshwar's death after that vesting. The trusts of the residue thereupon came to an end. Sideshwar's share then became his own indefeasibly and absolutely and now devolves upon the appellant as his widow.

In support of this contention reliance was mainly placed upon the judgment of the Board in *Christian* v. *Taylor* [1926], A.C. 773, and of Sargant J., as he then was, in *In re Roberts* [1916], 2 Ch. 42, and *In re Brailsford* [1916], 2 Ch. 536. Of the words of clause 14, " in the event of any sons or son's sons dying without leaving lineal male issue him surviving," it may be said as Lord Haldane said of the corresponding words of the will in *Christian* v. *Taylor*, that they

> " Are *prima facie* to be construed in their literal significance as referring to death at any time. . . . This rule of interpretation will yield to any sufficient intention to a contrary effect to be found in the language of the will taken as a whole, but apart from any such indication death at any time is what the words taken by themselves must be assumed to mean."

If the contrary intention to which Lord Haldane refers is to be found in this will, it can only be so found by reading clause 10 as amounting to a provision that on attainment of the age of 25 by the youngest of the testator's sons there is to be a division of the property in specie and the trusts of clause 14 are then to come to an end.

Their Lordships are unable to find all this in a clause so partial and colourless as clause 10.

First of all it is a clause applicable only to sons. It has no reference to son's sons or adopted sons, although the provisions of clause 14 are applicable as much to son's sons as to sons.

Secondly, clause 10 is negative and not positive in form. It says that there shall be no partition before a certain event; but it does not, even by implication, require that there shall be any partition after that event. Still less does it suggest that even after that partition the then unexhausted provisions of the will to which reference has been made shall cease to have paramount effect. Their Lordships are well aware of Section 343 of the Succession Act, as a result of which the annuities at any rate might be provided for so as to permit of a partition for an absolute estate, notwithstanding their continuance. But that section does not make it possible to say of this testator that it was his intention that the trusts declared by him in clause 14 should cease to be operative, and in the hands of his trustees, at any moment before they were completely fulfilled.

Their Lordships have, in short, been unable to find in this will any indication of an intention sufficient to displace the *prima*

facie meaning of the words used in clause 14. And the question is solely one of intention.

In the result, therefore, their Lordships conclude that the appeal fails and should be dismissed. And they will humbly so advise His Majesty.

The costs of both parties to the appeal, taxed as between solicitor and client, ought, they think, to be paid out of the estate. The difficulty has been created by the testator himself, and it was properly brought before His Majesty in Council for final solution.

In the Privy Council.

SRIMATI INDIRA RANI GHOSE

v.

AKHOY KUMAR GHOSE, SINCE DECEASED.

DELIVERED BY LORD BLANESBURGH.

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

1932.