

(1933) 11 CAL CK 0002
In the Calcutta High Court

Annada Sundari Gupta

APPELLANT

Vs

Ratan Ram Deb

RESPONDENT

Date of Decision : 21-11-1933

Acts Referred:

Letters Patent Act, 1865 — Section 15

Citation : AIR 1934 Cal 370

Hon'ble Judges : Nasim Ali, J

Bench : Division Bench

Judgement

Nasim Ali, J.—This is the plaintiff's appeal in a suit for recovery of arrears of rent for the years 1332 to 1335 B.S. with damages and coats. The plaintiff's case is that her father was the owner of the land for which the rent is claimed, that the suit lands along with other lands were bequeathed by him in favour of her mother absolutely, that after her death she being the sole heiress of her mother is entitled to recover rent from the tenant defendant. The defence substantially is that the suit is bad for defect of parties inasmuch as under the terms of the will left by the plaintiff's father her mother got only a limited estate and after her death the plaintiff as well as other persons, namely, Nagendra Chandra Dutta and others were entitled to get the rent. The learned Munsif held that under the will the plaintiff as well as the other persons alleged by the defendants became entitled to the property after the death of the plaintiff's mother and in that view dismissed the plaintiff's suit as being not maintainable at the instance of the plaintiff alone. The plaintiff thereupon preferred an appeal to the lower appellate Court. The learned Judge dismissed the appeal. Hence the present appeal by the plaintiff to this Court. The decision of this case really turns upon the construction of the will of the late Dwip Chandra Dutta of which probate was taken in due course. The following are the relevant portions of the will:

2. Para. 1.—In case I die sonless my wife Gunamoyee Dassi shall become the owner and possessor, in absolute right, of the rest of my properties moveable and Immovable excluding the lands mentioned in the schedule having equal and

same powers as myself and with full powers to make sale or gift of the same for valid reasons and abiding by the following provisions. Only she will not be competent to sell the lands appertaining to my ancestral Khanabari to anybody other than a co-sharer.

3. Para. 3.?If I die sonless my wife will have the power to adopt one or more sons and if she makes such adoption such adopted son would be the full owner of the property left undisposed of by her along with the properties mentioned in Schedule 2 and 3.

4. Para. 4.?If my wife dies without making any adoption in the manner stated above my married daughter Sm. Ananda Moyee Dassy and my unmarried daughters Sm. Swarna Moyee Dassy and Sm. Sarada Sundari Dassy and my nephews Sarat Chandra Dutta, Golok Chandra Dutta, Tarak Chandra Dutta, Ishon Chandra Dutta and Nabin Chandra Dutta will be entitled in equal shares to all the properties moveable and Immovable that would be left after the sales made by her excluding therefrom the land mentioned in the schedule below.

5. Admittedly the land in this suit is not included in any of the schedules given in the will, and was not disposed of by the widow during her lifetime. If upon a proper construction of the will the widow got an absolute interest in the land in question, the plaintiff is entitled to a decree. If on the other hand, the widow had a limited interest, the plaintiff's suit must fail for defect of party. The point for decision therefore is whether under the terms of the will the widow Gunamoyee got an absolute interest or only a limited interest. The words "having equal and same right as myself and shall be the owner and possessor in absolute right" if not otherwise qualified would indicate the creation of an absolute interest. But the words used in the same sentence, namely, "with powers to make sale or gift for valid reasons" would go to show that the object of the testator was to restrict the powers of transfer. Reading para. 1 as a whole it seems to me that the intention of the testator was not to create an absolute interest in favour of the widow with unrestricted powers of transfer, but to enable her to enjoy the properties for her life with powers to alienate the same or portion thereof if there was any legal necessity for such alienation. This construction is supported further by the recitals in paras. 3 and 4 quoted above. The will is to be read as a whole and the intention of the testator is to be gathered from all the terms of the will taken together. It was contended by the learned advocate for the appellant that the restrictions put upon the power of the widow about transfers are repugnant to the real intention of the testator and are therefore void.

6. I am unable to accept this contention. Para. 1 of the will must be read as a whole and reading the paragraph as a whole there cannot be any doubt that the testator had no intention of giving an absolute right to the widow. If the contention of the appellant about the meaning of para. 1 of the will be accepted, the expressions about the restrictions on transfer and the other paragraphs quoted above would become wholly meaningless. In my judgment the construction put upon the will by the Courts below is correct, and is justified by

the terms of the will taken as a whole.

7. My attention was drawn to the decision of the Judicial Committee in the case of AIR 1933 67 (Privy Council) . In that case there was no restriction on the donee's power of transfer and there was nothing definite to the contrary in the other terms of the will to qualify the meaning of the expression indicating an absolute estate. Other cases were also cited both by the appellant and respondent, but it is always dangerous to construe in one way or other by the construction of more or less similar words in a different will which was adopted by a Court in another case. The question in each case is what was the paramount intention of the testator as expressed in the will taken as a whole. In my judgment the widow Gunamoyee Dassi took only a limited interest and after her death the plaintiff alone is not entitled to claim rent for the land in suit. The result therefore is that this appeal is dismissed, but in view of the circumstances of this case I make no order as to costs. Leave to appeal u/s 15 of the Letters Patent is refused.