

(1962) 06 CAL CK 0002

In the Calcutta High Court

Case No : Appeal from Appellate Decree No. 1107 of 1957

Harilal Saha and Others

APPELLANT

Vs

Satya Bala Dasi and Another

RESPONDENT

Date of Decision : 12-06-1962

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 144

Citation : 67 CWN 870

Hon'ble Judges : Mukherji, J;Bijayesh, J

Bench : Division Bench

Advocate : Jitendra Kumar Sen Gupta, Dharendra Kumar Das and Rameswar Saha, for the Appellant; Basanta Kumar Panda, for the Respondent

Judgement

1. This is an appeal by four out of five defendants from a judgment and decree dated June 15, 1957 of the first court of the Subordinate Judge, Midnapore, which affirmed the judgment and decree dated March 12, 1956, of the third court of the Munsif there, resting mainly on the true consideration of an ancient will dated July 21, 1879 duly probated on May 25, 1899. The will is exhibit 5 couched in the old Bengali language with Midnapore patois and words of Persian origin thrown in almost all over. The maker of the will is Gopal Chandra Saha, a polygamist with four wives and children by each. When he makes the will, his first wife Gouri he no more. But a son (Madhusudan) and a daughter (Subhadra) by her are there. Subhadra has been given in marriage -- a fact which the testator recites with apparent satisfaction. And Madhusudan, a mere child when his mother Gouri died, is amply provided for.

2. Reference is also made in the will to the second wife Sm. Panu and two children by her -- Sri Situ Sau and Sm. Genda -- minors both. With a view to providing for the residence of the said Sm. Panu

a specified parcel of land with structures (specified too) at Oliganj Mahalla in the town of Midnapore is bequeathed. Then follows a description of the third married wife Sm. Dasi and three children by her -- two sons Panchu and Manohar Sao

(who has also an alias Prabodh) and a daughter Parvati, minors all. Here also a specified parcel of land with specified structures upon it at Mia Mahalla in the town of Midnapore is bequeathed for the purpose of her residence --

which I have made a literal translation of.

3. For the maintenance of the children of the second and third wives there is a further disposition -- separate groceries the income of which will feed and clothe them and meet their other needs -- in fine, will maintain them, as the income from the groceries has been maintaining them hitherto. In a like manner there is a disposition in favour of the fourth wife Sm. Punya who is described as one with two minor children -- a daughter Dukhani and a son Jhagru.

4. Other matters in the will I skip over, for the time being at any rate, just as Mr. Sen Gupta appearing for the appellants does, save an excerpt the importance of which demands that it be reproduced verbatim:

5. Literally translated it reads:

Be it further known that the aforesaid wives have each a right of residence (and) cannot alienate their own rights; (that) upon her and her alone with sons born in her womb living

shall vest (what is bequeathed by this will); (when) one is without (such) sons (living), sons of other wives will acquire rights (to the dispositions under this will) and that person acquiring such rights) shall maintain her (without sons living); if after the sons now living (my) wives bear (me) other sons, such sons also will get the rights to the properties and all of their own mothers and not to the properties and all of others.

6. It is now time to note what the controversy is about and how it arises:

The year of the testator's death is 1898. Panchu, a son of his by the third wife Dassi, dies after his father (the testator) but before his mother the date of whose death is October 3, 1923 (vide the extract from the death register: exhibit 8/a). Parvati, a daughter of the testator by the third wife, predeceases her mother too just by a month. The date of her death is September 3, 1923. Thus, of the three issues by Dassi, two (son Panchu and daughter Parvati) die after their father, the testator, but before their mother Dassi. Manohar alias Prabodh alone outlives his father and mother, the testator and his third wife Dassi.

7. Herein lies the seed of the controversy. Does the will confer a life-estate on Dassi and make provisions for a bequest on her death? If it does, on Dassi's death Prabodh alone gets what was his mother Dassi's to the exclusion of Panchu's children and children's children -- the defendants to this litigation (now appellants). Or does the will provide no more than a mere right of residence with a little income from the grocery for maintenance for Dassi with the disposition vesting on her sons at the testator's death? If the will does that, the property did vest in Panchu too in 1898, the year of the testator's death, and his death

before his mother is of no consequence. This is the main question upon which I have been addressed at the Bar. But to my thinking the decision of this appeal turns on another consideration. (More of which hereafter).

8. The immediate cause of the controversy is this. Some six months ahead of Prabodh's death, he executes a deed of gift as respects the property in controversy in favour of his daughter, Satyabala, the plaintiff (now the first respondent). The date of the deed of gift, exhibit 1, is March 24, 1948 and the date of Prabodh's death September 29 of the same year (vide exhibit 8: another extract from the relevant death register). Satyabala says: "The subject of the gift was my father's and father's alone. So it is mine too to the exclusion of others". Panchu's son and son's sons, Harilal, Purna, Kali and Badal, defendants all, brought up under the same roof as Prabodh since Panchu's death, will not let this go unchallenged. They say: "The property vested in Panchu too. What vested in him has now vested in us."

9. The trouble brews. Apparently the matters come to a head when the defendants go in for a lease (exhibit F) of part of the property in controversy to Bhuramal Agarwalla, the fifth defendant (now the second respondent). The date of the lease is October 13, 1953. Peace is about to be broken and section 144 of the Code of Criminal Procedure is called in aid. And then with a view to securing a lasting solution beyond the reach of section 144 *ibid*, Satyabala institutes the suit (out of which this appeal arises) contending for the construction of the will which will make her father the sole owner to the exclusion of the appellants. On that footing what she prays the court for is declaration of her title to the property in controversy and recovery of possession thereof. The date of the institution of the suit is December 1, 1954.

10. The appellants qua defendants resist the suit and contend for the will's construction in a manner which will make Panchu a co-owner with his brother Prabodh. They contend too that adverse possession defeats the plaintiff Satyabala's claim.

11. It is held by the learned Munsif and on appeal by the learned Subordinate Judge that the will does confer a life-estate only on Dassi and makes provisions for a bequest on her death to the children born *manner womb* then living and that the requisite ingredients which make adverse possession are not there. The suit therefore culminates in a decree and the appeal taken against that fails. Hence the first four defendants, heirs of Panchu, have come up to this Court in second appeal.

12. Mr. Sen Gupta for the appellants contends that on a proper construction of the will the property it bequeaths passes to the sons of Gopal, the testator, alive at the time of his death. If a life-estate for each of the three living wives is what the testator had intended, Mr. Sen Gupta submits then

will be destitute of meaning, will be destitute of meaning. Mr. Mr. Panda appearing for the first respondent sees it full of meaning -- a life-estate for each

of the surviving three wives and thereafter an absolute estate to each sons born in her womb then living, that is, living when the life-estate-holder dies. The question therefore is: whom does refer to? If the sentence is read fairly in the context of the whole of the will its plain and obvious meaning is: upon her and her alone with sons born in her womb living then, it shall vest. This is not only a fair but also a very literal translation of the passage upon which Mr. Sen Gupta so strongly relies (her and her alone) goes with she who has sons born in her womb living). She and she alone who has such sons will get this. Not that her sons will get it, as Mr. Sen Gupta contends timing the succession to open on the testator's death or as Mr. Panda contends timing the succession to open twice -- (i) on the testator's death when the surviving wives with own sons get life-estates only and (ii) on the death of the wives, the life-estate-holders, when their sons then living inherit. And what Mr. Panda contends is what the learned Judges -- the trial Judge and the appellate Judge -- have found. To say, however, that (her and her alone) goes with sons living is to do violence to the plain language used. The intention of the testator collected from the words of the will appears to be clear enough. The life-estate is for the wife who has her own son or sons living at the testator's death. What then about the wife whose sons are no more when the testator dies? She gets no life-estate. Sons of her co-wives get what she would have got, had a son of hers been living then. But they (the co-wives' sons) get it with the charge of maintaining their sonless stepmother. Once this is remembered, there appears to be little force in the further contention of Mr. Sen Gupta that a life-estate on the living wives connotes sons succeeding after their mother's death and that in the context the sons of wives A and B being called upon to maintain their co-wife C bereft of a son at the time of the testator's death but seized of a life-estate all the same brings the matter on the verge of absurdity. To amplify it, C's life-estate is there, Mr. Sen Gupta contends, so long as her life is there. A corollary to that is that her life-estate ends when she dies. Hence to read the will so means that her co-wives' sons have been asked to maintain her when she is dead and gone -- which, Mr. Sen Gupta concludes, is *reductio ad absurdum*. But the obvious fallacy of such an approach is that the testator gives no life-estate to A, B and C without any reservation. He qualifies it with a reservation which is: those with sons born in their wombs living at his death will get life-estates. Say, A and B have their sons living then. They get a life-estate each. Say, C has no son living then. She gets no life-estate but only an added privilege of being maintained by her step-sons who get what she would have got, had she had a son then. An added privilege, because provisions for maintenance are already there. Where is then the absurdity? What is seen instead is clarity itself.

13. This is how I meet Mr. Sen Gupta's contention which initially held me and which on further examination I reject. I reject too the contentions of Mr. Panda in answer to Mr. Sen Gupta's. Such contentions with my reasons for rejecting them are noticed with utmost brevity. One,

that one (getting the rights of his sonless step-mother) will maintain her (the

sonless step-mother) is not in "the operative portion" of the will. With respect, these words are there to receive effect -- to operate. So operative words they are. Two, a little down the much debated provision reproduced verbatim the testator says that during his life time each wife has been given a separate residence and a separate shop for maintenance, that each group has to feed for themselves on that, subject to what Providence wills, and that one has not the jurisdiction to trench upon the others

14. Mr. Panda therefore, asks: why provision for maintenance again for a sonless wife at the testator's death merging the jurisdictions kept watertight? The answer is: it is the testator's pleasure to do so by way of abundant caution. The earlier jurisdiction founded on shop and residence do remain watertight all the same. That therefore does not negate the contention Mr. Sen Gupta urges upon me. What I have recorded in the foregoing lines does, in my judgment. Three, Mr. Panda sees ambiguity in the words reproduced above. I do not. Four, Mr. Panda reads in the expression to mean the widow -- the sonless one and there to mean the co-wife son who gets what his sonless stepmother would have got, had her son been alive then. This turns the plain language used upside down and turns the little knowledge I have of my mother tongue upside down too. I need say no more on a contention which has only to be stated in order to be rejected.

15. Upon the whole, the testator proceeds step by step -- first, an absolute estate to Madhusudan, son of his predeceased first wife Gouri; second, specified shop and residence to each of the three wives living including their children; third, no power of alienation to any one of the three wives; fourth, a life-estate to the wives with sons (born in their wombs) living, subject to restriction on alienation; fifth, no life-estate to a wife without sons (born in her womb) living -- disposition in her favour going to the sons of other wives subject to her right of residence and maintenance for which (maintenance) her share devolving on the co-wives' sons is charged; seventh, restriction of the rights of sons yet to be born to what their own mothers get. Thus, on a fair reading of the whole of the will and keeping in view the necessity of a harmonious construction the conclusion I have reached is that the will does not provide merely for a right of residence for the testator's wives but does confer a life-estate -- a limited estate on each of them with her own sons living at the time of the testator's death. Mr. Sen Gupta's argument that on the testator's death the properties earmarked for each group of three wives vest in their sons then living, therefore, fails.

16. Mr. Sen Gupta next contends that by (santan) the testator means not only sons but grandsons by the predeceased son. This argument rests on the assumption that on the death of the testator the property bequeathed for each of the three wives, the second, third and fourth, vests in each's sons born in her womb. But if I am correct in reading the will as I have done, on the death of the testator the property bequeathed vests in the wives with sons born in their womb then living. Dassi, the third wife, with whom alone this litigation is concerned,

had such sons living then. So she gets a limited estate -- a life-estate, deprived as she has been by the will of her power of alienation. Thus, Dassi dying, the property passes to the testator's heirs in Dassi's group in the facts and circumstances obtaining here as if the testator has no heir in other groups. And a son of a predeceased son as the appellant Harilal is, as also the grandsons of a predeceased son as the appellants Purna, Kali and Badal are must necessarily be the heirs of the testator in this group -- the third wife's group. To make it clear, here is the genealogical table in so far as it is necessary for the present purpose:

17. Thus the object of the second branch of Mr. Sen Gupta's arguments succeeds, though not the contention itself as formulated by him. Could it have been possible for me to hold that on the death of the testator a life-estate is created in favour of each of the three wives and that life-estate terminating, each wife's own sons then living inherit -- just as the two Judges find and Mr. Panda contends -- it would have been for me to accept or reject Mr. Sen Gupta's contention that by (santan) is meant grandsons by the predeceased son. The word (santan) simpliciter means that: lineal male descendants and not sons only as held by the Judicial Committee in (1) *Buddha Singh and others v. Laltu Singh and others*: 20 C.W.N. 1, a case Mr. Sen Gupta cites. Mr. Panda cites two cases: (2) *Kishto Kishore Bhattacharjee and others v. Seetamonee Bhattacharjee and others*, 7 W.R. (Civil) 320, and (3) *Kumud Krishna Mandal and others v. Jogendra Nath Sarkar*, 21 C.W.N. 854, to show that (santan) is not limited to male issues only. Fletcher, J. delivering the judgment of the Court in Kumud's case (3) Newbould, J. agreeing, contents himself saying that the Privy Council did not purport to lay down what the ordinary meaning of the word (santan) was as used in the Bengali documents at the end of the 19th or the beginning of the 20th century. Such a consideration need not detain me, because if the word santan is as wide as that, the appellants as the children and children's children of the deceased Panchu are not excluded. So that way comes little to the first respondent. But the word santan does not stand by itself. It is preceded by (born in the womb). A grandson cannot be said to have been born in the womb of a grandmother. To that extent Mr. Panda is right. But Mr. Sen Gupta's further submission is that the word has been used to distinguish the sons born in the womb of one wife from the sons born in the womb of another, an acceptable proposition on the whole. Keeping this distinction clear, lineal male descendants are provided for. That is so consistent with the wishes of the testator on the devolution of his property. That fits in so well with the predilection of the class to which the testator belonged. And he had made the will a little less than a century ago. Sons of his predeceased son getting nothing could have scarcely been in the contemplation of such a one. But it is a profitless task to pursue this any further in view of what I have found already: the will provides for a life-estate -- a limited estate -- for Dassi who, at the testator's death, had sons born in her womb living and on Dassi's death, the deceased Panchu's children and Prabodh inherit as the testator's heirs in this group.

18. The two other points on which this appeal has been opened merit a short

treatment, as the appellants succeed on the main point touching the construction of the will and as that success means the success of the whole of the appeal. One such point is about the property mentioned in schedule kha to the plaint. On this, the learned appellate Judge finds: "It formed part of the estate left to Dassi Bewa by the will by Gopal Saha". Upon all I see here, that finding stands. So, the will being constructed in the manner I have done, schedule kha property becomes the appellants' too.

19. On the findings as they now are the question of adverse possession does not arise. Had it arisen and could I have found that on Dassi's death Probodh alone inherited, I would have decided it in the manner following:

20. After the death of the testator, Panchu, a son of his by the third wife Dassi, dies leaving behind him surviving two sons, Bhupati and Harilal. They are Dassi's son's sons. Surely they will not be thrown out on the street. They therefore continue to live as before befriended by their grandmother. Then the grandmother (Dassi) dies. Even then they will not be ordered off the house forthwith, rights though they may not have. So they continued living as before. It will be using incorrect language to say that such continuance of living is adverse to the true owner. In such living it is difficult to see that animus to possess adversely, an open act in defiance of the rightful owner. Sporadic payment of house taxes (11 out of 84 tax receipts -- exhibits A to A/83) and that too in dubious names and without the knowledge of the true owner falls far short of the animus possidendi without which there can be no adverse possession. See (4) Rangalal Ram v. Makhan Lal and others: AIR 1951 Or. 183. Or to put it another way, on the lines of Pal, J.'s observations in (5) Maharajah Sashikanta Acharyya Bahadur v. Nayajan Bewa, 46 C.W.N. 938, we possess a thing with the body and the mind, not with the body alone nor with the mind alone. In the circumstances and probabilities the evidence reveals, the appellants possessed part of the property in controversy here with the body only, not with the mind till October 13, 1953 when the appellants inducted Agarwalla to nullify which (and for more) the present suit was instituted on December 1, 1954. So, limitation by adverse possession is out of the appellants' way.

21. On the basis of the findings recorded earlier, misconstruction of the will which is the foundation of the claim in suit is patent. Is therefore patent too an error of law which gives me the jurisdiction to upset the decision under appeal.

22. In the result, the appeal succeeds. It is allowed. The judgments and decrees of both the courts are set aside and the plaintiff respondent's suit be dismissed.

23. The litigation is between those who in the normal circumstances ought to be so near and dear to one another. That is one consideration. Another is: the will is such that each party may have honestly believed that what it contends for is right. Hence costs shall not follow the event. I direct instead that each party do bear its costs throughout. Leave to appeal under clause 15 of the Letters Patent has been asked for. Leave cannot be had for the mere asking. In that event all

such decisions will be appealable as a matter of course. There are certain principles to go by. If I can press into service any one of those principles, most certainly I shall grant the leave prayed for. If not, the leave shall be refused. The question I have been called upon to decide and I have decided just now cannot be said to be a question of general importance. Nor can it be said that it is a question of very frequent occurrence. Again, the principles of law are now well-established. It is therefore not possible to say that the existing authorities on the point are obscure or conflicting. Then, I am not vain enough to think that every judgment I render is perfect. But so far as this appeal is concerned, I have no reasonable doubt in my mind about the correctness of my own decision, if I may say so without shedding my modesty. That being so, I regret, I cannot allow the leave asked for. It is refused.