

Privy Council Appeal No. 67 of 1937.

Bengal Appeal No. 21 of 1935.

Bhupendra Mohan Roy and others - - - *Appellants*

v.

Srimati Purna Sashi Debi 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 7TH JULY, 1939.

Present at the Hearing :

LORD ROMER.

SIR GEORGE RANKIN.

MR. M. R. JAYAKAR.

[*Delivered by* LORD ROMER.]

This is an appeal from a decree of the High Court of Judicature at Fort William in Bengal dated the 20th May, 1935, reversing the judgment and decree of the First Additional Subordinate Judge of Dacca dated the 17th June, 1932, whereby he had dismissed with costs a suit brought by the first respondent Srimati Purna Sashi Debi (hereinafter called the respondent) against the appellants and others.

The respondent is the widow of one Bhabendra Mohan Roy (hereinafter called the testator) who died on the 11th January, 1915, having made his will on the day preceding his death. He left a daughter surviving him but no son. He also left him surviving his three brothers (who are the appellants) and a step-brother one Rajendra Mohan Roy.

Inasmuch as the questions to be determined upon this appeal are concerned with the proper construction and effect of the will the material portions of it must be set out in full. They are as follows:—

“ 2. If no son be born to me of my loins or if such a son dies after birth, my wife Srimati Purnasashi Debi will be permitted, for the purpose of performing the Sradh, funeral rites and for offering water and funeral cakes to my ancestors, to take five sons successively (one on the death of the other) and that adopted son will be the owner of the estate, and will be, on attaining majority, entitled to take the estate from the hands of the Executors; and I

grant her permission to take son in adoption as aforesaid. Before I gave her oral permission to take son in adoption in that manner.

“ 3. Within ten years after my death my aforesaid wife, in accordance with the provision mentioned in paragraph 2, will take a son in adoption from amongst the sons of my three full brothers or from amongst those of my step-brother Srijut Rajendra Mohan Roy. If it be impossible to take in adoption a son from amongst the sons of any one of them, then, after the expiry of ten years and within the next two years, she will take, at her own choice, a son in adoption from amongst the sons of my other agnatic relatives. In the absence of that or if that is not possible, she will take a son in adoption from one of my own Gotra or from a different Gotra. She will take the first son in adoption within twelve years as aforesaid. If the said son dies sonless, she will be entitled to take a second son in adoption even after the said period of twelve years. My aforesaid wife will be entitled to adopt five sons in succession, one on the death of the other, in the aforesaid manner.

“ 4. My full brothers, mentioned in paragraph 1, are my well-wishers and faithful objects of my love; and I have been living with them in Ejmali and in the same mess. My two elder brothers have been properly looking after and managing the estate even during my life-time. Accordingly, I appoint my full brothers Srijut Bhupendra Mohan Roy, Srijut Prithwindra Mohan Roy and Sriman Hiranya Mohan Roy, Executors to the estate, after my death till my son or my adopted son or, if they die during their minority, till their sons attain majority. They will together, or in the event of the death, inability or absence of the one the others will manage and look after the estate. For the welfare or for the necessity of the estate they will be able to settle permanently, or in Putni or in Ijara the whole or any portion of my immovable property. They shall not be able to do any act detrimental to the estate, or to transfer or encumber the same. The Executors will perform the religious rites and duties of my ancestors and other festivities, according to their consideration and the custom of my family, the expenses of which will be borne by the estate left by me. They will maintain my mother, wife, daughter and others mentioned in paragraph 5, and pay their monthly allowance from the estate left by me. The Executors and their representatives will be bound to act according to the provisions of the Will of my deceased father Sudhendu Mohan Roy. Nobody will be able at any time to demand or take any accounts of income and expenditure from the Executors.

“ 5. My mother Srijukta Harakamini Debi, of whom I was born, will be entitled to maintenance out of my estate according to share, in accordance with my father's Will, and a sum not exceeding Rs.2,000 should be spent out of my estate for her Sradh ceremony. My wife, Srimati Purnasashi Debi, will be under the care of my Executors and under the care of my son or adopted son when he would attain majority. She will be entitled to maintenance and all expenses for religious rites, pilgrimage, &c., out of the estate according to the circumstances of the estate and directions of the Executors. If my aforesaid wife be not on good terms with them, she will be entitled to a monthly maintenance allowance at the rate of Rs.20 during her life and to a sum of Rs.1,000 at a time out of my estate for the expenses of her pilgrimage, and she will further be entitled to live in a proper house in my residential homestead. My only daughter Srimati Binapani Debi is at present minor and unmarried. All the expenses of her marriage will have to be paid out of my estate in accordance with the custom of my family, and my estate will bear the cost of her maintenance till her marriage. If she lives at her husband's house after her marriage, she will receive Rs.5 per month during her life out of my estate, and if she lives at my own house she will be entitled to maintenance out of my estate. If she be not on good terms with my heirs or successors in interest and if she wants to live in my own village, then my

heirs and successors-in-interest should be bound to give her separate lands and houses according to the circumstances of the estate, and she will be entitled to a monthly allowance of Rs.20 during her lifetime on account of her maintenance out of my estate; and she will be entitled to get proper sum of money out of my estate on the said accounts. If any other daughter is born to me, then she also will be entitled to maintenance, monthly allowance, marriage expenses, homestead and houses, &c., just like the aforesaid Srimati Binapani.

" 6. My three brothers executors, will together or two of them or one of them will take the probate of this Will and will administer and manage the estate left by me till my son or grandson attain majority, being vested with all the responsibilities and power as mentioned in this Will and by paying off all the debts.

" 7. If there be no son born of my loim, or if such a son die sonless after birth, or if perchance, no son be taken in adoption, or if the son taken in adoption die sonless, then the Executors or any of them or, in the event of their disagreement the Collector of Dacca will establish at my own native village Rawail, the place of my residence, a school or a charitable dispensary named after me and will spend the whole amount of surplus of my estate for its maintenance. To the above effect, being in full possession of my senses and in tranquil state of mind, I execute to-day this Will, being in Calcutta at 19, Hara Chandra Mallick Lane. Finis. Dated 26th Pous, 1321 B.S."

As already stated the testator died on the 11th January, 1915. Ten years then passed without the respondent taking any steps to adopt any one of the sons of the testator's brothers or step-brother. This was in no way due to any difficulty in finding such a son. It seems to have been a deliberate omission on her part. The learned Subordinate Judge has examined the evidence about this in some detail and has summed it up in these words:—

" So there is not only no evidence that the plaintiff even made any genuine endeavour to take any of her husband's brothers' sons in adoption within 10 years and failed, but there is evidence in the contrary direction that defendants 1 and 2 (i.e., two of the appellants) offered their sons for adoption to the plaintiff but she did not adopt."

On the 13th August, 1926, however, the respondent purported to adopt an infant son of one of the appellants. That the adoption took place in fact is not now in dispute. The only question about it is whether it was a valid adoption seeing that it was not made within 10 years of the testator's death. On the 24th November, 1926, the adopted son died sonless.

It was in these circumstances that the respondent instituted the present suit on the 20th January, 1928, claiming that the appellants as executors of her husband's will should put her in possession of the properties to which she was entitled at his death. She also claimed to have an account taken of the income of such properties. Her contention was that the adopted son had become by virtue of the express words in clause 2 of the will " the owner of the estate," and that upon his death she became entitled to the estate as his heiress. As to clause 7 of the will which contains a gift over in favour of charitable purposes in the event (amongst others) of the son taken in adoption dying sonless, she contended that the gift over was void on the ground that

it was repugnant to the absolute gift to the adopted son contained in clause 2. This was, of course, on the assumption that the adoption was valid. If that assumption proved to be ill-founded, she claimed to be entitled to the properties as heiress of her husband, alleging that the gift over in the event of no son being taken in adoption was void on the grounds of remoteness and uncertainty.

The suit came on for hearing before the Additional Subordinate Judge at Dacca on the 17th June, 1932. He held that the adoption was invalid as not having been made within the 10 years limited by the will. He thought in view of certain authorities, to which their Lordships will refer later, that the power to adopt given to the respondent was one that had to be strictly followed. He held further that the gift over in clause 7 in the event which had happened of no son having been taken in adoption was valid in every respect. The result, as already stated, was that the respondent's suit was dismissed with costs.

The respondent then appealed to the High Court. The appeal was successful. It was held that the adoption was valid. Mitter J., in whose judgment Rau J. concurred, agreed with the Subordinate Judge that under the Bengal School of Hindu Law an authority to adopt given by a husband to his widow must be strictly followed. "No one," he said, "would quarrel with this proposition of law." But he thought that according to the true construction of the testator's will the authority given to the widow to adopt a son of one of his four brothers could be exercised at any time within 12 years from the testator's death. He said:—

"In our opinion on a reasonable construction of the will, even on a literal construction of it, the proper way to read it is to hold that there was no prohibition with reference to the taking in adoption of the nephews of her husband beyond the period of 10 years and within 12 years of the testator's death and by the adoption of the nephew within 12 years the wishes of the testator were complied with."

And a little later he said:—

"We have to see on the authorities whether there is an intention within the four corners of the will as expressing that the nephews are to be excluded beyond the period of 10 years. As we have already said that seems to us to be an unreasonable construction to put upon the will."

The adoption having been in their opinion validly made and the adopted son having died sonless, it necessarily followed that the respondent had power at any time thereafter to take four more sons in adoption successively. In order, therefore, to determine whether the gift over contained in clause 7 of the will had taken effect by reason of the son taken in adoption having died sonless, it might be necessary to wait until the death of the respondent. What then was to happen in the meantime to the testator's estate which had vested in the son whose adoption had been held to be good? This question was answered by the High Court in the respondent's favour. They held that the estate had vested in her as heiress of the adopted son and that she was entitled forthwith to be put into possession of it and

to administer it. They considered that any other conclusion would be inconsistent with the Hindu law that the succession to an estate can never remain in abeyance.

It is, in their Lordships' opinion, established law that in such a case as the present the authority to adopt given by a husband to his widow must be strictly followed. In the case of *Mutsaddi Lal v. Kundan Lal*, 33 I.A., p. 55, the law upon the subject was stated by the Privy Council to be as follows:—

“ All the schools of Hindu law recognise the right of the widow to adopt a son to her husband ‘with the assent of her lord.’ It is equally well established that this assent may be given either orally or in writing; that, when given, it must be strictly pursued; that she cannot be compelled to act upon it unless and until she chooses to do so; and that in the absence of express direction to the contrary, there is no limit to the time within which she may exercise the power conferred upon her.”

Much to the same effect was said by Lord Buckmaster when delivering the judgment of the Privy Council in *Sitabai v. Bapu Anna Patil*, 47 I.A., p. 202:—

“ According to the Bombay School of Law the duty of a Hindu widow to obey her husband's command compels her to act upon any mandatory direction that he may give by will as to the way in which her power of adoption should be exercised.”

Their Lordships so far are in complete agreement with the High Court. But with all respect to that Court their Lordships are unable to agree that in making the adoption of her husband's nephew more than 11 years after his death the respondent was acting in strict conformity with the authority given to her by the will. It is true that the will does not in terms state that an adoption of one of the sons of her husband's brothers or step-brother after the expiration of 10 years from his death should be void. That, however, is not the point. The question is not what the will says shall be void but what is the power of adopting such a son that is given to the respondent. In their Lordships' opinion the answer to this question is plain. It is the power set forth in the first paragraph of clause 3 of the will, viz.: a power to adopt within 10 years after the testator's death. Their Lordships are unable to find anything in the will either preceding or succeeding this paragraph that can be regarded as in any way enlarging this power.

The power is expressly limited and in accordance with the authorities and in accordance with the general principles applicable to powers the express limitation must be strictly observed.

For these reasons their Lordships agree with the decision of the Subordinate Judge that the adoption was invalid.

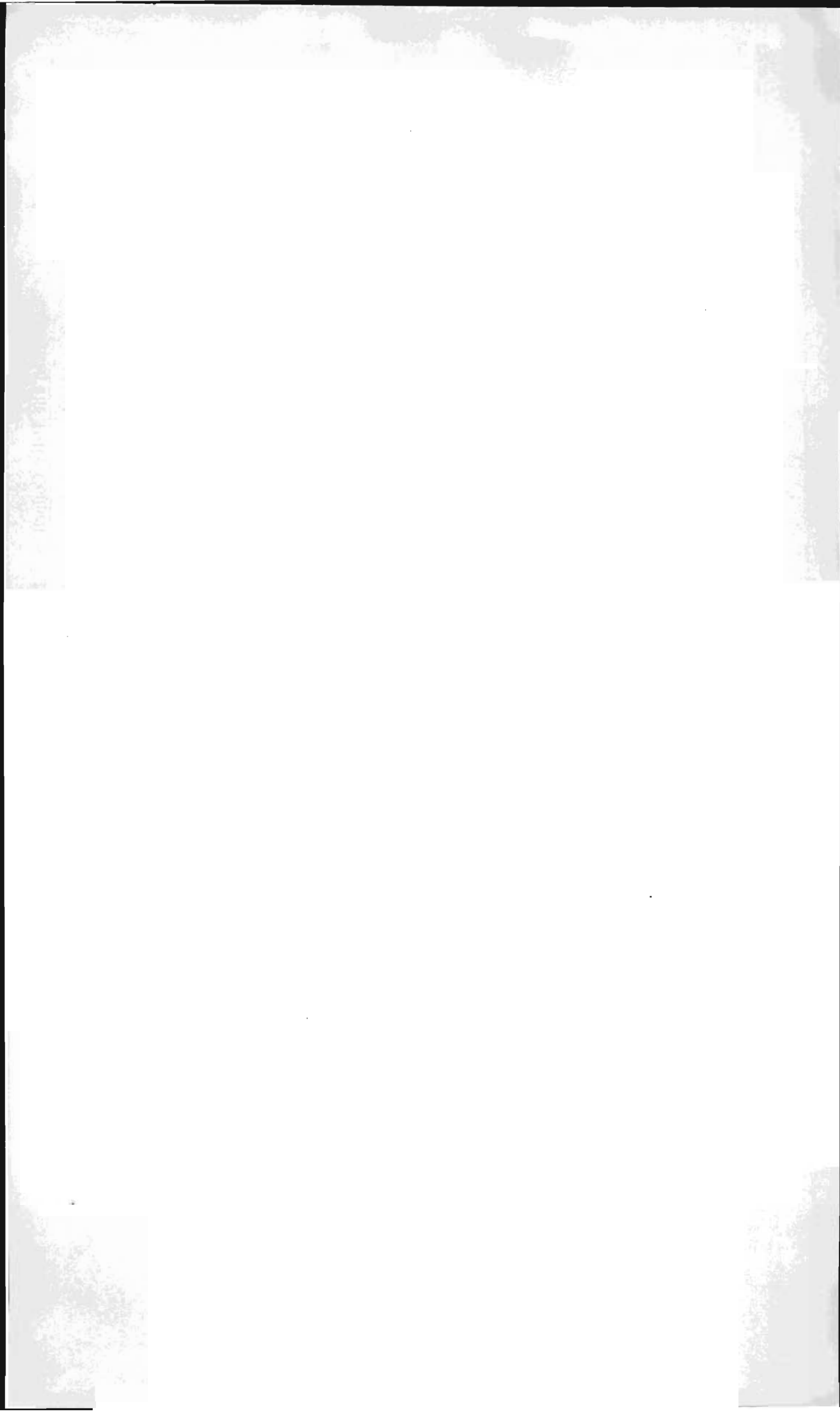
They also agree with him that the gift over contained in clause 7 of the will in the case of no son being taken in adoption was valid in the events which happened and took

effect upon the expiration of 10 years from the death of the testator. Their Lordships express no opinion upon the question whether, if there had been a valid adoption, the gift over in the event of "the son taken in adoption" dying sonless would or would not have failed for remoteness. For the gift over in the event of no son being taken in adoption is clearly severable from the gift over in the other event just mentioned and necessarily would take effect, if it took effect at all, at the latest upon the expiration of the period of 12 years from the death of the testator or the earlier death of his widow. In the events that happened it took effect upon the expiration of 10 years from the testator's death inasmuch as it was not impossible for the respondent within that time to take in adoption one of the sons of his brothers or step-brother.

It was, however, contended on behalf of the respondent that even so the gift over was invalid on the ground that between the death of the testator and the expiration of the 10 years the succession to the estate would be in abeyance and that this was contrary to Hindu law. Their Lordships do not desire in any way to question this principle of the Hindu law of succession. But it has no conceivable application to the present case. Upon the death of the testator any interest in his estate not effectually disposed of by his will would vest at once in the respondent as his heiress. There could not therefore be any abeyance of the succession. If the surplus income from his estate after making the provisions detailed in clauses 4 and 5 of the will has not been effectually disposed of, the right to receive such surplus income vested in the respondent. In truth it was not so disposed of. For the gift over of the residuary estate of the testator in favour of the charitable purposes mentioned in clause 7 of the will was a contingent gift and would not therefore carry the income accruing before the gift vested. In these circumstances the respondent is entitled to have an account taken of that income and to be paid what shall be found due upon taking that account, and her suit ought not to have been dismissed altogether. It ought, however, to be stated in justice to the learned Subordinate Judge that this aspect of the matter does not appear to have been called to his attention.

In their Lordships' opinion the right course to take in all the circumstances is to discharge the decree of the Subordinate Judge and also the decree of the High Court except in so far as it directs payment of the Court fees out of the estate; to direct that an account be taken of the surplus income of the testator's estate accruing during the 10 years immediately succeeding the death of the testator; and to direct payment by the appellants to the respondent of what shall be found due on taking such account. Their Lordships will humbly advise His Majesty accordingly.

Their Lordships think that this is a proper case for directing that the costs of the appellants and the respondent both in the Courts below and of this appeal should be raised and paid by the appellants out of the estate of the testator.



In the Privy Council

BHUPENDRA MOHAN ROY AND
OTHERS

v.

SRIMATI PURNA SASHI DEBI AND
OTHERS

DELIVERED BY LORD ROMER

Printed by His Majesty's Stationery Office Press,
POCOCK STREET, S.E. 1.

1939