

(1936) 07 CAL CK 0035
In the Calcutta High Court

Fani Bhusan Saha and Others

APPELLANT

Vs

Fulkumari Dasi and Others

RESPONDENT

Date of Decision : 21-07-1936

Acts Referred:

Citation : AIR 1937 Cal 1

Judgement

1. This is an appeal from a preliminary decree for partition and accounts; the facts of the case, shortly put, are the following. One Hiralal Shaha died in 1292 B.S.=1886 leaving seven sons, one of whom was Jogendra, who died later on in 1905 leaving a widow Radharani and two daughters Fulkumari and Santashila. The suit was instituted on 27th September 1924 by Radharani. The defendants in the suit are some of the other sons and the heirs of the deceased, sons of the said Hiralal Shaha. During the pendency of the suit Radharani died and the two daughters Fulkumari and Santashila got themselves substituted as plaintiffs in her place. The facts, as alleged in the plaint, were that the plaintiff Radharani was entitled to have a partition of the properties left by Hiralal Shaha inasmuch as under his will each of the sons was entitled to a 1/7th share in the property. Her case was that although under the will the life interest in the said share was given, yet the gift in respect of the residue that was made in favour of the grandsons had failed because at the death of Hiralal no grandson had been born to him, and that therefore each of the sons got absolute title to a seventh share in the properties left by Hiralal.

2. The contesting defendants took the plea that under the will of Hiralal each of his sons got only life interest in respect of one-seventh share and the plaintiff Radharani as widow was not entitled to sue for partition inasmuch as she had inherited nothing from her husband. It was also attempted to be shown on behalf of the contesting defendants that as a matter of fact a grandson had been born during the lifetime of Hiralal, he having been a son of Benode Behary, one of the sons. There was a further defence taken on behalf of the defendants and it was to the effect that even if it could not be established that Bejoy was born during the lifetime of Hiralal, the plaintiff cannot succeed because the residue must be

regarded as having been given to the grandsons to be taken by them on the death of all the sons of Hiralal and therefore there was a valid gift over which can yet take effect. These defences were overruled by the Subordinate Judge who eventually made a preliminary decree for partition and accounts. From this decree, this appeal has been preferred by some of the defendants, who are sons and grandsons of Benode Behary. The principal question in the appeal is the construction that has to be put upon the provisions of the will left by Hiralal Shaha. The will first of all provides for certain expenses to be incurred for the purposes of certain seva, pujah and religious festivals in connexion with certain deities and states that the total amount so to be spent would be Rs. 533. It is then provided that the said sum of Rs. 533 being thus spent out of the profits of the ancestral properties the balance of the profit and the proceeds of the other properties shall be employed for the maintenance of the members of the family. Amongst the recitals in the will is to be found a passage wherein the testator gave his reasons as to why he was making a will of this character. There it is said:

I have long made up my mind to make a will in respect of my estate; specially all my sons are not majors and the sons who have attained majority are not also fully competent. It is highly improbable that my sons will be able after my death to earn for themselves a name in society by satisfactorily performing the business of the estate and by maintaining the rites and ceremonies prescribed by myself and by managing the properties to be left by me. For this reason, it is absolutely necessary to make a will while I am yet alive providing satisfactorily for all things I have in view.

3. The two relevant clauses in the will are Clauses 7 and 10. Clause 7 runs in these words:

My sons, upon coming by the movable and immovable properties which I have in my own name or benami in equal shares after my death without powers of sale, gift, etc., shall spend out of the income of those properties the said total amount of Rs. 533 (five hundred and thirty three) year after year for all time to come and continue to enjoy the balance of the income. My sons shall after my death collect all sorts of dues in respect of my estate either jointly or severally according to their respective shares and comply with my directions by maintaining the rites laid down by me above.

4. Clause 10 runs in these words:

My sons shall on coming by the properties to be left by me at my death continue to hold and enjoy them without powers of sale, gift etc. On their death my son's son (grandson) shall obtain the properties to be left by me in absolute right with powers of sale, gift, etc., and shall maintain the rites laid down by me in compliance with the directions set out in this will made by me.

5. On these clauses the first contention that has been urged on behalf of the appellants is that after the death of Hiralal, the sons became joint tenants and not tenants in common in respect of the properties left by him although as a

matter of fact each of the said sons would have a 1/7th share therein. This contention, in our opinion, is not well founded. It has, been laid down by the Judicial Committee that the principle of such joint tenancy is unknown to Hindu law. Unless therefore there is found in the will some positive indication that some departure from the ordinary rule of Hindu law is intended, an interpretation which would go to establish that as a matter of fact a joint tenancy was intended by the will, ought not to be adopted. One of the decisions of the Judicial Committee which is relevant on this point is the case in *Jogeswar Narain Deo Ram Chand Dutt* . To the same effect also is their Lordships' decision in AIR 1933 72 (Privy Council) . The words used in the two clauses of the will, in our opinion, make it perfectly clear that the testator intended that it was a tenancy in common that was to rest in the sons in equal shares. In Clause 7 it was expressly stated that the sons upon coming by the movable and immovable properties in equal shares without powers of sale, gift, etc., and again it is stated that they would collect all sorts of dues in respect of the estate either jointly or severally according to their respective shares. Furthermore, in Clause 11 of the will, it is provided that after the testator's death his sons shall jointly carry on the existing business and none of the sons will be at liberty to carry on separate business independently, but if any of them desire to do any business with his own funds, he will be free to do so. This clause suggests that although there will be no actual division of the properties, the sons would be entitled to have their separate funds. In the circumstances in our opinion, there is sufficient indication contained in the will which would go to establish that as a matter of fact it was a tenancy in common that was intended. That a life interest was created in favour of each of the sons is a matter about which there can be no dispute.

6. It has been contended on behalf of the appellants in the next place that even if it be held that the sons would take as tenants in common and not as joint tenants, yet on the death of any one of them his interest would by implication devolve on the survivors of them and that it was on the death of all the sons that the grandsons would come in. In other words, the will purported to devise the residue to the surviving sons by way of cross remainder, as it were. In support of this contention reference has been made to two cases, viz. *In re Tate, Williamson Gilpini* and *In re Stanley's Settlement, Maddocks v. Andrews* (1916) 2 Ch D 50 . In our opinion, nothing that has been said in the will would suggest that such a devise was intended to be made. And indeed an interpretation which would import into a will executed in this country a highly technical rule of English conveyancing, such as was applied to the documents in the two cases referred to above, would, in our opinion, not be justified specially as such a provision would be repugnant to the principles of Hindu law with regard to the creation of estates. It has next been contended that Clause 10 of the will should be interpreted as meaning that the grandsons would come in after the death of all the sons of the testator and this interpretation is sought to be justified by the words of the will which are as follows:

On their death (that is to say, the death of the sons) my son's son (grandson)

shall obtain the properties to be left by me in absolute right, etc.

7. The difficulty of accepting this interpretation would be that in that case the residue in respect of each life estate would remain undisposed of until all the sons were dead and that it is only in the event of the death of the sons that the grandsons would come to inherit. Moreover, the words "on their death" are neutral words and need not necessarily be read as meaning "on the death of all the sons." The true meaning of the two clauses taken together, in our opinion, is that it was intended that each of the sons would get life interest in 1/7th of the estate left by the testator, and on his demise that share would pass on in absolute right to the grandsons of that son. This is the natural interpretation which to our mind is the correct interpretation to be put upon the will. That being the position and there being no question that any son had been born to Jogendra during the lifetime of the testator, the provision as regards the grandson that had been made in the will had failed and that the absolute title therefore vested in Jogendra and on Jogendra's death in the plaintiff.

8. In the view that we have taken of the meaning of Clauses 7 and 10 of the will, no other question arises in this appeal. But the learned Subordinate Judge has gone into the other question which was raised, namely as to whether at the date of the death of Hiralal Shaha, Benode Behary had got a son or not. And we do not think we should refrain from expressing an opinion on that question. With regard to this matter it has to be stated that in the written statements that were originally filed on behalf of defendants 1, 2, 4, 5 and 6 there was no mention whatsoever of the fact that Benode Behary had got a son prior to the death of Hiralal. And it was only in the written statement of defendant 3 that it was stated that Hiralal had a grandson born to him prior to his death. The name of the grandson however was not mentioned nor was any date given of his birth in that written statement. It was only after the suit had gone back on remand under an order of this Court on appeal that in 1928 a case was specifically put before the Court that the grandson who had been born to Hiralal was the son of Benode Behary and that he was born in 1290 B.S. In the evidence that was given in support of this case there was a further development, namely that it was sought to be established that not only was Bejoy born during Hiralal's lifetime but there was another grandson also, namely Jatin, who was born before Hiralal's death. The learned Subordinate Judge has examined the evidence of the witnesses bearing upon this question with very great care, and although we do not approve of all the criticisms that he has made as regards that evidence, we are on the whole of opinion that evidence is not sufficient to establish that as a matter of fact Bejoy was born before the death of Hiralal.

9. A number of account books have been produced in order to corroborate this case. It is quite true that these account books on the face of them appear to be genuine and it is not possible to suggest upon only an inspection of those account books that they or any of them have been fabricated. But the fact remains that although the suit was filed in September 1924, these account books

were not produced before the Court till June 1928. With regard to these account books the learned Judge evidently was in error in treating them in the way that he has done in his judgment and in saying that they were filed out of time; because, as a matter of fact, time was granted for their production and they were produced within the time so granted. But even then we are unable to say that on the strength of these account books we would be justified in taking the view in defendants' favour on the case which they have put forward. It has already been stated that this case was not put forward sufficiently specifically at any early stage of the suit. We are further of opinion that the conduct of the parties themselves go a great way to show that this case cannot be relied upon because we find that after the death of Jogendra, Radharani, as entitled to a one-seventh share of the properties, got her name registered; and to this no objection appears to have been taken on behalf of the defendants. These and other matters which have been referred to in detail in the judgment of the learned Subordinate Judge incline us to agree with the conclusion at which he has arrived.

10. On the whole we are in agreement with the view which the learned Subordinate Judge has taken on the questions which arise in this case. We accordingly dismiss this appeal with costs to the plaintiffs-respondents, hearing fee being assessed at ten gold mohurs. The appeal is rejected.