*Privy Council Appeal No.* 69 *of* 1947
*Bengal Appeal No.* 36 *of* 1945

**Aniruddha Mitra** - - - - - - - - - *Appellant*

*v.*

**The Administrator General of Bengal and others** - - - *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 5TH APRIL, 1949

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*Present at the Hearing:*

LORD PORTER
LORD DU PARCQ
SIR MADHAVAN NAIR
SIR JOHN BEAUMONT

[*Delivered by* SIR MADHAVAN NAIR]

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This is an appeal from a judgment and decree of the High Court at Calcutta in its appellate jurisdiction dated 5th April, 1946, which affirmed a judgment and decree of that Court in its original jurisdiction dated 28th March, 1945.

The appeal arises out of a suit by way of originating summons instituted by the appellant for the construction of the will of his father the late Rai Bihari Lal Mitra.

The facts are not in dispute. The testator was a wealthy Hindu governed by the Dayabhaga School of Hindu law. He died on 7th February, 1933, leaving him surviving his widow Sreemutty Nayani Mitra, his only son the appellant Aniruddha Mitra, and the wife of the appellant, Sreemutty Nivanani Mitra.

At the time of the testator's death the appellant and his wife had no children. On 4th July, 1934, the appellant took the 2nd respondent Arabinda Mitra in adoption as his son. He was born on 19th October, 1932.

On 5th July, 1931, the testator executed his last will whereby he appointed the 1st respondent, the Administrator of Bengal, his sole executor with liberty to make over the property to the official trustee for carrying out the trusts.

On 24th August, 1936, the appellant was adjudicated an insolvent and his estate vested in the 3rd respondent. On 7th May, 1943, he was granted a conditional discharge.

The question for determination in the appeal is whether the residuary bequest in Clause 9 of the will in favour of " the legitimate son or sons of the testator's son Aniruddha Mitra, whether natural born or validly

adopted" is as held by both Courts in India valid, or whether as contended by the appellant it is invalid by reason of the provisions of Sections 113 and 114 of the Indian Succession Act, and the appellant is entitled to the property as on an intestacy.

The relevant provisions of the testator's will are as follows:—

* * * * * *

"5. I will and direct that after my death my wife Sreemutty Nayani Mitra, my son Aniruddha Mitra and his wife shall be entitled to reside for the respective terms of their natural lives in my family dwelling house and use the furniture therein, but they shall not be at liberty to remove or dispose of the said furniture in any way.

* * * * * *

7. I further will and direct that my executor or trustee shall pay the sum of Rupees Seven hundred per month to my wife Sreemutty Nayani Mitra, the sum of Rupees Seven hundred per month to my son Aniruddha Mitra and the sum of Rupees Seven hundred per month to Sreemutty Nivanani Mitra the wife of my son Aniruddha Mitra for their maintenance respectively during the respective terms of their natural lives. In the event of the death of any one of the said three persons the monthly allowance so payable to the person so dying shall be paid to the survivors in equal shares for life. On the death of one of such two survivors, the last survivor of the said three persons shall be paid the said monthly allowances payable as aforesaid to the two that are dead in addition to his or her own monthly allowance of Rupees seven hundred.

8. I further will and direct that my executor and trustee shall pay the sum of Rupees four thousand per month out of the income of my estate to the University of Calcutta for the advancement of female education among Hindu females of Bengal.

9. I further will and direct that the legitimate son or sons of my son Aniruddha Mitra whether natural born or validly adopted shall become entitled to all the rest and residue of my property. If there is only one son of my son such residue shall be made over to such son of my son on his completing the age of twenty-one years and if there are more sons of my son than one then to such sons of my son Aniruddha Mitra in equal shares on the youngest of the said sons completing the age of twenty-one years. Until the youngest of such son or sons of my son attains the age of twenty-one years the executor or trustee shall pay the sum of Rupees seven hundred per month to each of such son or sons of my son Aniruddha Mitra for maintenance and education.

10. I further will and direct that until the youngest of the son or sons of my son Aniruddha Mitra shall complete the age of twenty-one years all surplus income of my property after the expenses aforesaid shall be accumulated and invested by my executor or trustee in Government securities or in immovable property yielding income and the accumulation and/or the property so acquired shall be made over by my executor or trustee to the son or sons of my son Aniruddha Mitra on the youngest of them (if more than one) completing the age of twenty-one years.

11. I further will and direct that if a son is not born to or is not adopted by my son Aniruddha Mitra during my lifetime then the income of my property moveable and immoveable after the expenses aforesaid shall be paid to the University of Calcutta for the advancement of education in such manner as the said University shall think fit amongst Hindu females of Bengal until such time as a son shall be born to or shall be adopted by my son Aniruddha or his wife.

12. I further will and direct that if no son shall be born to or is at all adopted by my son Aniruddha Mitra or his wife then the whole of my property moveable or immoveable shall subject to the bequests

annuities and directions aforesaid be made over to the University of Calcutta for being applied by the said University in such manner as it shall think proper for the advancement of education amongst Hindu females of Bengal."

Before proceeding further, it will be convenient to refer to some of the provisions of the Indian Succession Act 1925. That Act consists of 11 parts. Part VI relates to testamentary succession and comprises Sections 57 to 191. Of these only some apply to Hindu wills, being those mentioned in Schedule III to the Act.

"SECTION 57.

The provisions of this part (i.e. Part VI) which are set out in Schedule III shall, subject to the restrictions and modifications specified therein, apply—

(*a*) to all wills and codicils made by any Hindu . . . on or after the first day of September, 1870, within the territories which at the said date were subject to the Lieutenant-Governor of Bengal. . . .

SCHEDULE III.

Provisions of Part VI applicable to certain wills and codicils described in Section 57.

Sections . . . 87, 111, 112, 113, 114, 115, 116 . . . 119.

*Clause* 2. Nothing therein contained shall authorise any Hindu . . . to create in property any interest which he could not have created before the first day of September, 1870.

*Clause* 3. Nothing therein contained shall affect any law of adoption. . . .

*Clause* 5. In applying any of the following sections, namely: 112, 113, 114, 115 and 116 to such wills the words 'son,' 'sons' . . . shall be deemed to include an adopted child. . . .

SECTION 87.

The intention of the Testator shall not be set aside because it cannot take effect to the full extent, but effect is to be given to it as far as possible.

SECTION 111.

Where a bequest is made simply to a described class of persons, the thing bequeathed shall go only to such as are alive at the Testator's death.

Exception:—If property is bequeathed to a class of persons described as standing in a particular degree of kindred to a specified individual, but their possession of it is deferred until a time later than the death of the Testator by reason of a prior bequest or otherwise, the property shall at that time go to such of them as are alive, and to the representatives of any of them who have died since the death of the Testator.

SECTION 112.

Where a bequest is made to a person by a particular description, and there is no person in existence at the Testator's death who answers the description, the bequest is void.

Exception:—If property is bequeathed to a person described as standing in a particular degree of kindred to a specified individual, but his possession of it is deferred until a time later than the death of the Testator, by reason of a prior bequest or otherwise; and if a person answering the description is alive at the death of the Testator, or comes into existence between that event and such later time, the property shall, at such later time, go to that person, or, if he is dead, to his representatives.

SECTION 113.

Where a bequest is made to a person not in existence at the time of the Testator's death, subject to a prior bequest contained in the will, the later bequest shall be void, unless it comprises the whole of the remaining interest of the Testator in the thing bequeathed.

SECTION 114.

No bequest is valid whereby the vesting of the thing bequeathed may be delayed beyond the lifetime of one or more persons living at the Testator's death and the minority of some person who shall be in existence at the expiration of that period and to whom, if he attains full age, the thing bequeathed is to belong.

SECTION 115.

If a bequest is made to a class of persons with regard to some of whom it is inoperative by reason of the provisions of Section 113 and Section 114, such bequest shall be (*void in regard to those persons only and not in regard to the whole class*).

(The words in italics were substituted for the words 'wholly void' by the Transfer of Property (Amendment) Supplementary Act, 1929.)

Illustration (i) to Section 115 reads as follows:—

'A Fund is bequeathed to A for life, and after his death to all his children who shall attain the age of 25. A survives the Testator, and has some children living at the Testator's death. Each child of A's living at the Testator's death must attain the age of 25 (if at all) within the limits allowed for a bequest. But A may have children after the Testator's decease, some of whom may not attain the age of 25 until more than 18 years have elapsed after the decease of A. The bequest to A's children, therefore, is inoperative as to any child born after the Testator's death (*and in regard to those who do not attain the age of* 25 *within* 18 *years after A's death, but is operative in regard to the other children of A*).'

The words in italics were substituted, by Act XXI of 1929, for the words 'as it is given to all his children as a class, it is not good as to any division of that class, but is wholly void.' This amendment was made at the same time as the section was amended and in order to make the illustration conform with the section.

SECTION 116.

Where by reason of any rules contained in Sections 113 and 114, any bequest in favour of a person or of a class of persons is void in regard to such person or the whole of such class, any bequest contained in the same will and intended to take effect after or upon failure of such prior bequest is also void.

SECTION 119.

Where by the terms of a bequest the legatee is not entitled to immediate possession of the thing bequeathed, a right to receive it at the proper time shall, unless a contrary intention appears by the will, become vested in the legatee on the Testator's death, and shall pass to the legatee's representatives if he dies before that time and without having received the legacy, and in such cases the legacy is from the Testator's death said to be vested in interest.

Explanation:—An intention that a legacy to any person shall not become vested in interest in him is not to be inferred merely from a provision whereby the payment or possession of the thing bequeathed is postponed, or whereby a prior interest therein is bequeathed to some other person, or whereby the income arising from the fund bequeathed is directed to be accumulated until the time of payment arrives, or from a provision that, if a particular event shall happen, the legacy shall go over to another person."

Prior to the passing of certain special Acts, the rule of Hindu law was that a Hindu cannot make a bequest in favour of a person who was not born at the date of the testator's death. This rule of law has been altered by three Acts, namely, the Hindu Transfers and Bequests Act, 1914 (Madras Act I of 1914), the Hindu Disposition of Property Act, 1916 (Act XV of 1916), and the Hindu Transfers and Bequests [City of Madras] Act, 1921 (Madras Act VIII of 1921). The Madras Act I of 1914 applies to the Madras Presidency except the town of Madras;

The Madras Act VIII of 1921 applies to the Town of Madras ; and the Hindu Disposition of Property Act extends to the whole of British India except the Province of Madras. The rule as altered by these Acts may be stated as follows:

> " Subject to the limitations and provisions contained in Sections 113, 114, 115, and 116, of the Indian Succession Act, 1925, no bequest shall be invalid by reason only that any person for whose benefit it may have been made was not born at the date of the testator's death." (See Mulla's Hindu Law, 9th Edition, page 439, Section 373, also page 457, Section 383.)

It may be mentioned here that, prior to 1929, Section 115 of the Act rendered a bequest to a class wholly void if it was inoperative with regard to some members of the class by reason of the provisions of Sections 113 and 114. Section 115 has been amended in 1929 by Act XXI of 1929, and as a result of the amendment the bequest is now void only with respect to those members, and it is valid with respect to the remaining members of the class.

The learned Trial Judge, Das J., first dealt with the question whether the bequest in Clause 9 of the will in favour of " the legitimate son or sons of my son Aniruddha Mitra whether natural born or validly adopted. . . ." is hit by Section 114 of the Succession Act. That Section enacts the rule of perpetuity (or remoteness) as prevailing in India. According to the rule enunciated in that Section a bequest in favour of an unborn person to be valid must vest within a period covered by the lifetime of one or more persons existing at the time of the testator's death and the minority of the person who shall be in existence at the expiration of that period and to whom if he attains full age the thing bequeathed is to belong. By the ordinary law a Hindu attains majority at the age of 18. It follows therefore that the longest period within which the bequest must vest in order to be valid is a life or lives in being plus 18 years thereafter.

The bequest in Clause 9 of the will is in favour of the " legitimate son or sons of my son Aniruddha Mitra whether natural born or validly adopted ". After carefully considering the scope and meaning of the term " validly adopted " the learned Judge held that the bequest extended to any son who might be adopted by the appellant's wife Nivanani, or by another wife whom he might marry in future ; that inasmuch as such wife might be a person born after the death of the testator, the vesting in such an adopted son might be delayed beyond the prescribed period and that the bequest might be invalid, but he held that an adopted son was in the eye of the law deemed to have been begotten by the person by whom or for whom he was adopted and was therefore in existence at the death of such person, and that therefore if (as in the present case) the adoptive father was alive at the time of the testator's death the adopted son must be deemed to be in existence within the period fixed by Section 114 and the Clause does not offend against the rule against perpetuities contained in Section 114. He further fortified his conclusion on this point by referring to Clause 5 of Schedule III of the Succession Act and held that for the purpose of the Indian Succession Act at any rate, the interest of the adopted son relates back to the death of the person for whom the son is adopted and the adopted son must be deemed to be in existence at that date and capable of taking legacy as if he were a natural born son.

The learned Judge next dealt with the argument raised on behalf of the contesting respondent that in any event the bequest so far as it enures for the benefit of the natural born sons or the son to be adopted by Aniruddha himself should be held to be good by virtue of Sections 87 and 115 of the Succession Act. On this point the learned Judge held that in view of the illustrations to Section 115, " the members of the class, the bequest in whose favour is saved by Section 115, must be in existence at the date of the testator's death " and that since the respondent had not been adopted at the date of testator's death he could not claim the benefit of that Section and that Section came into

play only when a bequest to a class is void by reason of the provisions of Section 113 and Section 114. In support of his view, he relied on illustration (i) to Section 115.

The learned Judge next dealt with the objection based on Section 113. He held that the gift in Clause 9 comprised the whole of the remaining interests of the testator in the property bequeathed, and that such interest vested in the legatees although their possession was postponed and that therefore the gift did not offend against the provisions of that Section.

In accordance with the above conclusions he gave appropriate answers to the questions raised in the summons.

In appeal against the judgment of Das J., the principal judgment was delivered by Gentle J. After construing the material Clauses of the will the learned Judge summarised his conclusions as follows:—

> "1. A bequest in favour of an unborn person is valid subject to the limitations contained in the Hindu Disposition of Property Act 1916.
>
> 2. The rules in Sections 113 and 114 have to be applied as at the Testator's death but are subject to the provisions of Section 115 and the Hindu Disposition of Property Act.
>
> 3. A son or sons of the Testator's son become immediately entitled to the bequest in Clause 9—
>
> (*a*) if born to or adopted by the Testator's son at the death of the Testator ;
>
> (*b*) upon subsequent birth to or adoption by the Testator's son.
>
> 4. That bequest is subject to the prior bequests in Clauses 5 and 7.
>
> 5. That bequest is not contingent upon the attainment of twenty-one years by the only or youngest son.
>
> 6. The provision as to payment is merely a postponement of possession of the thing bequeathed."

Dealing with the question whether Section 115 affected the rights of the legatees under Clause 9 of the will, the learned Judge dissented from the view of Das J. that the Section was limited in its application only to a class of persons in existence at the date of the testator's death and expressed the view that the Section applies to all members in whose favour a bequest is made.

The learned Judge next considered the application of Section 114 and held that upon his adoption by the appellant the respondent became a member of a class in whose favour the gift was made and his interest became vested in him, such vesting taking place within the statutory period.

As regards Section 113 of the Act the learned Judge held that the bequest in Clause 9 did not offend against that Section as the testator by that Clause had bequeathed the whole of his remaining interest subject to the prior interest created by Clauses 5 and 7. In this connection he also stated that postponement of possession is not repugnant to law when a bequest is made to a person who is either alive or who is unborn at the testator's death.

For the above reasons, the learned Judge held that the respondent Arabinda became entitled to the bequest upon his adoption by the appellant and when his interest in it vested and that therefore there was no intestacy of the residuary estate and the appellant does not succeed to that residue.

The learned Judge then discussed the question regarding the validity of the bequest with reference to the position of a son adopted to Aniruddha after his death, especially by a widow other than Navanani who was not alive at the testator's death. In the light of the opinion expressed that Arabinda has a vested interest in the bequest it was really not necessary to consider the position of an after adopted son (as pointed out by the learned Judge himself) but he thought it was desirable to express his view in case his expressed opinion regarding Arabinda's right

was wrong and out of respect to the able arguments upon the question advanced by the learned Counsel. After a detailed discussion of the entire case law on the subject the learned Judge came to the following conclusion:—

> "It follows that a son adopted by any widow of Aniruddha, properly authorised, no matter how long it may take place after Aniruddha's death and even when such widow was not alive at the testator's death, the adopted son became one of the legatees of the bequest and his interest will vest within the statutory period prescribed in Section 114 since he will be 'in existence' as the Section requires, at the date of Aniruddha's death."

Ormond J. agreed with the opinion of Gentle J. on all the points arising in the case.

The main dispute in the case relates to the construction of the bequest in Clause 9 of the will. It was argued as in the Courts in India that the bequest in Clause 9 is a conditional or contingent bequest, that the interest of the testator in the thing bequeathed does not immediately vest in the legatee, that the completion of 21 years by the only or youngest son before getting possession is a contingency which makes the gift invalid and has the effect of the bequest not comprising the whole of the testator's interest, that it is in consequence hit by Section 113 of the Succession Act, and is also opposed to the rule contained in Section 114 of the Act as the vesting in the case of a son adopted by a wife of the testator's son other than Navanani may take place beyond the period mentioned in Section 114 of the Act. It was also pointed out that the "doctrine of relation back" does not apply to the Hindu law of adoption and that Section 115 of the succession Act has been rightly construed by Das J. To state shortly, the arguments proceeded on the lines indicated in the judgments of the Courts in India which their Lordships have already referred to, in summarising their conclusions.

As already explained, a Hindu can now make a valid bequest in favour of an unborn person subject to the limitation contained in Sections 113 and 114 of the Succession Act. It is not disputed that in scrutinising the validity of the bequest the rules in Sections 113 and 114 have to be applied as at the testator's death.

The material clauses of the will may now be summarised. By Clause 5, the testator has given the right of residence in the family house and the use of the furniture therein to his wife, his son (the appellant) and his wife (unnamed) for their respective lives. By Clause 7, he has allowed maintenance of Rs.700 per mensem for his wife, to his son and his son's wife Navanani during their lives. The Clause also provides how the allowance is to be distributed in the event of the death of one or other of them. By Clause 8, an annuity of Rs.4000 per mensem is granted to the Calcutta University. By Clause 11 if a son is not born to, or adopted by, the appellant during the testator's lifetime the income of the estate after meeting the "expenses aforesaid" was directed to be paid to the Calcutta University until such time as a son shall be born or shall be adopted by the appellant or his wife (not named).

By Clause 9 the testator proceeds to make the bequest in favour of person or persons unborn, these persons being a class designated as "the legitimate son or sons" of the appellant "whether natural born or validly adopted." The Clause says they *"shall become entitled to all the rest and residue of my property"* (the italics are by their Lordships), i.e., the residuary estates. Then it says that if there is only one son the residue "shall be made over" to him on his completing the age of 21 years: if there are more sons than one the residue is to be made over to them in equal shares, on the youngest son attaining the age of 21 years. The Clause ends with the statement that until the youngest son of such son or sons attains the age of 21 years the executor shall pay Rs.700 to each son for maintenance and expenses.

The first question arising on the construction of this clause is, when does the residuary estate mentioned in the Clause vest in the legatee? Does it vest the moment a son is born to or adopted by the testator's son (Aniruddha), or does the fact that the estate is to be " made over " on the completion of 21 years by the only or youngest son make the vesting contingent, i.e., in other words does the postponement delay or affect the vesting of the residuary estate? All the Judges who have considered this question have come to the conclusion that the residuary estate in Clause 9 became vested the moment a son was born to or adopted by the testator's son, and the completion of 21 years by the only or youngest son is not a contingency, but is only a postponement of possession. The arguments advanced by Mr. Khambatta, the learned counsel for the appellant, have not convinced their Lordships that the view taken by the Courts in India is wrong. The words " shall become entitled to " used in the first sentence in Clause 9 show that there is a transfer of ownership with a vesting as soon as a testator's son (or sons) is born or adopted, i.e., at the date of the birth or adoption. The expression that the residue shall be " made over " to the person concerned supports the above view. Further, that the legatee when he comes into existence becomes immediately entitled to the estate appears to be clear from Clause 11 of the will. On the death of the testator, unless there is a legatee in existence entitled to the estate, the Calcutta University is entitled to the surplus ; but the University's interest immediately comes to an end upon the birth of a son to the appellant or the adoption of a son by him or by his wife. This view is borne out also by Clause 10 of the will. The completion of 21 years by the only son or the youngest son before the estate is handed over, relied on by Mr. Khambatta to show there is a contingency, is in their Lordships' opinion not a contingency but amounts only to a postponement of possession and does not affect the actual vesting of the estate.

Coming to Section 113 of the Act, it was held by Gentle and Ormond JJ. that the interests created by Clauses 5 and 7 of the will viz. the bequests with respect to the house and furniture to which rights were given to the testator's wife, his son and his wife, and the life annuities, constituted prior bequests contained in the will within the meaning of Section 113. Their Lordships are not satisfied that Section 113 would apply where the prior bequest referred to can be regarded as bequest prior to the disposition of the residue ; if so, their Lordships think the interests cannot be regarded as prior interests of residue, since the property allocated to meet such bequests does not fall into residue until the interests under Clauses 5 and 7 have determined ; but even if the bequests do amount to prior bequests of the residue, their Lordships are satisfied that the whole remaining interests of the residue have been bequeathed under Clause 9, and the provisions of Section 113 have no operation on Clause 9 of the will. In passing it may be mentioned that Das J. appears to have taken a slightly different view as to what he considered as the prior bequests under the will. The learned Judge stated that " in my opinion the provisions of Clauses 5 and 11 constitute prior bequests to which the latter bequest in Clause 9 is subject ". The learned Judges, Gentle and Ormond JJ., did not agree with the view that the bequest in Clause 11 is a prior bequest to which the bequest in Clause 9 is subject. Their Lordships do not think any further discussion of the question with reference to Clause 11 is necessary.

The next question is whether the bequest in Clause 9 offends the rule contained in Section 114 of the Succession Act. Since the terms of the bequest in Clause 9 would extend to a son adopted by a wife of the appellant who might be a person born after the death of the testator it was said that the vesting might be delayed beyond the period prescribed in Section 114 of the Act. The respondent met the objection by the plea that the adoption would relate to the death of the adoptive father, and the Section did not therefore apply ; but assuming that the Section would apply, Section 115 of the Act applied and therefore the gift was not bad in so far as it affected respondent No. 2. As already stated, the trial

Court held that the doctrine of relation back applied and that Section 114 did not therefore apply. It rejected the contention that Section 115 of the Act would apply. The Appellate Court held that the doctrine of relation back applied and that Section 114 did not apply, and that the bequest was saved by Section 115 also.

In the view that their Lordships take of Section 115 of the Act they think it is not necessary to consider whether the doctrine of relation back would apply to save the bequest from being invalid under Section 114. Assuming that that Section would apply, they think, as will be explained below, that the bequest to the 2nd respondent would be saved by force of Section 115. On this question their Lordships disagree with the view of Das J. and accept the views of Gentle and Ormond JJ.

Attention has already been drawn to Section 115, and illustration (i) to that Section, and the amendments that were introduced in them by Act XXI of 1929 (*supra*). Under the Section before the amendment, if a bequest was made to a class and it was inoperative with respect to some members of the class by reason of the provisions of Section 113 and Section 114, the bequest to a class was wholly void ; after the amendment the bequest to a class was void only with respect to those members of the class whose interest was void by reason of the provisions of Sections 113 and 114.

Relying on the amended Section it was argued before Das J., " that reading Clauses 9, 11 and 12 (of the will) it is apparent that the testator contemplated two kinds of adoption namely (*a*) adoption by Aniruddha which must be during his lifetime and (*b*) adoption after the death of Aniruddha by his wife who may or may not be born at testator's death. Even assuming that the adoption after the death of Aniruddha be hit by Section 114, there is no reason why the adoption by Aniruddha should also be hit by that Section." The learned Judge rejected the argument for the following reason:—

> ". . . The illustrations to Section 115, however, clearly indicate that the members of the class the bequest in whose favour is saved by Section 115 must be in existence at the date of the testator's death. It has been recently held by the Judicial Committee in *Sopher's* case L.R.71 I.A. 93, that the Sections of the Indian Succession Act should be construed in the light of the illustrations. Reading Section 115 in the light of the illustrations thereto it appears to me that in the case of a bequest to a class the validity or otherwise of the bequest in respect of any member of that class has to be decided with reference to the date of the testator's death. I therefore agree with the learned Advocate General that the defendant Arabinda, not having been adopted at the testator's death, he cannot claim the benefit of Section 115."

From the reasoning of the learned Judge it is clear that the application of Section 115 is limited to members of a class who are in existence at the date of the testator's death, and that the bequest is inoperative in this case with respect to all the children born after the testator's death.

It may be mentioned that what was actually observed by Lord Maugham, who delivered the judgment of the Judicial Committee in *Sopher's* case (*supra*), was that " the Section must of course be read and construed in connexion with the illustrations to be found in the Act." The Section therein referred to is Section 113 of the Act.

Gentle J., with whom Ormond J. agreed, did not accept the interpretation put upon the Section by the learned Judge, for the reason that the words of Section 115 of the Act are general, that though the illustrations may be looked into, in order to understand the meaning of the Section, they do not exhaust its meaning, and that illustration (i) referred to by the learned Judge, when correctly understood, does not support his view.

Their Lordships agree with the above view. It is perfectly clear that the words of Section 115 of the Act are sufficiently wide and do not in any manner limit its application to members of a class who are in existence

at the date of the testator's death. The learned Judge, Das J., would have certainly accepted this view of the Section, but for what he considered the light thrown upon its meaning by the illustrations. The words of the Section are not ambiguous; as pointed out by the Board in *Mahomed Syedol Ariffin* v. *Yeoh Ooi Gark* (1916) 2 A.C. 575—the decision referred to by Lord Maugham in *Sopher's* case (*supra*), "Illustrations appended to Sections of a statute should be accepted, if that can be done as being of relevance and value in construing the text . . . ": It is well settled that just as illustrations should not be read as extending the meaning of a Section, they should also not be read as restricting its operation, especially so, when the effect would be to curtail a right which the plain words of the Section would confer. In the present case there is no difficulty. The illustration relied on by the learned Judge (apparently illustration (i)) does not restrict the meaning of Section 115. It is the last sentence in the illustration that has given trouble to Das J. As already pointed out, the Clause in italics in the last sentence was substituted for the words "as it is given to all his children as a class it is not good as to any division of that class, but is wholly void" by Act XXI of 1929. This amendment was made at the same time as the Section was amended, in order to make it harmonise with the Section. In their Lordships' view the last sentence in the illustration means that the bequest is inoperative in regard to children of A born after the testator's death who do not attain the age of 25 within 18 years after A's death, but it is operative in regard to such children who do attain the age of 25 within 18 years—though born after the testator's death. The learned Judges of the High Court who heard the appeal have interpreted the sentence in the above sense, and their Lordships think they have correctly interpreted it. The illustration thus understood does not in any manner restrict the operation of the Section. It just illustrates its meaning and does nothing more. Their Lordships may in this connection draw attention also to Section 87 of the Act, which says that "The intention of the testator shall not be set aside because it cannot take effect to the full extent, but effect is to be given to it as far as possible." The principle underlying this Section is thus stated in "Williams on Executors", (12th Edition, Vol. II, p. 692). "The intention of the testator is not to be set aside because it cannot take effect to the full extent but it is to work as far as it can". It may be noted that the provisions of this Section apply to wills of Hindus (see Schedule III).

In the above view the application of the doctrine of "relation back" as stated by the High Court (viz., "that an after adopted son, for all purposes, including succession to and inheritance of property, is deemed to be in existence at the time of his adoptive father's death irrespective of the period intervening between the death of the father and the adoption by his widow . . . .") in connection with Section 114 of the Act does not necessarily arise for consideration in this appeal, and their Lordships do not express any view about it.

For the above reasons their Lordships will humbly advise His Majesty that this appeal should be dismissed. The appellant must pay the costs of the respondents. The Administrator General will be entitled to take his costs from the estate to the extent to which they are not otherwise satisfied.

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**In the Privy Council**

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ANIRUDDHA MITRA

*v.*

THE ADMINISTRATOR GENERAL
OF BENGAL AND OTHERS

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Printed by HIS MAJESTY'S STATIONERY OFFICE PRESS,
DRURY LANE, W.C.2.

1949