

(1951) 02 CAL CK 0031
In the Calcutta High Court
Case No : O.O.S. Suit No. 4748 of 1949

In Re: Estate of Sambhunath Roy and Gagan Chand Roy

Date of Decision : 05-02-1951

Acts Referred:

Succession Act, 1925 — Section 124, 125, 131, 134
Transfer of Property Act, 1882 — Section 24

Citation : AIR 1951 Cal 426

Hon'ble Judges : Banerjee, J

Bench : Single Bench

Advocate : A.K. Sen, for the Appellant; H.N. Sanyal, S. Banerjee and S.C. Roy, for the Respondent

Judgement

Banerjee, J.—The questions the Ct. has been asked to answer on the summons involve the construction of the will dated 21-6-1916, made by one Sambhunath. Roy who in his life time was a Hindu governed by the Dayabhag & died on or about 25-6-1916.

2. The questions are as follows :

"(a) On a true construction of the will of the testator, who on the death of Smi. Annabati Dassi, are entitled to the testator's estate, viz., (i) 55 equal parts or shares in the testator's portion of the family dwelling house; & (ii) 35 equal parts or shares in the rest & residue ?

(b) What are the rights (if any) of the parties named In paras. 18 (a) to (e) of the affidavit of Gagan Chandra Roy affirmed on 12-12-1949 ?

(c) What is the true line of succession to the estate of the deceased ?

(d) What is the period of distribution ?

(e) To whom is the income of the estate to be paid at present & in future, & from when ?

3. The testator left a son Rakhaldas Roy, his wife Annabati Dassi & their son, Tarakdas & other relations. The relationship of the parties appear from the

following pedigree :

BADAN CHAND ROY (d. 1858) _____ |
 _____ | | | Sreenath Roy (d. 190) Sambhunath Roy
 Gopinath Roy (d) | (d. 25.6.1916) | _____ |
 _____ | | | | | Rakhal Das =
 Annabati Daughter Daughter | (d. 1936) (d. 27.7.1949) | | _____ |
 _____ | | | | | Tarak Das Gosto Behary Seal Chandrika Narayan Netaji Ch.
 (d) Gour Ch. Gagan Ch. (d. 1926) Dhur | _____ |
 _____ | | | | | | | | | |
 Jugal Kissore Dulal Kissore Gocul Kissore Jadab Kissore Radha Madhab Mohan |
 (Roy (d. 1917) (d. 1927) (d. Jany. 1943) (d. Oct. 1943) Kissore Kissore Kissore
 | | | | | | Prayag Kartick Pasupati (minor) Dwarka (minor) |
 _____ | | | | | |
 Bankim Kala Tara Shyam Ratan Nemaï Chandra Chand Chand Chand Chand
 Chand

4. The will was duly proved by the executors, Gaganchand Roy, the testator's nephew, Nundolal" Roy & Jugal Kissore Roy, his grand-nephews.

5. Jugal Kissore Roy died in or about 1917 leaving a son, deft. Prayag Chand, his only heir. Jahar Lal Roy died in or about 1918. He left two daughters, defts. Satya Dassi & Jasoda Dassi, his heirs. Nundolal Roy, the executor, died in or about 1925, leaving his sons, defts. Bankim Chandra, Kala Chand, Tara Chand, Shyam Chand, Ratan Chand & Nemaï Chand, his heirs. In or about 1926, testator's grandson Tarakdas died unmarried & intestate. In or about 1927, Dulal died leaving deft. Kartick, his only son & heir. In or about 1936 Rakhal Das died intestate. He left his widow Annabati Dassi, but no son. In or about January 1943, Gocool died. He left a minor son, deft. Pasupati, his heir. In or about October, 1943, Jadab died. He left deft. Dwarka, a minor, his only son & heir. In or about July, 1949, Annabati died.

6. In Suit No. 757 of 1914 (Inder Chandra Roy v. Gagan Chand Roy), it was declared & decreed that the testator was entitled to a 1/3 share in the family dwelling house being premises No. 2 (formerly Nos. 1 & 2) Gopal Chandra Lane, Calcutta.

7. By the decree a portion of the premises was set apart for the purpose of the trusts which had been declared valid by a decree dated 15-3-1883, made in a previous suit being No. 448 of 1883. The portion of the house which the testator was declared entitled to, became a subject-matter of the testator's will.

8. The testator considered his share of the house as divided into 100 equal parts & gave 15 parts to his nephew Gagan Chand absolutely, 15 parts to his grand nephews, Nundolal Roy & Jahar Lal Roy absolutely in equal shares and another 15 parts to the sons of his nephew Gour Chand absolutely in equal shares. As to the remaining 55 parts, the will provides as follows :

"As to the remaining fifty-five equal parts or shares thereof unto my said executors and trustees (hereinafter referred to as my trustees) upon trust to allow my son Rakhal Dass Roy and his wife Sm. Annabaty Dassi and their infant son Tarruck Dass Roy otherwise called Phella and any other son or sons who may be born of them hereafter, to live and reside therein during their respective lives and subject to such right of residence to hold the said fiftyfive equal parts or shares thereof in trust for the absolute use and benefit of my grandson the said Tarruck Dass Roy and such other son or sons of the said Rakhal Dass Roy who may be living at my death or may be born within twenty years after my death and I declare that in the event of the said Tarruck Dass Roy and the other son or sons of the said Rakhal Dass Roy all dying without male issue him or them surviving then my trustees shall hold the said fiftyfive equal parts or shares of the said family dwelling house on the following trusts viz., as to one equal third part or share thereof for the absolute use and benefit of the said Gagan Chand Roy as to one equal third part or share thereof for the absolute use and benefit of the said Nundo Lal Roy and Johur Lal Roy in equal shares and as to the remaining equal third part or share thereof for the absolute use and benefit of the said Jugal Kissore Roy, Dulal Kissore Roy, Gocool Kissore Roy, Jadab Kissore Roy, Badha Kissore Roy, Madhab Kissore Roy and Mohun Kissore Roy the sons of the said Gour Chand Roy in equal shares."

9. As to the rest and residue of his property, the testator considered the same as divided into hundred equal parts, and gave & bequeathed 65 equal parts to his nephew, grand nephews and his natural sons whose names are mentioned in the will and the remaining 35 parts as follows :

"As to the remaining thirtyfive equal parts or shares thereof unto my said trustees upon trust to defray and pay out of the income thereof the expenses of the maintenance of my said son Rakhal Dass Roy and his wife Sm. Annabati Dassi and their son the said Tarruck Dass Roy and any other son or sons who may be born of them during their respective lives in a suitable style provided nevertheless and it is hereby expressly declared that in the event of the said Sm. Annabati Dassi not residing with her husband in the said dwelling house or in the event of such family dwelling house being acquired by Govt. or other public body in the house which shall for the time being be used by her husband and her son or sons as their family dwelling house she shall not be entitled to her maintenance as hereinbefore provided and subject to such right of maintenance I direct my trustees to hold the said remaining thirtyfive equal parts or shares of my said residuary estate for the absolute use and benefit of my grandson the, said Tarruck Dass Roy or any other son or sons of my said son Rakhal Dass Roy who may be living at my death or may be born within twenty years after my death and I declare that in the event of the said Tarruck Dass Roy and any other such son or sons of my son the said Rakhal Dass Roy as may be living or born as aforesaid all dying without male issue him or them surviving then my trustees shall hold the said thirtyfive equal parts or shares of my said residuary estate on the following trusts, viz., as to one equal third part or share thereof for the

absolute use and benefit of the said Gagan Chand Roy as to one-third equal part or share thereof for the absolute use and benefit of the said Nundo Lal Roy and Jahar Lal Roy in equal shares and as to the remaining one equal third part or share thereof for the absolute use and benefit of the said Jugal Kissore Roy, Dulal Kissore Roy, Gocool Kissore Roy, Jadab Kissore Roy, Radha Kissore Roy, Madhab Kissore Roy, and Mohan Kissore Roy (the sons of the said Gour Chand Roy deceased) in equal shares."

10. The contest arose after the death of Annabati Dassi between the daughters' sons of the testator and his nephews & grandnephews (hereinafter shortly referred to as the "Roys") as to the ultimate destination of the estate. It is contended on behalf of the daughters' sons that the gift over to the Roys is invalid and therefore, the daughters' sons take the estate as on intestacy.

11. Mr. A. K. Sen, counsel on their behalf puts his argument as follows : The gift to Tarak and his brothers is bad as the gift was to persons some of whom were not born at the testator's death : the gift was to a class some of whom were not born at the date when the testator died. Therefore counsel said the gift over to the Roys was bad because the condition precedent to the taking effect of the gift over was illegal. Secondly counsel said that a vested interest was created in favour of Tarak and other grandsons of the testator and therefore, there could not be a gift over for that would be tantamount to divesting of interest already vested. Thirdly, he said that this case came within the principle of *Norendra v. Kamalbasini* 23 I. A. 18 : (28 Cal. 563 P. C.) & AIR 1932 269 (Privy Council) had no application. Lastly counsel said that other sons must be born to Rakhal and they must all die without leaving male issue before the gift to the Roys could take effect as that was what the testator contemplated. In this case he added that condition did not and could not happen and therefore the gift in favour of the Roys must fail. This in substance is Mr. Sen's contention.

12. With regard to the first contention of Mr. Sen, the case of *Bhagabati v. Kali Charan* 32 Cal. 992 : (1 C. I. J. 482 F. B.) is a complete answer. In that case it has been held that there is no rule of Hindu law to the effect that a gift inter vivos or a bequest to a class of persons some of whom are incapable of taking by reason of the rule that a gift is valid only if it is made to a sentient being capable of taking, is void also as regards those who are in existence and capable of taking. The analogy of the rule of English Law laid down in *Leake v. Robinson* (1817 16 R. Rule 168) in connection with class-gifts infringing the rule against remoteness does not hold good. Where a bequest to a class does not offend against the rule as to perpetuities, the only question is, what was the primary and what the secondary intention of the testator.

13. In this case, the gift over does not infringe the rule against remoteness. Because the gift in favour of the Roys takes effect, if at all, at the close of a life or lives in being. It seems to me that the primary intention of the testator was that all members of the class should take who under the Hindu Law could take and his secondary intention was that if all could not take those who could take

would do so. Both intentions co-exist. In this case, the gift to the grandsons who might be born after the testator's death is invalid but that does not make the gift to Tarak and such other son or sons of Rakhal who might be living at the testator's death invalid. Therefore this contention of Mr. Sen fails.

14. As to his second argument that if the gift overtakes effect, it would divest the estate of Tarak and other grandsons of the testator who got a vested interest, it is a settled principle of Hindu law that, it is competent to a Hindu to make a grant of an absolute estate defeasible on the happening of a subsequent event. All that is required is that the event must happen, if at all, immediately on the close of a life in being, and the gift over must be in favour of some person in existence at the date of the gift or at the death of the testator, as the case may be. In this case both these conditions are satisfied. The gift over takes effect, if at all, at the close of a life or lives who would be in existence at the death of the testator & the gift is in favour of persons who were in existence at the death of the testator. There is no hiatus.

15. With regard to Mr. Sen's third & fourth contentions, I am unable to accept them. This case does not come within the principle of *Narendra v. Kamalbasini* 23 I. A. 18: (23 Cal. 563 P. C.). That was a case of death simpliciter as in illustration (b) of Section 124, Indian Succession Act (formerly Section 111). That section and the illustration read as follows :

"Where a legacy is given if a specified uncertain event shall happen & no time is mentioned in the will for the occurrence of that event the legacy cannot take effect, unless such event happens before the period when the fund bequeathed is payable or distributable."

Illustration (b) ;

"A legacy is bequeathed to A, & in case of his death without children, to B. If A survives the testator or dies in his lifetime leaving a child, the legacy to B does not take effect."

16. In *Norendra's* case death on the will was confined to "death" in the testator's lifetime. In the present case it is clear that death of Tarak or any of his brothers referred to in the will is the death of one who has taken something under the original gift contained in it; that is to say, it is a death which must take place after that of the testator. This distinction is vital. It is true that in each the event remains uncertain. But the question is was it an uncertain event with reference to which it could be said that "no time is prescribed in the will for its occurrence."

"The answer must be in the negative. The two first illustrations attached to Section 124 make clear what may be only implicit in the actual wording of the section--namely, that it does not apply if a period is specified in the will within which the contingent event is to happen, or putting it otherwise, that the section only applies, if without doing violence to the terms of the will, it can be held, as a

matter of words, that the occurrence of the uncertain event prior to "the period when the fund bequeathed is payable or distributable" is alone within the contemplation of the testator. If the terms of the will make that construction of his words impossible, the section then does not apply". AIR 1932 269 (Privy Council)

17. In my view, the case under consideration is governed by the principle laid down in AIR 1932 269 (Privy Council) The words "him or them surviving" contemplate the death of Tarak or any of his brother or brothers dying without male issue. What the testator intended was this. If Tarak was the only son of Rakhal who, would be living at the time of the testator's death, he would get absolute interest in the property, but on his death without leaving any male issue, the gift over would take effect; likewise if Tarak did not survive the testator, but some other son or sons of Rakhal born within the lifetime of the testator survived him & got absolute interest in the property & then died without male issue, the gift over would take effect.

18. I am unable to accept the contention of Mr. Sen that it was a condition of the gift over that there must be other sons born to Rakhal & they must all die without leaving male issue before the gift to the Roys could take effect. That was not the true intention of the testator.

19. This is a case of a bequest made with the condition superadded that, in case a specified uncertain event shall happen, the thing bequeathed shall go to another person (Section 131). The defeasance of a vested interest on the happening of a contingency has been recognised in India for a long time & the gift over takes effect. (See *Soorjeemony Dassee v. Denobundoo* 9 M. I. A. 123 (P.C.); *Kristomoni v. Narendra* 16 Cal. 383 : (16 I. A. 29 P. C.) & *Lalit Mohan v. Chukhan Lal* 24 Cal. 834 : (24 I. A. 76 P. C.)

20. Therefore the gift over in favour of the Roys is valid & the claim of the daughters' sons fails.

21. The only other point to be considered on this summons is whether all the Roys take or some of them are excluded as some of them, whose names are mentioned in the will as legatees, died before Tarak. The answer to the question depends on as to when contingent interest is transmissible. The law on this point is thus stated in *Jarman*, 7th Edn., at p. 1326 :

"A contingent interest will or will not be transmissible to the personal representatives of the legatee, according to the nature of the contingency on which it is dependent. If the gift is to children who shall live to attain a certain age, or shall survive a given period or event, the death of any child pending the contingency has obviously the effect of striking the name of such deceased child out of the class of presumptive objects: & consequently, such an interest can never devolve to representatives, as it becomes vested & transmissible at the same instant of time. Where, however, the contingency on which the vesting depends is a collateral event, irrespective of attainment to a given age &

surviving a given period, the death of any child pending the contingency works no such exclusion; but simply substitutes & lets in the legatees' representative for himself."

Therefore all the Roys take. I answer the questions as follows :

(a) All the Roys are entitled.

(b) (i) As to the 55 parts of the dwelling house $\frac{1}{3}$ goes absolutely to Gagan Chand Roy, $\frac{1}{6}$ to the heirs of Nanda Lal Roy in equal shares $\frac{1}{6}$ to the daughters of Jahar Lal Roy in equal shares to be held by them as a Hindu daughter's estate, $\frac{1}{3}$ in equal shares to Prayag (son of Jugal), Kartic (son of Dulal), Pasupati (son of Gocul) Jadab, Radha, Madhab & Mohan.

(ii) As to the rest & residue of the testator's estate like shares as in the dwelling house.

(c) No further answer is necessary.

(d) No answer is necessary.

(e) To the Roys--according to the shares I have mentioned above.

22. No argument was placed before me as to from when the income is payable. Therefore I refrain from giving any answer on this point.

23. Declarations accordingly.

24. The costs of the parties appearing to be paid out of the estate. Costs are to be taxed as of a defended suit; those of the executor as between attorney & client. Certified for two counsel.

25. I am obliged to counsel for their assistance & for the written notes of their arguments they submitted to me. The notes are kept with the records of this case.

26. Liberty to apply.