Privy Council Appeal No. 57 of 1925.

Allahabad Appeal No. 48 of 1921.

Rao Narsingh Rao - - - - - - - - *Appellant*

v.

Beti Mahalakshmi Bai and another - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT ALLAHABAD.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 31ST JANUARY, 1928.

Present at the Hearing:

VISCOUNT SUMNER.
LORD ATKINSON.
LORD SINHA.
SIR JOHN WALLIS.
SIR LANCELOT SANDERSON.

[*Delivered by* SIR JOHN WALLIS.]

This appeal was filed by the plaintiff Narsingh Rao, son of Balwant Singh and grandson of Raja Jaswant Rai, both deceased, against the first defendant, Rani Kishori, since deceased, the widow of Jaswant Rai, the second defendant, her daughter, Beti Maha Lakshmi Bai, and the third defendant, Musammat Rameshwar Debi, widow of Lal Raghubans Rao, the second defendant's son, to recover the immoveable properties which were the subject of a conditional deed of gift executed on the 4th September, 1875, by Jaswant Rai in favour of the first defendant, his junior wife. The plaintiff claimed that under the deed of gift he was entitled to succeed to these properties on attaining majority and that, even if the provisions of the deed in his favour were inoperative as opposed to the rules of Hindu law, still Rani Kishori took only an estate limited in point of duration which determined when he attained majority, so that he thereupon became entitled to take as heir of the settlor Jaswant Rai.

The District Judge found that the plaintiff had failed to prove that he was the legitimate son of Jaswant Rai's only son, Lal Balwant Singh, and that, even if he were legitimate, he was only entitled to take the estate by virtue of a condition subsequent terminating the estate limited to the Rani and her successors in the event of his attaining majority, and that this condition of defeasance, being illegal and void under Hindu law as created in favour of an unborn person, according to the decision of this Board in *Tagore* v. *Tagore* (I.A. Sup. Vol. 47), was inoperative and void and left the Rani's estate unaffected.

When the case came before the High Court on an appeal by the plaintiff against the decree of the District Judge dismissing the suit, the learned Judges dismissed the appeal on the ground that the plaintiff had failed to prove his legitimacy, and did not go into any other question. In coming to this conclusion, they attached great weight to the fact that the plaintiff's mother had refused to submit herself to a medical examination with reference to the question whether she had ever borne a child. The plaintiff having obtained special leave to appeal from this decree, presented a petition to His Majesty in Council praying that medical evidence on the question should be heard and recorded. His prayer was granted, and two lady gynæcologists, having examined the plaintiff's mother and certified that she had given birth to a child, and both parties having agreed to be bound by this certificate, subject to proof as to the identity of the lady examined, the case was remitted by an Order of His Majesty in Council to the High Court with a direction that in the event of their being satisfied as to the identity of the person so examined, the High Court should reconsider the whole case on the footing that the certificate was correct and pass judgment thereon, and that the appeal should stand over, with liberty to either party to restore or amend it as they might be advised after the High Court had passed its judgment. After a rehearing on remand the High Court delivered judgment, holding, in the light of the new evidence, that the plaintiff was the legitimate son of the late Balwant Singh, and that, though the provisions in the deed in his favour were void under Hindu Law, as he was not in existence at the date of the deed, still on a true construction of the deed of gift the first defendant's interest was determined on the plaintiff's attaining majority, and that his father Balwant Singh being then dead, he became entitled to come in as next heir of the settlor.

The plaintiff's appeal to His Majesty in Council against the judgment and decree of the High Court has again come on before their Lordships, and in view of the fact that the remand judgment was in favour of the plaintiff appellant, the case has been argued before their Lordships as if the respondents on the record were appealing from that judgment.

At the outset Sir John Simon, who appeared for the respondents, disclaimed any intention of questioning the finding of the High Court in favour of the plaintiff's legitimacy, which must

therefore be taken to be established. On the other hand, the finding of both the lower Courts that the provisions of the deed in favour of the plaintiff, who was not then born, were illegal and void, has not been questioned on his behalf. The sole question, therefore, for their Lordships in this appeal is whether, as contended for the defendants, on the true construction of the deed the Rani took the estate, subject to a condition of defeasance in the event of the plaintiff's attaining majority, and this condition subsequent being void, the Rani was entitled to retain the estate freed from the condition, or whether, as contended for the plaintiff and held by the High Court, the Rani only took a limited estate as custodian of the property until the plaintiff attained majority, when her estate was determined, and the provision in favour of the unborn son being illegal, the estate passed as on intestacy to the heir of the settlor—that is to say, to the plaintiff.

It will be convenient in the first instance to set out the following table showing the relationships of the parties in the suit to the settlor, Jaswant Rai:—

1. Ratan Kuer = d. 2nd Oct., 1880.		Raja Jaswant Rai (donor) = d. 24th Aug., 1879.	2. Rani Kishori (1st defendant), d. 23rd May, 1921.
Lal Balwant Singh = b. 1841, convicted 2nd Sept., 1871, released from prison Aug., 1883, d. 21st Jan., 1899.	1. Naraini Kuer (no issue). (16th June, 1884). 2. Kaithi Wali Lady (no issue and predeceased husband). = 3. Dunajau, married 1890.	daughter Maha Lakshmibai, b. 1868 (2nd defendant and 1st respondent)	
	Narsingh Rao (plaintiff), b. 2nd Mar., 1894.	son Lal Raghubans Rao = d. without issue, 1911.	Rameshwar Debi (3rd defendant and 2nd respondent).

In 1875, at the date of the deed, Raja Jaswant Rai, the settlor, had a son by his senior wife, Lal Balwant Singh, aged 34, who was then in prison undergoing a sentence of 13 years' imprisonment for culpable homicide, and a daughter, Maha Lakshmi Bai, aged 7, the second defendant, by his junior wife, Rani Kishori, the first defendant.

It appears clearly from the recitals in the deed, which is set out below, that the settlor's intention was to disinherit his unworthy son, Balwant Singh, as regards his self-acquired property. It appears equally clearly from the body of the deed that his intention was that, if Balwant had a son, that son on attaining majority should have the estate. This was a very natural wish on the part of a Hindu, and it is what would have happened if effect could be given to the deed according to its terms. Unfortunately, under a rule of law which has now been altered by the legislature but not retrospectively, the provisions of the deed in favour of Balwant's unborn son are void and inoperative, and the plaintiff has therefore to show that, on the true construction

of the deed, there was an intestacy when he attained majority by reason of the failure of the gift over in his favour and that he became entitled to come in as heir of the settlor.

It is unnecessary to set out the earlier recitals showing that the property, which was the subject of the gift, was the self-acquired property of the donor, but it may be mentioned that, after his release from prison, Balwant Singh sued to recover the properties included in the deed on the grounds that they were joint family property and that, even if they were not, the donor had no power to dispose of self-acquired immoveable properties. This came before this Board on appeal to His Majesty in Council in *Balwant Singh* v. *Kishori* (25 I.A. 54), when both these contentions were rejected and the decree of the Appellate Court dismissing the suit was affirmed. The rest of the deed was as follows : —

"I am now 63 years old, and weakness and loss of strength are soon coming on, and there is no hope of an issue being born to me, and out of the two sons and a daughter born, Lal Balwant Singh is the eldest, who has, since attaining majority, proved himself unworthy and of bad character; that in spite of the instructions that were conveyed to him to correct his morals, he tried to make himself worse, and openly declared himself to be my enemy, inasmuch as, in consultation with the wishes of the officers for the time being, an agreement was obtained from him to the effect that he would get Rs. 100 per month and improve and correct his morals, but it did no good and he began to commit heinous offences without even fearing the officers for the time being; that at last he had been committed to prison for 13 years on a charge of murder, and he is still in jail; that, looking to these facts, I was compelled to exclude him from right of representing me and from inheritance, under a petition, dated 5th August, 1872, and the younger son's life did not last, having died when only 18 months old. I have now only one daughter, aged 7. I had two Ranis, one the mother of Lal Balwant Singh, who died of the grief brought about by the misconduct and misdeeds of her son, and the other, Rani Kishori, who is still alive. Therefore, for maintaining the name and protecting the property, it is necessary that there should be some representative, and my old age and uncertainty of continuous breathing stand in the way of delay, and besides Rani Kishori, my younger wife, there is no one else entitled to represent me. I have, therefore, made a gift in favour of Rani Kishori, all my moveable and immoveable properties, together with all the rights and interests, both inherent and adventitious, all and in every shape, and appoint her my successor and representative, subject to the following conditions :—

"I. That the zamindari and 'malguzari' in five villages, Lakhna, etc., as la khiraj in perpetuity, belonging to me, would as well be owned by the Rani Sahib just as I owned it, and all the rights both inherent and adventitious and 'saier' and cesses, etc., appertaining to the zamindari would be in her possession just as I owned it, and complete possession has from this date been delivered to her and petitions would be presented in revenue courts, I would get her name entered in lieu of that of mine.

"II. That the 'jagir' property in seven villages, Biaspur, etc., I make a gift of in favour of the Rani Sahib, but I shall appropriate their income during my lifetime, and would, from time to time, spend that income at my pleasure : but whatever would out of this income be left as surplus after my death and ten per cent. that may for the future be fixed as 'malikana,' the Rani Sahib would be entitled to get it, and none would be able to offer obstruction, and the Rani's name would as well be entered in respect of these seven 'jagir' villages.

"III. That I have with great exertion built a temple of Kalka Debiat Lakhna, the Rani Sahib would be the superintendent ('mutvalli') and in possession of the temple without being interfered with by any one, but the 'charava' (offerings) income of the said temple would be used in the work of the temple, such as the improvement of buildings, etc., according to her wish, just as I have up to date done. and out of the income of the temple, it would never be legal to bring any portion whatever of the income to her personal use.

"IV. I have built a temple known as 'Chatri' in Lakhna in honour of my deceased father, Khuman Singh, and the 'haveli' now occupied by the Rani Sahib appertains to it. That 'Chatri' and 'haveli' are from before under the management and superintendence of Rani Kishori it would as heretofore remain in her possession and management of as 'mutvalli.' Be it known that Thakurain Adhar Kunwar having fixed and assigned the 'malikana' of Dhanua, etc., at Rs. 1,249-11-0 for the expenses of 'Chatri,' etc., had got mutation effected in favour of the Rani Sahib; but that amount appearing insufficient to meet the expenses relating to 'bhog' (charity), pay of 'Pujaris,' peons and other servants of the 'Chatri' and for education of Brahman youths, and the amount of 'malikana' allowance having been decreased in the recent settlement, since then out of the 'jagir' income of Lakhna, etc.—five villages, Rs. 10 per day, I have further allowed for the expenses of 'Chatri,' that the Rani Sahib should as usual continue to pay the 'malikana' of Dhanua, etc., and Rs. 10 from the income of five 'jagir' villages, and that money should be spent in the aforesaid work of that 'Chatri' and in preparation of goods and furniture that may add lustre to the 'Chatri.'

"V. Generally the rights of my servants, friends and defendants that are now fixed, they are binding upon the Rani Sahib subject to the conditions and incidents with which they were fixed. As the daughter has not yet been married, the Rani Sahib is bound to prove her generous and charitable spirit in this ceremony and do not give less than Rs. 50,000. Thakurain Adhar Kunwar Sahiba is the head member of my family, and the Rani Sahiba is, by reason of her being young, bound to pay respects due to her old age and attend upon and render service to her. She would continue to pay Rs. 50 per month to the married wife of Lal Balwant Singh.

"VI. That from this date up to 16 years, *i.e.*, when Lal Balwant Singh's age, which is now 34 years, reaches to that of 50, any male issue be born by married wife, he would be entitled to that property on attaining majority, and the Rani Sahib would be bound to retain proprietary possession until he attains majority and deliver the property to him on his attaining majority. If up to this period no male issue be born to Lal Balwant Singh, without waiting for the birth of an issue to him, the Rani Sahib would have the power to appoint owner and representative and heir of the property either Maha Lachhmi Bai, daughter, who is now seven years old, or her male issue if one be born to her, subject to this condition that the said daughter and her son take up their permanent residence at Lakhna. If both of these opportunities are not available, the Rani Sahiba is entitled to adopt and appoint him representative and owner of the 'riasat' and property aforesaid, a male issue of Chaudhri Bhup Singh, resident of Mehdipur, who may be considered by the Rani Sahib competent and fit, and in the three cases the Rani Sahib would be entitled to impose any condition or conditions which she thinks necessary in regard to manner of succession and possession of property.

"VII. If a son be born to Lal Balwant Singh by the married wife after the expiry of the fiftieth year of his age he would even then be entitled to the property after attaining his majority. Therefore the said property should remain either in the possession of the Rani Sahib or in that of the daughter, daughter's son or adopted son, whomsoever Rani Sahib might have appointed as representative up to the time that boy of Lal Balwant Singh

does not attain the age of 18, and then he would be the owner and hold possession of the property, and from whose possession the son of Lal Balwant Singh obtains the property, he would pay that person Rs. 100 per month.

"VIII. If by chance, before the son of Lal Balwant Singh attains majority, and an issue being born, or before the expiry of 50 years of his age, or in case of no issue being born, the Rani Sahib dies, the said property should devolve on Maha Lachmi Bai or on her son, if alive, and he would remain in possession until a son is born to Lal Balwant Singh by the married wife and attains majority, *i.e.*, he would obtain possession when 18 years old, and the person formerly in possession should get Rs. 100 per month.

"IX. Lal Balwant Singh personally has been excluded from inheritance since August, 1872; he has no power and authority to interfere with the proprietary possession and future powers of the Rani Sahib; but if Lal Balwant Singh after his release adopts an approved and grave course and remains obedient and in the service of Rani Sahib as a son, adopting such a mode of life which Rani Sahib may approve, he would besides Rs. 50 per month allowed to his married wife under para. V of this deed of gift, get Rs. 100 per month from the Rani Sahib for his personal expenses, and this pay is not based on any title, nor would Lal Balwant Singh be able to claim it; nay, its continuance would depend at the pleasure of Rani Sahib.

"X. This deed of gift would, subject to all the terms, be held enforceable from this date; but, subject to the condition that, in case the Rani Sahib dies before me, the entire subject of gift property would revert to me, and the deed of gift, together with all the terms, would be cancelled.

"XI. The Rani Sahib has started a money-lending and 'sarrafi' firm in the name of Sri Gobindji and Rani Kishori at Lakhna with her 'stridhan,' and the deeds relating to debts appertaining to the firm and mortgage deeds and property, which she has contained in her name, I have nothing whatever to do with the business, etc., appertaining to it; they are her special property, and the deed of gift or any of its terms do not at present or for the future affect the same."

After a very careful examination of the able arguments urged before them, their Lordships are of opinion that there are insuperable difficulties in the way of holding that the estate taken by the Rani was limited, as contended for the plaintiff. According to the recitals, the settler's object was to disinherit his son Balwant, and this purpose was effected by giving the estate to the Rani so that it was no longer descendible to the heirs of the settlor.

After reciting that the settlor had been compelled to exclude Balwant Singh from the right of representing him and from inheritance, and that for the purpose of maintaining the name and protecting the property it was necessary that there should be some representative (literally some one to stand in his place), and that there was none but Rani Kishori, the deed goes on, "I have therefore made a gift in favour of Rani Kishori of all my moveable and immoveable properties . . . and appoint her my successor and representative subject to the following conditions." Under condition 1 the villages were to be "owned by the Rani Sahib just as I owned," and complete possession was to be given her. Similarly as to the 10 per cent. on the revenue of seven villages, condition 2 provides that, after the settlor's death, "the Rani Sahib would be entitled to get it and none would be able to offer obstruction."

In their Lordships' opinion there is nothing so far in the deed to cut down the gift or prevent the Rani from taking such an estate in the properties, which are the subject of the gift, as a wife takes in immoveable property given her by her husband. According to the Hindu law, such property is taken by her as stridhan and is descendible to her heirs and not to his, and would devolve first on her daughter and her daughter's daughter and failing them on her daughter's son, thus effectually excluding Balwant: but over such property, it is stated by Mr. Mayne, paragraph 664, she would have no right of alienation unless the gift was coupled with an express power of alienation, or, as has been held by this Board, unless there are words of sufficient amplitude to confer it upon her. Some reliance has been placed on the fact that there is no mention of the donee's heirs such as is generally found where it is intended to create an estate of inheritance, but Condition VI, which has been so much discussed, shows clearly that it was the settlor's intention to establish a line of succession that would exclude Balwant.

Condition VI provides that if a son is born to Balwant Singh within the next sixteen years—in other words, before he attains the age of fifty—such son is to take the property on his attaining majority, and the Rani is bound to retain "the proprietary possession" until he does attain majority. If, however, no son is born to Balwant before he attains the age of fifty, she is not to be bound to retain the proprietary possession herself, but is expressly empowered to give or bequeath it to her daughter or her daughter's son, "*to appoint owner and representative and heir*" her daughter—the second defendant—or her daughter's son if she have one, and failing them to make an adoption, and in regard to all three cases she is empowered "to impose any condition or conditions which she thinks necessary in regard to manner of succession and possession of property." These provisions, which are only material in so far as they show the intention of the settlor, in their Lordships' opinion, clearly show that it was the intention of the settlor that she should not only have the estate, which under Hindu law a woman has in property given her by her husband, but should also have power to alienate it to her daughter or her daughter's son, thus enabling her, it may be observed, to prefer the daughter's son to the daughter's daughter, who would be a preferential heir to her stridhan. The effect was, whilst leaving the property to descend as stridhan and so exclude Balwant Singh to enable the Rani to transfer it as she was expected to do, to the daughter's son if there was one, because according to Hindu religious ideas a daughter's son stands in the place of a son and like a son is putrika, or a liberator from put. It was only failing them that she was to have power to adopt, and in all cases she was to have power to impose conditions of succession. These provisions, in their Lordships' opinion, make it clear that it was intended to give her a woman's estate enlarged by the powers of alienation to her daughter and daughter's son, already

specified, and that, in default of the exercise of these powers, it was to descend to her heirs.

Condition VII then deals with the birth of a son to Balwant Singh after he had attained the age of fifty, when the widow might have transferred the estate to her daughter and her daughter's son or to an adopted son under condition VI, and provides that she or her transferee should retain the property until Balwant's son attained his majority and hand it over then. Further, it provides that, on succeeding to the property, Balwant's son should be bound to pay Rs. 100 a month to the person from whom he obtained it, an obligation by which the plaintiff would not be bound if it were held that he was entitled to succeed, not under the deed, but as heir of the settlor.

Then comes Condition VIII, which, as translated, is not very clearly worded, but provides for what is to happen in case of the Rani dying before Balwant Singh had attained the age of fifty in case a son had been born to him but had not attained majority, or in case no son had been born to him. In either event the Rani's powers of disposition under condition VI would not have come into operation, and, accordingly, the settlor himself provides that in these events the property is to " devolve on Maha Lakshmi Bai or son if alive," who should remain in possession until a son was born to Balwant Singh and attain majority, in which case he would take, and the person on whom the property had devolved would be entitled to receive, Rs. 100 a month.

These provisions for events which have not happened, in their Lordships' opinion, were intended by the settlor to effectuate his declared object of disinheriting his son Balwant and preventing him from claiming to come in as heir on the death of the Rani.

The same intention is clearly expressed in condition IX, which, whilst making some provision for Balwant Singh, recites that he personally had been excluded from the succession and had no power or authority to interfere with the property, possession and future powers of the Rani.

Condition X contains an additional condition of defeasance in the event of the Rani predeceasing the settlor, when the property would revert to the settlor. This clause, which was no doubt intended to enable the settlor to make a fresh settlement, does not appear to throw any light on the present question.

In their Lordships' opinion the testator's intention clearly was that the property should pass to the Rani and her successors under the deed to the exclusion of the settlor's heirs, unless a son was born to Balwant and attained majority. In that event Balwant's son was to come in and take the estate under the deed, and not as the settlor's heir on the suggested intestacy arising from the failure of the gift over to him, following the determination of the estate limited to the Rani and her successors until Balwant's son should attain majority.

Two intentions appear clearly in the deed, one to exclude Balwant altogether from inheritance, the other to bring in his son

on his attaining majority. Both intentions are effectuated under the deed by holding that the Rani and her successors took an estate subject to defeasance on the happening of a certain event, the attainment of majority by a son of Balwant. On the other hand, the construction contended for on behalf of the plaintiff would defeat the settlor's intention by letting in Balwant as the settlor's heir if he was alive, as he very well might have been, when the plaintiff attained majority. For these reasons their Lordships are of opinion that the provisions in the unborn son's favour amount to a condition subsequent, and it is a well-settled principle of law, which has now been embodied in sections 28 and 30 of the Indian Transfer of Property Act, 1882, that in such a case "if the ulterior disposition is not valid the prior disposition is not affected by it."

Their Lordships are therefore unable to agree with the learned Judges of the High Court "that the Rani was left as a custodian of the property until its final devolution to a full owner." The Rani and her successors were put in, not merely as custodians until the attainment of majority of Balwant's son, an event which might never happen, but also to effect the disherison of Balwant himself by leaving the property away from the settlor's natural heirs. In their Lordships' opinion, the terms of the deed clearly show that they were given an estate which was not limited but absolute, in point of duration, and subject only to defeasance in case of Balwant having a son who attained majority or the Rani dying before the settlor. The learned Judges also held that there was a cesser of the Rani's estate "on the attainment of eighteen years by the appellant, and not on the appellant being capable of taking possession of the property," citing *Doe dem Blomfield* v. *Eyre* (5 C.B. 61), a judgment of the Court of Exchequer Chamber. That was the case of a gift to A. B. for life with a gift over which failed, and what was held was that it was clearly not the intention of the settlor that the heirs of the first donee should take in preference to the heirs of the settlor. In the present case the intention was wholly to exclude the heirs of the settlor as such as a means of keeping out his unworthy son, and, in their Lordships' opinion, it is not open to the Court to adopt a construction which lets them in. For these reasons their Lordships are of opinion that the decree of the High Court confirming the decree of the lower Court, and dismissing the suit, was correct, and that this appeal fails and must be dismissed with costs. The costs of the remand to the High Court must also be paid by the appellant. They will humbly advise His Majesty accordingly.

In the Privy Council.

RAO NARSINGH RAO

v.

BETI MAHALAKSHMI BAI AND ANOTHER.

DELIVERED BY SIR JOHN WALLIS.

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