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cannot say that it is such evidence as would justify us in ordering a new trial.

We accordingly reverse the conviction and sentence, and order that the prisoner be discharged.

Conviction reversed.

ORIGINAL CIVIL.

Before Mr. Justice Bayley.

August 29.

SIR MANGALDA'S NATHUBHOY, PLAINTIFF, *v.* KRISHNA'BA'I AND BHAGVA'NDA'S PRA'NJIVANDAS, DEFENDANTS.*

Hindu law—Will—Person competent to take under a will.

The doctrine laid down dy the Privy Council in the *Tagore Case* (1)—that only a person, either in fact or in contemplation of law in existence at the death of a testator, can take under his will—is a general principle of Hindu law applicable as well to Hindus governed by the law of the Mitakshara as to those governed by the Dayabhaga.

INTERPLEADER suit. In this case the plaintiff and the first defendant Krishnabai were the children of Nathubhoy Ramdas, deceased. The second defendant, Bhagvandas Pranjivandas, was the eldest son of Krishnabai, the first defendant.

Nathubhoy Ramdas died in September, 1843, and by his will, dated the 26th August, 1843, he gave a legacy of Rs. 3,000 to his daughter, Krishnabai (the first defendant) in the following terms:—"I do further write that my daughter, Krishnabai, is very young; but after she is grown up you will give her in marriage to a good husband, looking her father and mother-in-law possessing one dwelling-house. The marriage to be performed, according to our rule, with proper presents given on the marriage and after the marriage is performed. Rs. 3,000 is to be given her from my property by my son Mangaldas. She is to place it at interest in some proper place, and the interest thereof she is to enjoy. If she get any children, then that her money go to her children, and should she not give birth to any children then after her death that money may go to my son Mangaldas."

Krishnabai married in February, 1841, and there was issue of

* Suit No. 230 of 1881.

(1) 9 Beng. L. R. 377; L. R. Ind. Ap. Sup. Vol. 47.

this marriage—four sons and one daughter—all of whom were living at the date of the present suit. Shortly after Krishnábái's marriage, Sir Mangaldás Nathubhoy, in accordance with the above provision of the will, gave her the Rs. 3,000. From that time until shortly before the present suit he held it in deposit for her, and paid her interest upon it at the rate of 6 per cent. *per annum*.

Early in the year 1881, Sir Mangaldás gave notice to Krishnábái that he would not continue to pay interest at so high a rate. She then demanded that the principal sum should be paid over to her. The second defendant through his solicitor served notice on Sir Mangaldás not to pay over the money, alleging that, under the will of Nathubhoy Rámdás, Krishnábái was only entitled to a life-interest in the sum of Rs. 3,000, and claiming for himself and the other children of Krishnabai a beneficial interest in the said money in remainder after her death. Thereupon Sir Mangaldas paid the Rs. 3,000 into Court, and filed this suit, praying that the defendants might be ordered to interplead concerning their claims to the said sum of Rs. 3,000.

At the first hearing on the 8th August, 1881, the Court dismissed the plaintiff from the suit, and awarded him his costs under section 475 of the Civil Procedure Code (Act X of 1877).

Written statements were filed by the defendants. Krishnabai claimed that the money should be at once paid over to her, and she denied that the second defendant had any interest in it whatever. The second defendant, on the other hand, alleged that, under the will of Nathubhoy Ramdas, Krishnabai had only a life-interest in the money, and that he and her other children were entitled in remainder, and he prayed that the money should be invested in proper security under the direction of the Court.

Lang (*Jardine* with him).—No question arises in this case: the second defendant was not in existence at the time of the testator's death, and has, therefore, no claim. The point has been expressly decided by the Privy Council in the *Tagore Case*[1].

Kirkpatrick (*Telang* with him) for the second defendant.—We admit that our claim must fail unless this case can be distinguished from the *Tagore Case*, or reasons be given for holding that the *Tagore Case* does not apply. There has been no decision, un-

(1) 9 Beng. L. R. 377; Ind. Ap., Sup, Vol. 47.

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der the Mitakshara, that a gift by will can only take effect if the donee be in existence at the date of the testator's death. In this Presidency such gifts are frequently made to unmarried persons for life, and after their death to their children. The Dayabhaga lays it down (chap. I, sec. 21,) that a gift can only be made to a "donee who is a sentient person"; and as the Privy Council in the *Tagore Case* held that gifts *inter vivos* and gifts by will were analogous, there was no escape from the conclusion that a gift by will could only be to "a sentient person". But there is no such text in the Mitakshara, which is the law applicable here. "The Dayabhaga and Mitakshara differ in the most vital points, and they do so from the conscious application of completely different principles" (Mayne on Hindu Law, para. 35). Unless there is something in this will contrary to the letter or spirit of the Mitakshara, its provisions should not be declared void. There is clearly nothing in it contrary to the letter of the Mitakshara; and we submit that its provisions are not contrary to, but strictly in accordance with the spirit of that law. That law favours the rights of children. It gives them rights by birth which the Dayabhaga denies them (see Mitakshara, chap. I, sec. I, pl. 23; Dayabhaga, chap. I, pl. 13 *et seq.*; Mayne's Hindu Law, para. 35). The decision in *Sreemutty Soorjeemoney* v. *Denobundoo Mullick*(2) declares that there is nothing in an executory devise contrary to Hindu law. It is true that in the *Tagore Case* the application of that proposition was limited, but that was when an attempt was made to apply it to a case under the Dayabhaga.

According to the doctrine laid down in the *Tagore Case* (p. 397), if the testator in the present case had left the Rs. 3,000 to Krishnabai for life; and after her death to her adopted child, the bequest would be good. Apparently it would be so, even although the adopted child were not born till after the testator's death. Whatever the doctrines of the law of Bengal may be, it is anomalous under the Mitakshara to place an adopted child in a better position than a natural one. Hitherto the decisions of the Courts have been directed towards securing for an adopted child rights equal, not superior, to those of a natural child.

(1) 9 M. I. A. 123.

BAYLEY, J.—In this case the second defendant, Bhagvandas Pranjivandas, is the eldest son of the first defendant, Krishnabai, and he claims to be entitled in remainder, subject to his mother's life-interest, to a sum of Rs. 3,000 bequeathed by the will of his grandfather (the father of Krishnabai) in the following words :— [His Lordship read the clause of the will above set forth.] This will was made in the year 1843, and the testator died in the same year. Krishnabai was married in 1848 ; and if it be the case, as stated in the plaint, that Bhagvandas is now only 23 years of age, it would appear that he was not born until the year 1857 or 1858. We have, therefore, a person claiming to take under a will who was not in existence at the death of the testator, and the question is whether the claim can be maintained. I consider that the point is settled by the authority of the *Tagore Case*(1) which was decided by the Privy Council in 1872. Their Lordships in that case decided that it was a general principle of Hindu law that only a person, either in fact or in contemplation of law in existence at the death of the testator, can take under his will. Their decision was based, not on the Dayabhaga, but upon the Hindu law of gifts *inter vivos*, which they considered to be the law applicable to cases of gifts by will. By that decision I am bound, and I must, therefore, hold that the claim of Bhagvandas to be declared beneficially interested in the sum of Rs. 3,000 after the death of Krishnabai is unsustainable. It is not necessary for me to decide whether Krishnabai takes more than a life-interest in this money, and I give no opinion upon the point.

Attorneys for first defendant.—Messrs. *Craigie, Lynch, and Owen.*

Attorneys for second defendant.—Messrs. *Hore, Conroy, and Brown.*

(1) 9 Beng. L. R. 377 ; L. R. Ind, Ap., Sup. Vol. 47.