

(1981) 12 CAL CK 0021
In the Calcutta High Court
Case No : S.A. No. 1471 of 1973

Kali Sadhan Banerjee and Others

APPELLANT

Vs

K.K. Banerji and Others

RESPONDENT

Date of Decision : 17-12-1981

Acts Referred:

Succession Act, 1925 — Section 131, 135, 138
Transfer of Property Act, 1882 — Section 11, 28, 32

Citation : AIR 1982 Cal 158 : 86 CWN 583

Hon'ble Judges : Amitabha Dutta, J

Bench : Single Bench

Advocate : Kali Das Basu and Nanda Lal Shaw, for the Appellant; Robindra Nath Seal, for the Respondent

Final Decision : Allowed

Judgement

Amitabha Dutta, J.—This is an appeal from the decision of the learned Additional District Judge at Suri in Title Appeal No. 59 of 1971 affirming the judgment and decree of the learned Munsiff. First Court at Rampurhat by which he has decreed the Title Suit No. 163 of 1968 for a declaration of title and permanent injunction.

2. The only point that arises in this appeal relates to the construction of the terms of a deed of settlement. Admittedly the disputed tank in plot No. 1390 of Mouza Karkariya. 8 annas share in which is the subject matter of the suit, originally belonged to Janaki and Aghor Nath Banerjees who were two brothers. Janaki executed a deed of settlement dated 25th Aug. 1918 (8th Bhadra 1325 B. S.) in respect of his 8 annas share in the disputed tank and other properties in favour of his wife Brojendra Bala and son Dhvajadhari. The relevant recitals in the said deed of settlement are as follows:--

"Tumi Srimati Brojendra Bala Debi Adya Nija Jibankal Parjanta Nicher Likhita Sampattite Swatwabati Thakia Tahar Jabatiya Utpanna Grahanadi Jadechcha Bhog Dakhal Karibe 0 Tomar Ante Oi Sakal Sampattite Amar Putra Tomi Sriman Dhvajadhari Bandyopadhyay Dan Bikrayadi Hاستantar Karaniya Dattaswatwa

Malik Haia Pctrapautradi Wariskrame Jadechcha Bhog Dakhal Karibe Tahate Amar Kono Ojar Apatta Chalibe Ne Adya Haite Ami Nicher Likhita Sampattite Niswatwa Hailam. Iswar Na Karen Amar Jibitakale Tomader Ubhayer Lokantar Ghatile Nicher Likhita Sampatti Amake Arshibe. O Taha Ami Jadechcha Byabahar O Dan Bikrayadi Karite Pariba. Ar Tumi Srimati Brojendra Bala Jibjtakale Sriman Dhvajadhari Baba Jibaner Lokantar Ghatile Tumi Srimati Brojendra Bala Debi Nicher Likhita Sampattite Dan Bikroyadir Hastantar Karaner Swatwasaha Sampurna Malik Haibe."

Thus according to the terms of the deed of settlement the settlor transferred the properties to his wife Brojendra Bala for her life and thereafter to his son Dhvajadhari absolutely with right to transfer by way of sale or gift and enjoy the properties in any manner he liked being succeeded by his heirs from generation to generation. Then the deed provided that in case both the wife and the son of the settlor died during the settlor's lifetime, in that event the properties would revert to the settlor and the settlor would be free to enjoy the properties with right to transfer them by sale or gift. The deed further provided that in the event of the death of the settlor's son during the lifetime of the settlor's wife, she will become absolute owner of the properties with right to transfer them by way of sale, gift, etc. It has been found by the courts below that the deed of settlement was properly executed and was acted upon. These findings of fact are not challenged in second appeal. It is in evidence that Brojendra Bala died in 1329 B.S. and thereafter Dhvajadhari died in 1332 B.S. leaving his minor son Kamakshya who is the plaintiff and widow Anna Kali. Janaki, the settlor survived both the settlees as he died sometime after 1347 B.S. Before his death Janaki transferred 8 annas share in the disputed tank to his brother Aghore Nath by a registered kobala dated 21st Jaistha 1347 B.S. (Ext. A-2). Aghore Nath died in 1367 B.S. leaving a will which was duly probated and by which he bequeathed his property including the disputed tank to his four sons the defendants Nos. 1 to 4 who subsequently sold the suit property to the defendants Nos. 5 and 6 by two registered kobalas dated 8-4-68 and 15-4-68 respectively. The plaintiff has claimed the suit property on the basis of the deed of settlement of 1325 B.S. and his case is that the vested interest transferred to Dhvajadhari under the said deed devolved on him as the other clauses in the deed of settlement were invalid as they were repugnant to the grant of absolute interest to his father. On the other hand, the contesting defendants have resisted the plaintiff's claim on the ground that the absolute interest created under the deed of settlement in favour of the plaintiff's father was contingent on his surviving the settlor and as he predeceased the settlor he became divested of the settled properties which became vested in the settlor who had legal right to transfer the suit property to the predecessor-in-interest of the defendants. According to the defence there were conditions superadded to the absolute grant in the deed of settlement by way of defeasance clause. The court of appeal below has construed the terms of the deed of settlement in the following words --

"Giving my most careful consideration it appears to me that the terms of the

deed conferred an absolute estate upon Dhvajadhari. By the conditions superadded the interest of the grantee was not sought to be terminated. On the contrary by the added clauses a further interest was sought to be given to the settlor himself after or on the termination of the grantee's interest. It is not a defeasance clause. The condition super-added being derogatory to the grant is void for repugnancy. In my view, Section 31 of the T. P. Act cannot apply to this case. I accordingly hold that upon the death of Dhvajadhari the property did not revert to Janaki but devolved upon his son the plaintiff."

In that view the first appellate court has held that the plaintiff has title to the suit property consisting of 8 annas share in the disputed tank and has further found that the defendants have totally failed to establish that they possessed the tank in assertion of their hostile title. So, the appeal court has affirmed the decree passed by the trial court in favour of the plaintiff.

3. I cannot concur in the view taken by the learned Additional District Judge on the construction of the relevant clause in the deed of settlement according to which if both the wife and the son of the settlor died during the settlor's lifetime the properties would revert to the settlor as an absolute estate. In my opinion, the said clause is a defeasance clause and not a clause repugnant to the grant of absolute estate to the settlor's son Dhvajadhari because the effect of that clause is to reduce or curtail the absolute estate granted to the son of the settlor to a life estate on the happening of the contingency. In a case where the donor grants an absolute estate to the donee and in a subsequent clause in the deed provides that on the happening of a contingency the absolute estate would be curtailed to a life estate after the death of the donee by exclusion of all the heirs at law of the donee from inheritance, such a clause is a defeasance clause as it defeats or extinguishes the absolute estate and not a repugnant clause. The test bringing out the nice distinction between a defeasance clause and a repugnant one has been formulated by the Madras High Court in the case of Govindaraja Pillai and Others Vs. Mangalam Pillai and Another, in the following words. Where the intention of the donor or testator is to maintain the absolute estate conferred on the donee but he adds some restrictions in derogation of the incidents of such absolute ownership the clause is a repugnant one and is therefore void. If, however, the intention expressed or to be necessarily implied is to extinguish the absolute estate on the happening of a contingency and where the effect of the termination of the said estate would not be violation of any rule of law, the clause is a defeasance clause and would operate according to its tenor. In the Bench decision in the case of Golak Behari Mondal and Others Vs. Suradhani Dassi and Others, , the learned Judge Mitter J. held that the intention to terminate a gift or bequest may be an express one or may be inferred by necessary implication and where it is an absolute one, -- an estate of inheritance having been conferred on the donee or legatee -- and the contingency is one which is to happen if at all, the moment the donee or legatee dies and not earlier, that intention would be necessarily implied if at that moment of time the donee or legatee's absolute estate is cut down by the words used by the donor

or testator to a life estate. An absolute estate so conferred can only, where there are no express words of conversion into a life estate, be cut down to a life estate if the quality of heritability be destroyed and that can be done by exclusion of all the heirs of the donee or legatee then living. The exclusion by a subsequent clause of some of the heirs or only a class of heirs of the donee or legatee who has been given an absolute estate, an estate of inheritance, would not make the clause a defeasance clause but only a repugnant one. In the said reported case the testator after granting an absolute estate to his three sons in equal shares provided by a subsequent clause in the will that if any of his sons died without leaving any son then the widow and the daughter of the deceased son of the testator that is to say two only out of a large number of his possible heirs would be deprived of the inheritance. So, it was held that the said clause of the will could not be construed as a defeasance clause but must be taken to be a repugnant clause and so void. In that case the learned Judge Sen J. in his separate judgment observed as follows:

"I also agree with the proposition stated by the learned advocate for the respondent that where it is sought to be established that an absolute estate granted in one part of a will has been defeated by a subsequent clause it must be shown that the defeasance clause shuts out all heirs from inheriting and reduces the heritable estate to a life estate. A defeasance clause by its very terms means a clause which defeats or destroys. An absolute estate of inheritance cannot be defeated unless the quality or attribute of heritability is destroyed. A clause which does not completely destroy the heritability of the estate but merely modifies it or interferes with the course of succession cannot therefore operate as a defeasance clause."

In the case of *Bhoobun Mohini Debia v. Hurrish Chunder Chowdhury* (1878) 5 Ind App 138 the Privy Council gave effect to a defeasance clause on the interpretation that all the heirs of the donee were shut out on the donee dying without issue. Their Lordships interpreted the deed as granting to the donee an absolute heritable estate which was defeasible on the donee dying without issue and which was in such event to revert to the donor and his heirs. In the present case the contingency in the subsequent clause in the deed of settlement on the happening of which the absolute estate granted to settlor's son Dhvajadhari was intended to be defeated by implication is that if Dhvajadhari after getting the absolute estate died before the settlor, the quality of heritability of the estate of Dhvajadhari would be destroyed and the estate would revert to the settlor as an absolute estate. On the foundation of the reported decisions mentioned above, I hold that the subsequent clause in question in the deed of settlements is a defeasance clause and not a repugnant one. So, I find that after the death of Dhvajadhari during the lifetime of the settlor Janaki the estate reverted to Janaki who became absolute owner thereof and was competent to transfer the disputed 8 annas share in the tank in suit to his brother, Aghore Nath by a registered kobala dated 21st Jaistha 1347 B.S. (Ext. A-2). Ashore Nath died in 1387 B.S. bequeathing his properties including the suit property to his four sons defendants

Nos. 1 to 4 by a will duly probated and defendants Nos. 5 and 6 purchased the suit property from the defendants Nos. 1 to 4 by two registered kabalas dated 8-4-68 and 15-4-68 respectively. So, the plaintiff who has claimed the suit property as the legal heir of Dhvajadhari on the basis of the deed of settlement cannot succeed in his suit. As no other point has been raised in this appeal, the appeal must succeed.

4. The appeal is allowed. The judgment and decree of the court below are set aside. The suit is dismissed on contest. There will be no order for costs throughout.