Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Bhoobun Mohini Debia and another v. *Hurrish Chunder Chowdhry, from the High Court of Judicature at Fort William in Bengal; delivered* 13*th April,* 1878.

Present:

Sir James W. Colvile.
Sir Barnes Peacock.
Sir Montague E. Smith.
Sir Robert P. Collier.

THE facts which give rise to the questions of law into which this case resolves itself, are as follows:—

Shumbhu Chunder Surmana, in 1819, granted a talook to his sister, Kasiswari Debia, by a sunnud in the following words:—

"Shumbu Chunder Surmana.

"Sunnud executed to the worthy to be remembered Kasiswari Debia, of good conduct, in the year 1226 B. S.:—

"You are my sister: I accordingly grant you as a talook for your support the three dehas (villages), Hurripur, Futehpur, and Kudumtoli, in chukla Jonardunpore in my zemindari, pergunnah Mymensing, at a tahut jumma of Rs. 361, three hundred and sixty-one rupees, with the land and water, and trees, &c., comprised within the four boundaries, [and] all [rights] appertaining to the said mouzahs. Being in possession of the lands and paying rent according to the tahut jumma, do you and the generations (*santán sreni*) born of your womb successively (*kramé*) enjoy the same. No other heir of yours shall have right or interest. To this effect I have written and given a sunnud.

"The 8th Bysack, 1266."

Another translation of the document is given by the High Court substantially to the same effect.

At the date of the sunnud Kasiswari had one child only, a daughter, Chundermoni, one of the original

Plaintiffs in this suit. Kasiswari afterwards had a son who died in her life-time, leaving a widow, who was a co-Plaintiff, suing as guardian of a son whom he had adopted.

Kasiswari held undisputed possession of the talook until her death in 1871, and by her will devised it (together with other property) to the two Plaintiffs in equal moieties.

On the death of Kasiswari, the Defendant, as heir of his father Shumbhu Chunder Surmana, took possession of the talook, whereupon the Plaintiffs instituted the present suit to obtain possession of it, together with mesne profits from the date of their dispossession on the death of Kasiswari. Pending the suit the daughters of Chundermoni have been substituted for her as Plaintiffs.

The Plaintiffs claimed under the will of Kasiswari. A question, indeed, arose whether their plaint could be construed as containing an alternative claim on behalf of Chundermoni under the sunnud independently of the will, but in the view which their Lordships take of the case, this question becomes immaterial.

The Defendant denied the right of Kasiswari to dispose of the talook by will, contending that she took only a life estate under the sunnud. The principal ground on which he based this contention in the Court below was that, the terms *santán sreni kamé* imported only sons of Kasiswari living at the time of her death, and that these could only take, if at all, as donees under the sunnud.

No dispute was raised as to the genuineness of the will of Kasiswari, or its validity to pass whatever interest she was capable of devising. The subordinate Judge gave Judgment in favour of the Plaintiffs. The grounds of his Judgment, which are not very clearly stated, would appear to be that in his opinion Chundermoni took an absolute estate under the sunnud on the death of her mother, but that having elected to take under her mother's will, and to admit the co-Plaintiff to a half share of the estate, both the Plaintiffs were entitled to maintain the action against the Defendant. He gave the Plaintiffs a Decree for possession together with wasilut, the amount of which is not disputed.

On appeal to the High Court, in addition to the contention that *santán* signified sons only, it was urged that the sunnud was an attempt to create an estate tail in contravention of Hindoo law, and was, therefore, void except in as far as it gave a life interest to Kasiswari.

The High Court do not adopt this view, nor do they agree with the Appellant that the Hindoo words which have been quoted import issue male only, but they regard them as bearing "the wider and more general meaning of issue." They hold that Chundermoni having been born before the date of the sunnud took under it a life interest in the talook, in succession to the life interest of her mother. But that the Plaintiffs not having sued in respect of the life interest, but having claimed under the will of Kasiswari, which she was incompetent to make, their suit must be dismissed. From this Judgment the present appeal is preferred.

At their Lordships' bar the main grounds on which the Judgment of the High Court has been supported are—

1. That the sunnud is an attempt to create such an estate as is known in England by the name of an "estate tail," in contravention of Hindoo law, which does not recognize such an estate.

2. That even if this be not so, the gift to the children of Kasiswari to be born after its date as well as to those then born, is in contravention of the rule of Hindoo law that no gift can be made to any person who is not "a sentient being" at the time of gift. In support of these propositions the case, commonly called the Tagore case, reported in the ixth vol. of the Bengal Law Reports, p. 337, was quoted.

It was further argued that if the gift were void because made in favour of a class who could not legally take—that is to say unborn children—it could not be validated quoad Chundermoni (who happened to be born at the time), by changing it from a gift to a class into a gift to a designated individual. And in support of this proposition the cases of Gee *v.* Audley (1, Cox, p. 324), and Leake *v.* Robinson (2, Merivale, p. 364), were cited.

It appears from the sunnud that the donor intended to convey more than a life estate. If the

estate which he intended to convey was one which the law prohibits, effect cannot be given to his intention; but before coming to this conclusion their Lordships must be satisfied that the instrument does not fairly admit of being construed in a sense to which the law will give effect.

In the Judgment of the Tagore case the following passage will be found:—

"If an estate were given to a man simply without express words of inheritance, it would, in the absence of a conflicting context, carry by Hindoo law (as under the present state of law it does by will in England) an estate of inheritance. If there were added to such a gift an imperfect description of it as a gift of inheritance, not excluding the inheritance imposed by law, an estate of inheritance would pass. If, again, the gift were in terms of an estate inheritable according to law, with superadded words restricting the power of transfer which the law annexes to that estate, the restriction would be rejected, as being repugnant, or, rather, as being an attempt to take away the power of transfer which the law attaches to the estate which the giver has sufficiently shown his intention to create, although he adds a qualification which the law does not recognize."

The doctrine herein expressed had been frequently acted upon by the Courts in India, who have decided that words giving lands to the donee, "his children and grandchildren," conferred upon him an absolute estate. (See Judgment of Sir Barnes Peacock in the Tagore case. 4 Bengal Law Reports, p. 182.)

If the words of the sunnud, "You are my sister. I accordingly grant to you a talook for your support," had stood alone, it might have been open to question whether an absolute grant, or a grant for life only, was intended: coupled with the words that follow "being in possession of the lands and paying rent according to the tahut jumma, do you and the generations born of your womb successively enjoy the same;" they appear to import an absolute estate, such as would have been given had the words been "your children and grandchildren . . ." And no inference so far arises that the donor had an English estate tail in his contemplation, as the testator in the Tagore case undoubtedly had.

The only difficulty is caused by the words which follow, "no other heir of yours shall have right or interest."

Upon the best consideration which their Lordships have been able to give to the meaning of

these negative words, it appears to them that they may be read as referring to the time of the death of Kasiswari, that their effect is to make the absolute estate before given defeasible in the event of a failure of issue living at the time of her death, in which event the estate was to revert to the donor and his heirs. That there is nothing in such a condition repugnant to Hindoo law appears from the decision of this Tribunal as to an executory devise in the case of Soorjeenoney Dossee *v.* Denobundo Mullick (9 Moore I. A., p. 134), as explained in the Tagore case.

Their Lordships are, therefore, of opinion that Kasiswari took the whole estate defeasible on the happening of an event which did not occur, and that she had, therefore, an estate which she could dispose of by will.

It follows that the Plaintiffs are entitled to succeed in this suit. It is unnecessary to decide what their rights may be *inter se*.

Their Lordships will, therefore, humbly advise Her Majesty that the Decree of the High Court be reversed, and that the Decree of the Subordinate Court be affirmed. The Appellants will have their costs in the Courts of India, and of this appeal.

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