

(1871) 09 CAL CK 0005
In the Calcutta High Court

Brajanath Dey Sirkar

APPELLANT

Vs

S.M. Anandamayi Dasi and Others

RESPONDENT

Date of Decision : 13-09-1871

Acts Referred:

Citation : (1871) 09 CAL CK 0005

Judgement

Phear, J.—During the trial of this case, a question arose with regard to the reception of evidence, and I reserved it till the determination of the suit. It was objected that probate of the will was not evidence as against all parties to the suit. I think, on the whole, I ought to receive it as evidence. The 187th section of the Indian Succession Act, which is made applicable by Act XXI of 1870, says:-- "No right as executor or legatee can be established in any Court of Justice, unless a Court of competent jurisdiction within the province shall have granted probate of the will under which the right is claimed, or shall have granted letters of administration under the 180th section," and section 242 of the Indian Succession Act, which I also understand to be made applicable by Act XXI of 1870, says:-- "Probate or letters of administration shall have effect over all the property and estate, moveable or immoveable, of the deceased, throughout the province in which the same is granted, and shall be conclusive as to the representative title against all debtors of the deceased, and all persons holding property which belongs to him, and shall afford full indemnity to all debtors paying their debts, and all persons delivering up such property to the person to whom such probate or letters of administration shall have been granted." The effect of these two sections really is to make the probate the title of the executor to the property, and also to make it evidence of the contents of the will itself as against legatees, Now in Hindu wills, inasmuch as moveable and immoveable property are not distinguished in Hindu law by any difference of quality, the legatee must be, I apprehend, in precisely the same situation as a devisee. The Indian Succession Act was framed no doubt, in a view of things where a legatee was materially different from a devisee, but I think the effect of applying the Act to Hindus must be to make the probate evidence as against all persons executor

or others interested under the will. I therefore admit the probate. The testator commences his will thus: (reads clause appointing Anandamayi executrix.)

2. And the 179th section of the Indian Succession Act made applicable by Act XXI of 1870 declares that--

The executor or administrator, as the case may be, of a deceased person is his legal representative for all purposes, and all the property of the deceased person vests in him as such.

3. It has been argued, on behalf of the defendants, that these two passages, either of them, or both of them together, have the effect of conferring upon Anandamayi such an ownership of the property as necessarily shuts out from the plaintiff any possibility of an immediate beneficial interest as long as the executrix's right remains, and that consequently, inasmuch as the plaintiff does not seek to have this part of the will disturbed, the suit is premature, and should be dismissed.

4. I think, however, that the words of the will, which I have quoted, only invest the executrix with a representative character. They do not seem to me to have been used with the view of bestowing upon her an absolute proprietorship, or of conferring upon her an irresponsible discretion; the authority and power over the property which the testator intended to give her was, in my opinion, simply commensurate with the obligation "to perform all duties according to the instructions embodied in the will." It appears to me, in short, that, under the terms of her appointment as executrix, she took nothing more than a trust estate, an estate, such as in England before the 11 Geo. IV, c. 31, and 1 Wm. IV, c. 40, would not have entitled her in equity to hold beneficially any unexhausted residue.

5. And section 179 of the Indian Succession Act clearly, I think, does not carry the matter further; the executor is thereby made the legal representative of the deceased person, and all the property of the deceased person vests in him as such representative. But in the capacity of representative of the deceased, the executor is bound to carry out the deceased's directions relative to the disposal of the property, so far as they validly extend, and whenever such directions are absent or are inoperative by reason of illegality, then to hand over the property to those entitled by law to succeed to it. It can never be that, as representative of the deceased, the executor is entitled to exclude either those to whom the testator or those to whom the law directs that the property should go from the deceased. It seems to me then clear that, if the plaintiff is right in contending that a substantial portion of the property is not validly disposed of by the will, excepting so far as it is vested in the executor qu? executor, he is, in that event, immediately entitled beneficially to a share in that portion, notwithstanding the pendency of the executor's estate or right of representative ownership.

6. The testator, after appointing Anandamayi executrix in the words which I have quoted, says (reads commencement of will to beginning of 1st paragraph).

7. This constitutes a sort of introduction to the will, which, from this point onwards, is divided into numbered paragraphs. The first paragraph provides for the deceased's grandson, Charu Chandra Dey, who was a minor at the time of the testator's death, becoming in the event of attaining majority an executor of the will and manager of the estate. This paragraph also contains the very important direction (seemingly somewhat out of place here):-- "None of my offspring down to my great grand-children shall have the power to make gift or sale and none of the property, immoveable, moveable, or company's papers, &c., shall be sold for the nij (private) debts of the aforementioned managers." Then follow a variety of legacies and specific dispositions of property, and the part of the will which mainly gives occasion to this suit is all that which comes after the 10th paragraph, and which run, thus (reads the rest of the will).

8. It is to be observed that the three sons here mentioned are the heirs-at-law of the testator, who are therefore entitled to such residue of his property as is left after the specific legacies, &c., are satisfied, unless he has given it to somebody else, or devoted it to some other lawful purpose. What, then, has he done with it? In the first place, he has positively said that these sons shall only at the utmost have maintenance and support out of it. He has, also, in more than one part of the will strictly forbidden not only his sons, but also his executor's and managers to give, sell, or charge any portion of his property for their own personal benefit. And he continually throughout the will declares his purpose to be that his property should be preserved and protected by his executrix and managers. In the first line of his will he appoints his wife executrix for the purpose of preserving all his property; and in the 1st clause of the 16th paragraph, he says:-- "If my wife, Srimati Anandamayi Dasi, or my wife being dead, the executrix or executor for the time being or during my wife's existence think that she or he will not be able to preserve and protect this property, then she or he will consult the said managers and two or three other respectable individuals, and form a family fund in the Government trust fund of all the moveable and immoveable property, company's papers, &c., plates and vessels, &c., appertaining to my estate, and place the same with them." Further than this he declares by the words which I have already quoted from the 1st paragraph:-- "None of my offspring down to my great grandchildren shall have the power to make gift or sale; and none of the property, immoveable or moveable, company's papers, &c., shall be sold, for the nij (private) debts of the aforementioned managers." It seems to me perfectly clear that the testator intended the corpus of his property, subject to the legacies, &c., and the provisions for maintenance and for religious services, to remain and accumulate in the hands of his executors or managers or of a sort of committee in their place, un-enjoyed by his children and grandchildren until the happening of a future event, which the next passage in effect declares to be the event of a great grandson attaining majority. The specification of this event appears to be made in immediate connection with a particular condition of the property, viz., the condition of its existing in the shape of a fund in the hands of a committee, but I

have no doubt that it was intended to apply as well to the case of the property being unconverted in the charge of the executor and managers alone. The testator thus declares the ultimate destination of his property. "My great grandsons shall, when they attain majority, receive the whole to their satisfaction, and they will divide and take the same in accordance with the Hindu laws. God forbid it; but should I have no great grandsons in the male line, then my daughter's sons, when they come of age, shall take the said property from the trust fund, and divide it according to the Hindu shastras in vogue."

9. Now, at the time when the testator died, the event of a great grandson of the testator attaining majority had not happened, and it was a contingency, which either might not happen at all, or might happen at a period greatly more remote than the period within which a gift must certainly take effect in order to be valid in law. It appears to me therefore that the gift to the great grandsons, which is embodied in the first of the two passages just quoted, is clearly void and inoperative, I have not the same certainty, however, with regard to the nature of the gift made in the second passage, "God forbid it; but should I have no great grandsons, then my daughter's sons, when they come of age, shall take the said property from the trust fund, and divide it according to the Hindu shastras in vogue." Suppose this to mean, "If at the time when my daughter's sons come of age, the gift to my great grandsons for any reason has not taken effect, then my daughter's sons shall take the property, &c.," this gift would not infringe the statute law in respect of remoteness; it would take effect, if at all, within the period prescribed by section 101 of the Indian Succession Act. On the other hand, suppose that these words make the gift to the daughter's sons contingent on the double event: 1st, of the gift to the great grandsons ultimately failing to take effect according to its terms, and, 2ndly, of the daughter's sons coming of age, then clearly this gift is affected with the vice of remoteness, it is a gift made on failure of, and postponed to, a gift which is void for remoteness, and is therefore itself void for the same reason (section 103 of Indian Succession Act). After consideration I am of opinion that the latter is the true interpretation of the passage. The first paragraph of the will declares that no grandchild shall have the property; the first of these two passages under consideration says that the great grandsons shall have it when they attain majority, and then comes this passage:--

God forbid it; but should I have no great grandsons in the male line, then my daughter's sons, when they come of age, shall take the said property, &c.

10. It seems to me that the testator intended this last gift to follow upon, and not to be made in a certain event a substitution for the preceding gift.

11. The "postscript" does nothing, I think, to effect this construction. I understand it simply to give to the wife all the company's papers which the testator had purchased and kept in her name. I am of opinion therefore on the whole that the testator died intestate as to his residuary estate.