(1935) 02 PAT CK 0020

In the Patna High Court

Case No : Appeal No. 255 of 1930

Mt. Rameshwar Kuer and another — APPELLANT

Vs

Shiolal Upadhaya and others — RESPONDENT

Date of Decision : 20-02-1935

Acts Referred:

Citation : (1935) 02 PAT CK 0020

Judgement

Courtney Terrell, C.J.—The main question to be decided in this appeal is the construction of a deed of gift dated 14th October 1917 executed by Mt. Ganga Kuer in favour of her three daughters of whom the youngest was Dhaneshar Kuer. This daughter in May 1921 married the plaintiff and she died, without issue surviving, in May 1923. The plaintiff sues the two surviving daughters Rameswar Kuer and Parmeshwar Kuer for a declaration that the deceased Dhaneshar Kuer became the absolute owner of the share of the property transferred to her by the deed of gift. The surviving daughters resist the claim on the ground that upon the death of Dhaneshar Kuer her share under the terms of the deed of gift passed to them. The deed of gift recites, as indeed is the undisputed fact, that the donor was the absolute owner of certain property therein specified and that she was recorded as the owner thereof in the Land Registration Office and was in possession. The deed continues thus:

I, the executant or my husband Have no heir other than the three aforesaid daughters; and after the death of me, the executant, the three daughters aforesaid shall be the share-holders proprietresses of the properties mentioned in both the deeds of sift aforesaid. All the three daughters aforesaid while living joint and joint in mess, keep me pleased and remain present in obedience and service of me, the executant. All the three daughters are minors and are under my protection and guardianship. Hence out of filial love it is my heartfelt desire to keep, a portion of the properties given in gift by virtue of the two deeds of gift aforesaid and to give the balance to my three daughters and put them in possession thereof in my lifetime; so that their obedience and services might be recompensed. Therefore I the executant of my own accord and free will in a sound state of my body and mind and in full enjoyment of my senses and all the legal functions, without any coercion or pressure being brought to bear upon me and without any illegal fraud and inducement and persuasion on the part of anyone else, have in equal shares given away in gift the milkiat property and houses, situate in the District of Gaya and Patna, full details and specifications whereof are given in the schedule of this deed, together with the entire right and appurtenances; in short, all the rights that I had in the aforesaid properties, the valuation whereof is Rs. 20,000 to Rameshar Kauri, wife of Mahabir Upadhya and Parmeshar Kuer and Dhaneshar Kuer, minor daughters of Babu Karu Upadhya deceased who are under the guardianship and protection of me, the executant, residents of Rajgir, Pargana Rajgir, District Patna, by caste Dakshini Brahmin, by occupation zamindari, and I have made all the three daughters as absolute proprietresses of the property given in gift and put them in possession and occupation as rightful owners thereof. I do hereby declare that by virtue of this deed of gilt, all the three daughters have, in proportion to their respective shares, acquired full and absolute title with rights of transfer, etc., in respect of the properties specified below. Whatever right, title and interest I, the executant, have in respect of the shares in the Mauzas and other properties specified below, given in gift, having been transferred and passed become vested in the three daughters by virtue of the deed of gift. Now I or my other heirs and representatives have no claim, demand or contention as against the three daughters and their heirs, in respect of the properties specified below, given in gift. If they make any claim contrary to the terms of this deed, it shall be held illegal by the Court. Now the three minor daughters should, under my guardianship, get their names recorded in the Land Registration Office in respect of the milkiat proprietary right.

2. It is clear that if the agreement had terminated at this point, each of the three daughters would be the absolute owner of a one-third share in the estate given. The difficulty arises by reason of the next concluding sentence of the deed:

If any daughter, out of the three, dies issueless the surviving daughters shall in equal shares be the absolute proprietresses of the properties specified below. I have therefore executed this deed of gift, so that it may be of use when required.

3. The contention, of the defendants, is that the deed must be read as a whole and that the effect of it is to confer upon each of the daughters in the first instance a life estate that if any daughter dies without issue surviving, her life estate terminates and passes to the surviving daughters and that on the death of a second daughter leaving no issue surviving, her estate will pass to the last of the daughters absolutely. On the other hand the plaintiff contends that each of the daughters took an absolute estate and that the last clause is merely an attempt to change the course of inheritance. It is suggested that the first part quoted of the document confers an absolute gift upon each of the daughters and that the subsequent clause is merely repugnant and void. It is conceded however that the intention of the donor was as the construction proposed by the

defendants would suggest, that is to say, that the donor intended to make a gift over to the surviving daughters if one of them should die issueless. It is first necessary to examine the terms of Ss 28 and 31, T.P. Act. S. 28 is as follows:

On a transfer of property an interest therein may be created to accrue to any person with the condition superadded that in case a specified uncertain event shall happen such interest shall pass to another person, or that in case a specified Uncertain event shall not happen such interest shall pass to another person. In each case the dispositions are subject to the rules contained in Ss. 10, 12, 21, 22, 23, 24, 25 and 27.

4. On behalf of the plaintiff it is argued that this section has no application and it is suggested that the words "interest" and "such interest" should be contrasted with the words "the thing bequeathed" in S. 131, Succession Act. It is argued that S. 28 refers only to a divestment of the donee during his or her life and that the interest referred to is the legal interest enjoyed by the first holder and not the property bequeathed as referred to in the Succession Act. So it is said that if the first donee enjoyed a life interest only, the life interest of the donee could not possibly pass to another person and if on the other hand the first donee took an absolute interest, the donor was unable to control the devolution of the property after the death of the absolute owner. In my opinion this construction is erroneous and the word "interest" has the same meaning ''as the "thing bequeathed" in the Succession Act, and providing that the deed of gift can be construed as the gift of a life estate to the first donee with a gift over in the case of the death of that first donee issueless. Then S. 28 is directly applicable to the case and the "specified uncertain event" in the deed will be the death without surviving issue of the first donee. The Transfer of Property Act, by S. 28, deals with a case in which on the happening of a specified uncertain event the property transferred is to pass to a second donee, whereas S. 31 refers to a mere censer of the first donee''s interest on the happening of a specified uncertain event in which case the property will, in ordinary cases, revert to the donor. To my mind this argument on behalf of the plaintiff based upon the suggested construction of S. 28 is unsound.

5. It was further contended that the law does not contemplate either in the case of a transfer inter vivos or in the case of a bequest, that an earlier clause conferring an absolute interest may be defeated by a later clause. The difference between a repugnant clause which is invalid and a clause of defeasance to which the Courts will give effect has been pointed out and I can not do better than quote the words of Chetty, J., in Govindaraja Pillai v. Mangalam Pillai, 1933 Mad 80 = 139 I C 867 = 63 M L J 911 at p. 913, where the Court had to construe a pre-nuptial settlement by a husband in favour of his wife in the following terms:

I have accordingly given you the undermentioned properties valued at Its. 1,000 and you shall yourself from this day hold and enjoy the same with all rights. Should any issue be born to us, that issue shall get the properties after our death. If there is no issue, after your death, your brothers should take the properties.

6. The wife pre-deceased the husband leaving no issue. The learned Judge said, in giving effect to the claim of the brothers:

The distinction between a repugnant provision and a defeasance provision is sometimes subtle, but the general principle of law seems to be that where the intention of the donor is to maintain the absolute estate conferred on the donee but he simply adds some restrictions in derogation of the incidents of such absolute ownership, such restrictive clauses would be repugnant to the absolute grant and therefore void; but where the grant of an absolute estate is expressly or impliedly made subject to defeasance on the happening of a contingency and where the effect of such defeasance would not be a violation of any rule of law, the original estate is curtailed and the gift over must be taken to be valid and operative.

7. It is clear in the case before us, that if the deceased daughter took an absolute estate, her disposition of the property could not be controlled; she would have the right to enjoy during her life as she thought best and to bequeath it after her death to whom, she would. The real question is whether she took an absolute estate or only a life estate. There have been many cases in which the Courts in construing a deed of gift or a will have found that the earlier clauses of the document if read by themselves and without reference to the rest of the document would confer an absolute estate, but that subsequent clauses if read with the earlier clauses indicate that the intention of the donor or testator as the case may be, was that the donee should have such a degree of power of disposing of the estate as should not be inconsistent with the subsequent enjoyment of the second donee on the happening of the specified uncertain event. The earliest of these cases was that of Bhoobun Mohini Debia v. Hurrish Chunder, (1879) 4 Cal 23 = 5 I A 138 = 3 Suther 537 = 3 Sar 815 (PC), where a Hindu granted a talook to his sister, K by a sanad in the follow terms:

You are my sister; J accordingly grant you as a talook for your support the three villages H.P. and K. belonging to my zamindari with all rights appertaining thereto, at a thatjama of Rs. 361. Being in possession of the lands and paying rent according to the tahutjama do you and the generations born of your womb successively enjoy the same. No other heir of yours shall have right or interest,

8. The opinion of the Privy Council delivered by Sir Robert Collier was that these words, had they stood exclusive of the last sentence, would have conferred an absolute estate upon K, but the last clause cut down this gift so that in the event of failure of issue living at the time of her death, the estate was to revert to the donor and his heirs, that there was nothing in such a condition repugnant to Hindu law, and, that as the uncertain event contemplated had not occurred, K was able to dispose of the property by will. In Sreemutty Soorjeemoney Dossoy v. Denobundoo Mullick, (1861-63) 9 M I A 123 = 1 Sar 837 (PC), a Hindu testator governed by Dayabhag law devised all his real and personal estate

among his five sons in equal shares. The will contained the following clauses:

Should any among my said five sons die, not leaving any son from his loins, nor any son''s son, in that event neither his widow nor his daughter nor his daughter''s son, nor any of them will get any share out of the share that he has obtained of the immovables and moveable of my said estate. In that event, of the said property, such of my sons and my son''s son as shall then be alive, they will receive that wealth according to their respective shares.

9. On the construction of the will that the uncertain event was a failure of male issue of any one of his sons at the time of the death of that son, it was held that the gift over was not inconsistent with the general principles of Hindu law and therefore the gift over was valid. The precise terms of the first gift arc not described in detail in the report. This case of Sreemutty Soorjeemoney Dossoy v. Denobundoo Mullick, (1861-63) 9 M I A 123 = 1 Sar 837 (PC), was explained by the Privy Council in the subsequent case of Kristoromoni Dasi v. Narendra Krishna Bahadur. (1889) 16 Cal 383 = 16 I A 29 = 5 Sar 235 (PC):

In stating the rule relating to the defeasance of a prior absolute interest by a subsequent event, it is important to add, first, that the event must happen, if at all, immediately on the close of a life in being at the time of the gift, as was laid down in Sreemutty Soorjeemoney Dossoy v. Denobundoo Mullick, (1861-63) 9 M I A 123 = 1 Sar 837 (PC), and, secondly, that a defeasance by way of gift over must be in favour of somebody in existence at the time of the gift, as laid down in Jotendromohan Tagore v. Gunendra Mohan Tagore, (1872) I A Sup Vol 47 = 9 Beng L R 377 = 13 W R 359 = 2 Suther 692 = 3 Sar 82 (PC).

10. Their Lordships also dealt with the case of Bhoobun Mohini Debia v. Hurrish Chunder (1879) 4 Cal 23 = 5 I.A. 138 = 3 Suther 537 = 3 Sar 815 (PC), above referred to and explained the decision saying

In effect the construction was that, if Kasiswari left issue, the absolute interest given to her in the first instance was to remain unaffected, but if she left none, it was cut down to a life interest. In the latter case nothing had passed from the donor but the life interest, and when that was spent, he or his heir would lawfully re-enter.

11. The last sentence makes it clear that in the case of a valid defeasance clause, it is not the case that the first donee will when the document takes effect, take an absolute estate which subsequently on the happening of the uncertain event is to be cut down to a life interest, nor is it the case that the first donee will, when the document takes effect, take a life interest which will Subsequently ripen into an absolute estate; it is merely that when the document takes effect (in the case of a will on the death of the testator, in the case of a transfer inter vivos on the execution of the document), the first donee will take a life interest and in cither case on the death of the first donee, the full estate will pass to the person designated by the gift over. If the gift over is to have any effect, the terms of the bequest taken as a whole must not confer an absolute estate on the

first donee, for if the further interests arc given merely after or on the termination of the first donee''s absolute interest, the absolute, interest is not cut down and the further interests will fail. This was pointed out in Partap Chand v. Makhani, 1933 Lah 365 = 144 I C 651 = 14 Lah 485. With the particular document in question which was construed in that case we are not concerned, nor is the whole of it set forth in the report, it is sufficient to state the conclusion as to its construction in the words of Tek Chand, J., at p. 492:

After a careful perusal of the will as a whole, I have no doubt that the provision in the last clause, relating to the gifts to the daughters, is not in defeasance of the absolute estate conferred on the two widows in the earlier clauses, but is a ''gift over'' of the property of each widow on the termination of her life. If this is the correct interpretation of the will, there can be no doubt that the ''gift over'' is void and must be considered as non-existent in the eye of the law. The proposition of law is firmly established that if an estate is given in terms which confer an aborted estate on the donee, and then further interests are given merely after or on the termination of that donee''s interest, his absolute interest is not cut down and the further interests fail.

12. See also Sures Chandra Palit and Another Vs. Lalit Mohan Dutta Chaudhuri and Others, . The case of Saraju Bala Devi v. Joytirmoyee Debi, 1931 P C 179 = 134 I C 648 = 58 I A 270 = 59 Cal 142 (PC), is one which illustrates the class of invalid repugnant clauses mentioned by Chetty, J. An absolute estate was given with a condition that it was not to be transferred by gift except to a limited extent for religious purposes. This condition of course was held to be void. As in the case before us the word "malik mustaqil" was used to indicate the interest conferred, and as to the use of this word their Lordships said (p. 277):

The word ''malik'' imports full proprietary rights, unless there is something in the context to indicate an intention to the contrary.

13. It was held that there was nothing to the contrary in the documents concerned. There was also a defeasance clause whereby the properties were to revert

if the particular heirs of you, whose rights have been mentioned in respect of the lands of this patta, cease to exist.

14. Sir Dinshah Mulla in delivering the judgment of their Lordships of the Privy Council said referring to this supposed defeasance clause:

The conditions referred to above are followed by a defeasance clause which provides that if the persons designated as the heirs of Kirpamoyee (legatee) that is, her sons, their male descendants, and her daughters ''cease to exist, the taluks should revert to the Raja and his heirs. A Hindu, no doubt, may give property by way of executor gift upon an event which is to happen, if at all, immediately on the close of a life in being and in favour of a person born at the date of the gift and such a gift over might be a sufficient indication that only a life estate to the first taker was intended: Sreemutty Soorjeemoney Dossoy v. Denobundoo Mullick, (1861-63) 9 M I A 123 = 1 Sar 837 (PC) and Jotendromohan Tagore v. Gunendra Mohan Tagore, (1872) I A Sup Vol 47 = 9 Beng L R 377 = 13 W R 359 = 2 Suther 692 = 3 Sar 82 (PC). That however is not the case here. The event which is referred to in the leases is an indefinite failure of the male issue of Kirpamoyee and the attempted gift over is therefore void.

15. This decision is of interest not on account of the construction'' of the particular document in question, but by reason of the fact that it expressly contemplates that the earlier part of the document may appear to grant an absolute estate, but that the gift over may be a sufficient indication that only a life estate to the first taker is intended. I now turn to the particular document in question adopting the following shortly summarised principles of construction:

(a) The document must be read as whole (b) the intention of the testator in so far as it can be obtained from the document as a whole mast be given effect to; (e) that notwithstanding the earlier clauses if read by themselves and without reference to later clauses would confer on the donee an absolute estate, yet the subsequent clauses may indicate that such was not the donor''s intention and that in some cases a gift over by itself may be enough to negative the contention and further, as was admitted on behalf of the plaintiff, firstly that the intention of the donor in this particular case was clearly to give the first donee a life estate with a gift over on the happening of her death without surviving issue; secondly, that if the effect of the document as a whole is as intended by the donor, there is nothing in such intention repugnant to the general provisions of Hindu Law.

16. There can be no doubt that the earlier clause, if considered by itself, would in fact confer an absolute interest on the deceased, but the throe daughters were alive at the date when the deed came into operation. It is clear that the donor did not intend that the property should go to another family, but should continue as long as possible in the hands of her daughters and the survivors of them. The desire was perfectly natural. Much stress has been laid on behalf of the plaintiff upon the earlier provision that each daughter is to have a free right of disposal of the property. But in so far as the intention of the donor can be gathered from the document, it cannot have been in contemplation that either of the daughters would be at liberty so to dispose of her share of the property in her lifetime as to defeat the intention expressed in the last clause, indeed the argument on behalf of the plaintiff was put very frankly as an invitation to us to disregard the last clause altogether notwithstanding the admission that the intention of the donor as therein expressed, and it was argued that the donor had inadvertently defeated her own intention by absoluteness of the earlier clause. I have no doubt as to the meaning of the deed of gift taken as a whole and upon an examination of the authorities above referred to we are at liberty as a matter of law to give effect to that meaning notwithstanding that if the document had consisted of the earlier clause only it would have had a different meaning.

17. I am unable to agree with the judgment of the Subordinate Judge and I would reverse Ms decision and dismiss this suit with costs to be paid by the plaintiff throughout.

Dhavle, J.

I agree.

18. After making the daughters "absolute proprietresses" (malik mustaqil) of the property given in gift and putting them in possession as rightful owners, and declaring that they have acquired a "full and absolute title with rights of possession, transfer, etc." the deed of gift provides that

ii any daughter out of the three dies issueless, the surviving daughters shall in equal shares be absolute proprietresses of the property......

19. The question is whether we have here a defeasance by way of gift over of the "full and absolute title" (milkiat mustaqil) that the donor appears in the first instance to have transferred to the three daughters, or an attempt by her to create an interest in favour of the surviving daughters merely after or on the termination of the prior interest created in favour of Dhaneshar Kuer, wife of the respondent Sheolal Upadhaya, upon her dying without issue. If the latter be the case the appellants must fail, as has been held by the lower Court; if Ganga Kuer, the donor, made an unconditional grant of the absolute interest in favour of the three daughters, it was not open to her to alter the ordinary course of succession upon Dhaneshar Kuer''s death, whether with or without issue. The deed of gift must however be construed as a whole and effect given to the donor''s intention as gathered from the deed so read, taken with the surrounding circumstances (though not with the statements she was called into the witness box to make), unless there be anything contrary to law in it. The first part of the disposition taken by itself undoubtedly confers the full and absolute title to the l-3rd share in dispute upon the daughter now deceased, but it is not a sound construction of the deed to give effect to this part by itself, and treat the part contingent upon the death of Dhaneshar Kuer without issue, as inoperative by reason merely of its apparent inconsistency with the prior grant of the milkiat mustaqil. In Indira Rani Ghosh v. Akhoy Kumar Ghosh, 1932 P C 269 = 140 I C 433 = 59 I A 419 = 60 Cal 551 (PC), their Lordships observed in connation with a will that

A conscious intention on the part of a testator to dispose of property in the hands of another person under a gift from himself is not lightly to be imputed,

20. And a similar consideration may well be applied to gifts. S. 23, T.P. Act, which is applicable to Hindus provides for an "ulterior transfer conditional on happening of specified event", as the marginal note puts it, and section 23 which applies in such cases dealing with transfer contingent on happening of specified uncertain event, lays down that where no time is mentioned for the, occurrence of the uncertain event, the later interest fails unless such event happens before or at

the same time as the prior interest ceases to exist. The law is well settled that a Hindu may give property by way of executory gift upon an event which is to happen, if at all, immediately on the close of a life hi being and in favour of a person born at the date of the gift, conditions which are satisfied in the present case. The rule of construction applicable to deeds of gift is well illustrated in more than one authoritative decision. In Bhoobun Mohini Debia v. Hurrish Chunder (1879) 4 Cal 23 = 5 I.A. 138 = 3 Suther 537 = 3 Sar 815 (PC), their Lordships of the Judicial Committee dealt with the gift of a taluk to a sister for her support. The warrant was coupled with the words that the donee and the generations born of her womb successively were to enjoy the same, upon which it was held that the terms imported an absolute estate, no inference arising that the donor had an English estate-tail in his contemplation. Then followed the words, "no other heir of yours shall have right or interest", and their Lordships decided that the effect of these words was to make the absolute estate, before given defensible in the event of a failure of issue living at the time of her death, in which event the estate was to revert to the donor and his heirs.

21. As there was nothing in such a condition repugnant to Hindu law, their Lordships held that the donee had taken the whole estate, defensible on the happening of an event which did not occur, and that she had therefore an estate which she could dispose of by a will. It is true that this case differs from the case before us in two respects; there was no gift over in that case, and the clause of defeasance did not actually come into operation because the donee did have issue living at the time of her death. These differences however do not seem to affect the principle of construction for grants of this kind. S. 28, T.P. Act, places a defeasance by way of gift over on much the same footing so far as the present case is concerned, as S. 31 does to

condition that, transfer shall cease to have effect in case specified uncertain event happens or does not happen.

22. and the actual happening or not happening of the specified uncertain event upon which the defeasance is to come into force, will make no difference in the interpretation of the deed as it stands. The important thing to notice is that in Bhoobun Mohini Debia v. Hurrish Chunder (1879) 4 Cal 23 = 5 I.A. 138 = 3 Suther 537 = 3 Sar 815 (PC), their Lordships of the Judicial Committee did not consider the clause of defeasance void as being repugnant to the absolute estate already given, and that they gave effect to both parts of the deed of gift by holding in effect, upon the construction of the deed, that:

If Kasiswari loft issue, the absolute interest given to her in the first instance was to remain unaffected, but if she left none, it was cut down to a life interest. In the latter ease, nothing had passed from the donor but the life interest, and when that was spent, he or his heir would lawfully re-enter, to quote Lord Hothouse in Kristoromoni Dasi v. Narendra Krishna Bahadur. (1889) 16 Cal 383 = 16 I A 29 = 5 Sar 235 (PC).

23. Some stress was laid on behalf of the respondents on the power given to the daughters to transfer their interest, but it is plain that this power does not add anything to the "milkiat mustaqil" and does not give the donees any different estate from what Kasiswari, the donee in Bhoobun Mohini Debia v. Hurrish Chunder (1879) 4 Cal 23 = 5 I.A. 138 = 3 Suther 537 = 3 Sar 815 (PC), would have taken in the absence of the defeasance implied in the provision "no other heir of yours shall have right or interest." In Saraju Bala Devi v. Joytirmoyee Debi, 1931 P C 179 = 134 I C 648 = 58 I A 270 = 59 Cal 142 (PC), their Lordships of the Judicial Committee were again dealing with leases which conferred upon the lessee "an absolute estate as effectively as if she was constituted ''malik'' of the properties." The grants were followed by defeasance clauses which provided that if the persons designated as the heirs of the lessee "cease to exist", the taluks should revert to the donor and his heirs. Their Lordships referred to the power of a Hindu to give property by way of executory gift upon a specified uncertain event, and observed that

such a gift over might be a sufficient indication that only a life estate to the first taker was intended: Sreemutty Soorjeemoney Dossoy v. Denobundoo Mullick, (1861-63) 9 M I A 123 = 1 Sar 837 (PC) and Jotendromohan Tagore v. Gunendra Mohan Tagore, (1872) I A Sup Vol 47 = 9 Beng L R 377 = 13 W R 359 = 2 Suther 692 = 3 Sar 82 (PC). That however is not the case here. The event which is referred to in the leases is an indefinite failure of the male issue of Kripamoyee, and the attempted gift is therefore void.

24. As I have already indicated, the gift over in the present case is not opposed to the law applicable to Hindus, and it seems to me that reading the deed of gift as a whole, the donor''s obvious and natural intention of keeping the property as long as possible in the hands of her daughters, and failing issue, the survivors of them, is not defeated by the mere fact that the estate she confers upon the daughters is expressed in the first instance as an absolute estate. As Bhoobun Mohini Debia v. Hurrish Chunder (1879) 4 Cal 23 = 5 I.A. 138 = 3 Suther 537 = 3 Sar 815 (PC), that estate is cut down to a life interest by the defeasance by way of gift over which is in no way contrary to the law applicable. Dhaneshar died without issue and her 1-3rd share in the properties therefore passed to the surviving sisters, the appellant before us.

