

*Privy Council Appeal No. 86 of 1914.*

**Bhupendra Krishna Ghose and another** - *Appellants,*

*v.*

**Amarendra Nath Dey and another** - *Respondents.*

FROM

**THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.**

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF  
THE PRIVY COUNCIL, DELIVERED THE 15TH NOVEMBER 1915.

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*Present at the Hearing:*

VISCOUNT HALDANE.

LORD WRENBURY.

LORD PARMOOR.

SIR JOHN EDGE.

MR. AMEER ALL.

[*Delivered by Mr. AMEER ALL.*]

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This is an appeal from a judgment and decree of the High Court of Calcutta pronounced in a suit which relates to the will of one Herumbo Nath Ghose, a Hindu inhabitant of the town of Calcutta, subject to the Dayabhaga School who died on the 10th of November 1907.

The material portion of the will, which bears date the 26th June 1898, is in the following terms:—

" This is the last Will and Testament of me Herumbo  
" Nath Ghose of No. 45 Pathuriaghata Street Calcutta,  
" son of Girindra Chunder Ghose, deceased zemindar I  
" revoke all prior testamentary writings and appoint my  
" wife Srimati Poritoshini Dassi to be the sole executrix of  
" this my Will I hereby authorize my said wife to adopt  
" Dattaka putra In case of death of an adopted son my  
" said wife shall adopt one after another five sons in  
" succession If my said wife dies without adopting a son  
" or if such adopted son predeceases her without leaving

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' any male issue, in such case my estate after the death of  
" my said wife shall pass to the sons of my sister Srimati  
" Benodini Dassi who may be living at the time of my  
" death "

On the testator's death his widow Poritoshini Dassi applied for and obtained probate of the will. The estate of Herumbo accordingly vested in her as his legal representative and remained in her possession until her death three years later. It is alleged that in August 1909 she, in pursuance of the authority given to her by her deceased husband, adopted an infant of the name of Hem Chunder Dey. This child died on the 11th of March 1910 which was followed by the death of Poritoshini herself shortly after.

The present suit was instituted on the 30th of March 1910 by Kissory Moni Dassi, the adoptive mother of Herumbo, against the two sons of Benodini Dassi, his sister, for a declaration that in the events that had happened the devise to them had failed, and that the testator's estate had devolved on her. Kissory Moni died in September following, whereupon one Trailokya Nath Ghose, who alleged himself to be the next reversioner of the infant Hem, was substituted in her place. Trailokya has died since the trial; and the present appellants are his son and widow who represent him as his executor and executrix respectively. The fact of the adoption by Poritoshini of the infant Hem was denied by the respondents, but the question has not been tried. Both the courts in India have dealt with the case on the assumption that the adoption was duly made as alleged by the plaintiff; and on the construction of the will have held that as the adopted son died without leaving male issue, on the death of the widow the bequest to the sons of Benodini took effect and they accordingly dismissed the suit.

The judgment of the High Court is challenged on two grounds; *firstly*, it is urged that

on the adoption of the infant, the estate vested in him as full owner by virtue of the Hindoo law of inheritance, that he took it in his capacity of son and not as devisee under the will, and on his death the property devolved on his heirs. Consequently, it is contended the executory devise in favour of the respondents failed completely. *Secondly*, it is contended that it fails also under the provisions of Section III of the Indian Succession Act (X. of 1865) which has been made applicable to Hindoos by the Hindoo Wills Act (of 1870).

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 Hindoo. 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 Hindoo law. Before proceeding to examine the will in order to discover the intentions of the testator, their Lordships desire to make one further observation, viz., that under the *Dayabhaga*, the testator has not only the power of authorizing his widow to adopt a son to him, and in case of the death of such adopted son, to make other adoptions in order to ensure the performance of those religious rites on which depend his salvation in after life, but he can attach to such authority a direction that her estate should not be interfered with or divested during her life, just as he can postpone the succession of his natural-born son by interposing a life estate.

In the present case had the testator given to the widow a power to adopt without constituting her his executrix she would have taken merely a widow's interest which would have become divested on her adopting a son. It is clear, however, from the language of the will that the testator was anxious that there being no natural-

born son, a son should be adopted who and whose male issue should duly perform those religious rites which are considered essential in the Hindoo system for the salvation of the deceased. With this object he empowered her to make five successive adoptions and constituted her as his executrix to give effect to his wishes. If the first son so adopted died in her lifetime without leaving male issue, she had the power to adopt a second; or a third, fourth, or fifth in case the second, third, or fourth also died without leaving male issue. Thus the power to adopt confided to the widow could not be exhausted so long as she was alive until the directions of the testator had been fully carried out. It is obvious that the estate could pass only to the son who survived her, or, in case of his death in her lifetime, to his male issue, if he left any. Otherwise the whole object with which the power was given to the widow for making the adoptions would be defeated. The estate was in the widow during her life; the gift over is expressly declared to take effect after her decease in case of the failure of the adoptions without securing the object the testator had in view. Their Lordships conceive that a mere statement of the purpose of the testator which is apparent on the face of the will and of the consequences resulting from the contention advanced on behalf of the appellants is sufficient to show its fallacy.

The infant who was adopted by the widow died in her lifetime unmarried and without leaving any issue, and as she died a few days later she was unable to give further effect to the wishes of her deceased husband. On her death, therefore, the gift to the sons of Benodini, the testator's sister named in the will, took effect, and the estate passed to them. But it has been strenuously contended that under the provisions

of Section 111 of the Indian Succession Act the bequest to them is void. That section runs 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.”

Section 111 embodies the rule enunciated in *Edwards v. Edwards*, 15 Beav. p. 361. The rule of construction laid down in that case has been considerably modified by later English decisions. The Indian Act, however, has given it statutory force. Even in India as regards Hindoos, its application is confined to special tracts such as the territories subject to the Lieutenant Governor of Bengal and the Presidency towns of Bombay and Madras. Their Lordships think that it should be applied only to cases strictly coming within its scope. In the present case the event on the occurrence of which the distribution was to take place is distinctly mentioned as being the death of the widow. That being so, the gift to the nephews is not affected by Section 111 and must take effect.

Their Lordships are of opinion that the judgments of the courts in India are correct and that this appeal should be dismissed with costs, and they will humbly advise His Majesty accordingly.

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In the Privy Council.

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BHUPENDRA KRISHNA GHOSE AND  
ANOTHER

v.

AMARENDRA NATH DEY AND  
ANOTHER.

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DELIVERED BY MR. AMHER AJI.

LONDON :

PRINTED BY EYRE AND SPOTTISWOODE, LTD.,  
PRINTERS TO THE KING'S MOST EXCELLENT MAJESTY.

1915.