

(1880) 01 CAL CK 0010

Calcutta High Court

Case No: None

Premchand Dutt

APPELLANT

Vs

Koonjbehari Dhur

RESPONDENT

Date of Decision: Jan. 12, 1880

Citation: (1880) ILR (Cal) 684

Hon'ble Judges: Tottenham, J; Jackson, J

Bench: Division Bench

Judgement

Jackson, J.

We are unable to give the effect to this will which has been given by the lower Appellate Court. The Additional Judge seems to consider that there was nothing to limit or affect the language of the instrument except what he calls the adoption clause. He appears to have left entirely out of sight the common rule of Hindu law, which is that, in respect of gifts by a husband to his wife, she takes immoveables only for her life, and has no power of alienation, while her dominion over moveable property is absolute. This rule is stated in a recent work, the Tagore Law Lectures for 1878, of which the author, Dr. Gurudas Banerjee, is the vakeel for the respondent. We understand it to be a rule of law, well established in this Court, that a Hindu wife takes, by a will of her husband, no more absolute right over the property bequeathed, than she would take over such property, if conferred upon her by gift during the life-time of her husband; and that, whether in respect of a gift or a will, it would be necessary for the husband to give her in express terms a heritable right or power of alienation. In the present case the will contains nothing of the sort. It is the will of a Hindu father of a family of respectable position in life, and a man of business. He must be taken to have been well aware of the rules of Hindu law in this particular, and even if, as is clear from the terms of this instrument, he was not a person accustomed to the preparation of legal papers, yet the words necessary to give full interest are very simple and familiar to every one, and there could be no difficulty whatever in his introducing such words in the will. Dr. Banerjee suggested, that the reason arising out of the condition of the Hindu society, which prevents a

Hindu wife from taking an absolute interest in the property given by her husband, does not apply in the case of a will, because that reason, he understands to be, that the husband, notwithstanding the gift, in fact reserves to himself a control over the property given. It appears to me that, supposing that to be the reason, it must be founded upon some consideration of the infirmity of the wife, and not of any intention on the part of the donor, to resume the property at his own convenience; and if that be the explanation of it, there can be no reason why such control should not be reserved to the male heir of the husband as well as to himself. In fact, the rule is as I have stated, and so far as we know, I am not aware of any qualification such as is contended for by Dr. Banerjee. Another argument is that by this instrument the property is given to other persons besides the wife, and in respect of all, the same expression "Deebo" ("Deebo" anglice "will give") is used, and ought to be construed in the same manner. Now it seems to me that the general rule of construction is not violated if we suppose that the property given in each case, passes to the recipient, qualified by the capacity in each case, to take under gift or will, and it differs in the case of a wife from that of other takers. There is not, moreover, any emphatic declaration on the part of the husband to give the property absolutely to his wife. On the contrary, it seems to me that there is internal evidence of his intention that it should not be absolutely given. In the first place, because he gives her power to adopt a son, and if the property was absolutely given to the wife, very little remained to the son to enjoy. Secondly, because as to the moveable property given, he expressly restrains her from exercising absolute control over it. He says, that the money which was declared to be her share was not to be taken from the business in which it was invested, but she was merely to enjoy the interest or the profits of it. When he makes this direction or restriction in regard to moveable property, we may well assume that the enjoyment of the Immovable property was left her subject to the restrictions imposed by the ordinary rule of Hindu law. I think, therefore, that the Judge was wrong in holding that she became absolutely entitled to this property, and was competent to mortgage or alienate. The judgment of the lower Appellate Court, therefore, must be set aside, and that of the Subordinate Judge restored with costs.