
(1914) 07 CAL CK 0042
In the Calcutta High Court

Mahim Chandra Sarkar

APPELLANT

Vs

Hara Kumari Dasee and Others
 Hemangini Dasee and
Another Vs Mahim Chandra Sarkar

RESPONDENT

Date of Decision : 13-07-1914

Acts Referred:

Citation : 30 Ind. Cas. 798

Hon'ble Judges : Holmwood, J;Chapman, J

Bench : Division Bench

Judgement

1. The question that arises in these three second appeals is principally one of interpretation of the Will of one Ananda Lal Sarkar, which has already been partially construed by a Bench of this Court in the case of Hara Kumari Dasi v. Mohim Chandra Sarkar 12 C.W.N. 412 : 7 C.L.J. 540. The position of the parties can be seen from the following genealogical tables-

SITARAM SARKAR. | _____ |
| Mohan Lal Sarkar, Ananda Lal Sarkar | Ichhamoye Dasee | | Mahim Chandra
Sarkar Hara Kumari Dasee | Hemangini Dasee and Nagendrabala Dasee. 2.
Ananda Lal Sarkar died on the 11th March 1866, His widow Ichhamoye died on
the 30th September 1898. Mahim Chandra Sarkar filed a suit against Hara
Kumari on the 19th July 1904 for the construction of the Will of Ananda Lal, after
withdrawing his suit for revocation of Probate but still setting up very
prominently that the Will was a forgery. Maclean, C.J., in the opening of his
judgment said: If the suit had come before me, I should have dismissed it
summarily. But we are told that the appeal to this Court which was existing when
the decision now appealed against was given, has since been withdrawn. So we
will deal with the question of the construction upon the merits " He appears to
have held that but for the gift over to Hara Kumari, the Will would have given the
widow an absolute estate. Though there is no clear and absolute gift to the
widow in the first portion of the operative clause of the Will, the words you will
have the right and power to alienate by gift or sale all the afore said moveable

and Immovable properties," would make it difficult to say that the widow did not take the property absolutely. The gift over to the daughter however, follows in the following terms: my daughter Hara Kumar, shall become entitled to and possessor of whatever property will remain after your death"--the words are satyaban dakhalkar or literally, possessor with title--"and she shall enjoy the same keeping up and maintaining the aforesaid sheba, etc." Later on he says the said daughter shall have the same rights as you have (it should be equal rights) and he to whom my daughter may willingly give away those properties shall, while possessing the same and keeping and maintaining the sheba, enjoy them." We have put this last clause rather more literally than in the translation in the report of the case in the books, because on this turns one of the main contentions that the whole Will was a devolution in trust for the sole purpose of keeping up the sheba and provided merely maintenance for the daughter.

3. The question before the Court in that case was, what interest did the widow Ichhamoye take. The question before us now, is what interest did the daughter Hara Kumari take and that question does not appear to have been gone into in the previous case. The Court, however, held that the widow took for life with power of alienation; but to the extent to which such power was not exercised the daughter took the property with equal rights to those conferred on the widow.

4. On the 8th March 1908, Hara Kumari executed a deed of gift in favour of her daughter, Hemangini, and on the 8th April 1908 a similar deed in favour of Nagendrabala. On the same date she also conveyed a patni to Hemangini.

5. On the 1st July 1903 Mahim Chandra Sarkar instituted the administration suit against Hara Kumari on the ground of waste, and it is out of this suit that Appeal No. 2597 of 1910 arises. On the death of Hara Kumari in August 1910, her daughters remained on the record as respondents having been brought on previously as assignees of the property during her life-time. On the 29th September 1910 Hemangini and Nagendrabala filed a suit to recover possession of the property on the basis of a gift to Hemangini by her grandmother, Ichhamoye. This is the subject of Appeal No. 1318 by Hemangini, against whom the lower Courts decided that Ichhamoye only having a life interest could not make a gift to a person not in existence at the time of her husband's death and that the property, therefore, on her death went to the reversioner. On the 19th December 1910, Mahim Chandra Sarkar filed a rent suit against the darpatnidars of Hemangini making Hemangini and Nagendrabala parties. Out of this the appeal No. 889 arises.

6. We will deal with the main question first, which is, what interest did Hara Kumari take under her father's Will. To decide this it is necessary to go more fully into the Will than was done by this Court on the previous occasion. The learned Judge in the lower Appellate Court has somewhat light-heartedly held in the appeal in the administration suit that under the construction put by this Court in 1908 upon the Will the present defendant takes the estate absolutely, holding, as we have seen erroneously, that the judgment in that case was

exhaustive. But it is obvious that no question of the nature of Hara Kumari's estate was either raised or decided in that case. The sole question before the Court was the nature of the widow's estate.

7. Turning, therefore, to the Will itself we find that the testator clearly recites that the family had ancestral zemindari in Pabna District, that there were seven brothers of whom the testator and Mohan Lal Sarkar, the father of the present appellant, alone survived, that one brother died childless and the names of the widows of the other four are given together with the minor son of one of them. He then recites that on the 11th Ashar of the current year they determined their shares in equal parts and after putting them into writing they are in enjoyment separately and that the testator with money acquired in his service as sheristadar had purchased certain taraf (estate) and gave 2-annas share of the said estate to his brother Mohan Lai, six-annas share to the brother's widow who had a son and reserved the remaining eight-annas share of his own self-acquired property to himself. He then recites that he has also acquired by his own exertions money by service, with which he has acquired two pucca houses at Bhowanipur, Calcutta, the Murshidabad property where he was the sheristadar, and Government paper, etc., etc., in which his brother, his nephew or his brothers' widows have no concern. He then proceeds to recite that he has no male issue but only a daughter named Hara Kumari, and although he has given her in marriage he felt it his duty to support her. For this reason he executes this Will in favour of his wife Ichhamoye; and then follow the terms which have already been discussed and which appear to us to amount to an absolute gift as far as the daughter is concerned, whether it be regarded from the point of view of the clear provisions of Manu and the Dayabhaga that a gift to a daughter makes the property her stridhan and the principle that the bequests of a Hindu Will follow the Hindu Law of gift, or whether it be regarded as a life-estate to the widow with remainder to a single living daughter with no limitation to her ownership except the charge on the estate to keep a certain sheba, or religious endowment.

8. Against this view three main contentions are taken: first, that the Privy Council has modified the rule of the Dayabhaga by laying down in more than one case that a Hindu must be presumed not to intend to allow his estate to descend in the female line unless there are express words to indicate such intention; secondly, that there is a power of appointment given to the daughter enjoining her to transmit the estate to some unknown person, and if that person was not living at the time of the testator's death the estate goes to the reversioners; and, thirdly, that the whole object of the Will was to create a trust in favour of the sheba and that the respondent had no beneficial interest in the estate, apart from the sheba, which reverts on her death to the reversioner.

9. Reliance is placed for the plaintiff-appellant upon the case of Brij Lal v. Suraj Bikram Singh 16 Ind. Cas. 92 : 34 A. 405 : 16 C.L.J. 47 : 16 C.W.N. 745 : 9 A.L.J. 802 : (1912) M.W.N. 646 : 23 M.L.J. 38 : 12 M.L.T. 1 : 14 Bom. L.R. 827 :

15 O.C. 270 which, it is contended, is on all fours with this case. A more clearly distinguishable case can hardly be imagined, for there the lady was given no estate in terms and she was vested with the power of appointing an heir to the testator either in her life-time or by Will. There, as the Judicial Commissioners pointed out, the words of the disposition to the two ladies are identical. Here they are markedly and, in our opinion, intentionally different, and as the learned Judicial Commissioners pointed out, in order to ascertain the intention of the testator former Wills cannot be looked at. All we can derive from the consideration of cases concerning other Wills are principles of construction applicable to all Wills. One of these principles which is cited by the Judicial Commissioners in the rule of the Privy Council in *Mahomed Shumsool Hooda v. Shewukram* 22 W.R. 409 : 2 I.A. 7 : 14 B.L.R. 226 is that in construing the Will of a Hindu it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindus with regard to the devolution of property. It may be assumed that a Hindu generally desires that an estate, especially an ancestral estate, shall be retained in his family, and it may be assumed that as a general rule at all events women do not take an absolute estate -of inheritance which they are enabled to alienate.

10. But what are the facts we have here? The recitals as to the nature of the property in the Will are not disputed, although it is faintly suggested that there was no actual partition. The major portion of the property is not ancestral. It is the separate property of the testator. He says that his object was to make provision for his daughter. She was then married, but too young to have children; subsequent to his death she had two daughters. He had, therefore, every reason to hope she might have sons, and he must be presumed to have known as a Judge's sheristadar that a bequest by a father to a daughter is under the Hindu Law an absolute estate, and by his conferring an absolute power of alienation on the daughter subject to the sheba, he must have intended, contrary to the general presumption and practice of Hindus, to confer an absolute right of inheritance on the daughter. We cannot hold that, when their Lordships of the Judicial Committee speak of a general rule in connection with Hindus' knowledge that women do not take an absolute estate of inheritance which they are able to alienate, they meant a rule of Hindu Law; since we know that the rule of Hindu Law with regard to gifts to mothers and daughters is the reverse. The judgment delivered in the Judicial Committee by Sir Andrew Scoble in the case of *Badha Prasad Mullick v. Ranee Mani Dassee* 35 C. 896 : 35 I.A. 118 : 12 C.W.N. 729 (P.C.) : 10 Bom. L.R. 604 : 8 C.L.J. 48 : 5 A.L.J. 460 : 18 M.L.J. 287 : 4 M.L.T. 23 does not carry the contention any further, since he merely cites with approval the previous dictum of the Privy Council in *Mahomed Shumsool Hooda v. Shewukram* 22 W.R. 409 : 14 B.L.R. 226 and found that in the case then before their Lordships the testator had clearly succeeded in showing that his daughters were not to have more than what is generally known to be a woman's estate in his property. On the principles laid down by Wills, J., in the case of *Jatindra Mohan Tagore v. Ganendra Mohan Tagore* 18 W.R. 359 : 9 B.L.R. 377 : Sup. I.A.

47 2 Suth. P.C.J. 692 : 3 Sar. P.C.J. 35 a daughter, being a person to whom the testator can under the Hindu Law give an estate of inheritance, if the Will shows that it was intended that she should have the estate of inheritance, a benignant construction is to be used even if the language is ungrammatical or mistaken as to name or description, or in any other manner, incorrect provided it sufficiently indicates what was meant, that meaning shall be enforced to the extent and in the form which the law allows. It is idle to contend that the use of the words a man in the judgment excludes females whom the Hindu Law allows to take such bequests. There is no universal presumption with regard to mother or daughter that in every case the estate she takes is less than would be taken by a male: see *Kollany Kooer v. Luchmee Pershad* 24 W.R. 395 *Thakur Singh v. Nokhe Singh* 23 A. 309 : A.W.N. (1901) 84; *Ramasumi v. Papayya* 16 M. 466 : 3 M.L.J. 205. In the case of *Bai Motivahu v. Bai Mamuhai* 24 I.A. 93 : 21 B. 709 : 1 C.W.N. 366 their Lordships of the Judicial Committee held that decided cases too numerous to be now questioned have determined that the testamentary power exists, and may be exercised at least within the limits which the law prescribes for alienation by gift inter vivos. The case was in many respects similar to the present case, and their Lordships say, it appears to them to follow from the first taker (who is the widow) being allowed to have only a life-interest that her possession is sufficient to complete the executory bequest which follows the gift for life.

11. It is sought to distinguish this case, because there was a power of demise by Will given to the daughter. But the only distinction is that in consequence of such power being given, the daughter did not take an absolute estate; but there was no principle of Hindu Law which stood in the way to prevent the testator from substituting his daughter for himself as the person empowered to designate a person who was alive at the time of the testator's death. In the Will before us we can find no such power to designate an heir to the testator. The daughter has absolute power, subject to the trust, to alienate the whole property to whomsoever she please.

12. This is an absolute estate which takes effect on the death of the life-tenant. We find, therefore, that there is nothing in the decision of the Privy Council to derogate from the rule of Hindu Law that the father can make an absolute gift to his daughter, and that there was no power of appointment to the daughter enjoining her to nominate an heir or successor to her father's estate, and thirdly, that the provision for keeping up the sheba was merely a collateral charge on the property in whosoever's hands it may be and did not affect the absolute character of the gift. That being so, the plaintiff calling himself the reversioner has no cause of action and cannot maintain the suit for administration against the respondent.

13. But it is argued that the shebaitship passes by law to the reversioner on the death of the last shebait. This point cannot arise in this appeal, since the suit for administration was brought in the lifetime of Hara Kumari; nor do we think that any specific estate was devised for the purpose of the alleged sheba. It is evident

from the Will itself and from the translation cited by Maclean, C.J., in his judgment that there were several pious intentions which the testator classed together as shebas. No specific sum is assigned to any of them and the injunction appears to go no further than the expenditure of a reasonable amount on them. These objects were no doubt a charge on the property; but the property was not left in trust for those objects alone, nor can the reversioner in face of the lady holding an absolute estate sue either herself or her heirs for administration of the property as trust property. The Appeal No. 2597 of 1910, therefore, must be dismissed with costs.

14. Appeal No. 889, which arises out of the rent suit against the darpatnidars of Hara Kumari's daughters brought on the record after her death, must be dismissed on the same considerations, first because the patni is vested in the defendants by alienation during Hara Kumari's life, secondly, because they are Hara Kumari's heirs, the property being stridhan and the plaintiff had no title whatever to any of the properties left by Hara Kumari. Appeal No. 889 of 1912 must, therefore, also be dismissed with costs.

15. As regards Appeal No. 1318 of 1913, the case is somewhat different. There the respondent, Mahim Chandra Sarkar, has got possession of the property which was given to Hemangini by her grandmother, Ichhamoye, who had only a life-interest, But upon the death of Ichhamoye the property did not revert to Mahim Chandra Sarkar as the reversioner of her husband, because he had already made a valid bequest of it to his daughter Hara Kumari. She was, therefore, the sole reversioner and the property being vested in her and having descended to her heirs, their title cannot be extinct if they sue within 12 years of her death or within 12 years of Mahim Chandra Sarkar's assumption of adverse possession. It is, therefore, necessary to see when the plaintiffs were dispossessed. This was in Kartic 1306 corresponding to October 1899. They brought their suit on the 23th September 1910 well within 12 years of their dispossession.

16. The error committed by the lower Courts in deciding this suit appears to us to be that they erroneously held that the defendants, Mahim Chandra Sarkar, was the reversionary heir of Ichhmoye's husband, Ananda Lal Sarkar. Admittedly, this appeal depends like the others on the question of the construction of Ananda Lal's Will, and if Hara Kumari was Ananda Lal's reversionary heir in absolute estate as has been held in the other cases, it is clear that the defendant-respondent can have no title whatever as reversioner to Ananda Lal's estate. The estate vested in Hara Kumari and has descended to the plaintiffs and the defendant is a pure trespasser.

17. The only difficulty is that they claimed possession on the basis of the gift from Ichhamoye which, it is said, failed on her death, if the estate Ichhamoye took was the ordinary estate of a Hindu widow. But we agree with Maclean, C.J., that the estate she took was something more than this and that there is no reason why she should not take the life-interest plus the power of alienation which, though perhaps analogous to what is known as a power of appointment in

English Law, cannot be governed by the rules of English Law relating to such appointments. The Privy Council in *Bai Motivahu v. Bai Mamubai* 24 I.A. 93 : 21 B. 709 : 1 C.W.N. 366 expressly says that there is no application of the English Law of powers to Hindu Wills. In ordinary life-estates of Hindu widow, the gift of the widow would be taken not from her but from the testator; but here she had 5 absolute power of alienation in derogation of the rights of the sole reversioner, her daughter, who was only entitled to the residue. It would be idle to say that all alienations which Ichhamoye may have made to strangers of her own free will are recoverable by the defendant-respondent as reversioner. They are recoverable, if at all, only by Hara Kumari and her heirs.

18. We think, on the construction we have put on the Will, the gift to Hemangini and her sister was valid and that the defendant-respondent cannot plead his right as reversioner against a suit by the heirs of Hara Kumari to eject him as a trespasser, even though the gift by which they originally obtained title should fail. Before they brought the suit, they had added to it a better title which concludes the defendant who has no title whatever. To hold otherwise would be to interpret the Will in one sense in two of these appeals and in a different sense in the third.

19. For all these reasons, Appeal No. 1318 of 1913 is decreed and the plaintiffs are declared to be entitled to recover whatever portion of the property claimed appertains to the estate of Ananda Lal Sarkar as set out in the Will, unless it had already passed out of the estate before the date of the gift. To decide these questions it is necessary to remand the case to the lower Court for a decision on issues Nos. 9 and 15, which were not decided by the judgment in appeal. The lower Appellate Court will decide these issues if there is evidence on the record in regard to them, otherwise it will itself take such evidence or cause it to be taken by the Court of first instance and make a decree according to the directions contained in this judgment, that the plaintiffs do recover the lands to which they may be entitled under our judgment with costs in proportion to their success.