

(1933) 03 PAT CK 0003
In the Patna High Court

Nakshetramali Dei

APPELLANT

Vs

Brajasunder Das

RESPONDENT

Date of Decision : 01-03-1933

Acts Referred:

Succession Act, 1925 — Section 112, 136, 96

Citation : AIR 1933 Patna 647(1)

Judgement

1. These two appeals arise out of a suit brought by one Nakshetramali Dei, one of the daughters of Rai Bahadur Sudan Charan Naik, for the construction of a will left by him. The principal relief claimed by her is set out in the plaint in these terms:

"That on a proper construction of the document, dated 9th January 1925, propounded as the last will and testament of the late Rai Bahadur Sudani Charan Naik, let it be declared that the disposition made by the deceased of his properties by the said document are invalid, inoperative and void and as such the said properties have vested in his legal heirs, namely, the plaintiff and defendants 8 and 9."

Sudani Charan Naik died on 31st January 1925, leaving behind three daughters, one of whom is the plaintiff and the other two are defendants 8 and 9 in the suit.

2. His only son Kishore Charan Naik had died during his lifetime and the latter's widow is defendant 1 and their daughter is defendant 2. The other defendants in the suit are the husbands of defendants 8 and 9, their sons, one Lakshmidhar Mahanty (one of the executors under the will) and his two sons. The will after making certain bequests provides in effect that the person referred to in Clause 1 as the "heir" is to be the residuary legatee.

3. The only clauses of the will with which we are concerned in these appeals are the following:

1. Lalmohan's first male child by the present wife to be heir; in default of any male child being born to him or dying in childhood either a son of Lakshmidhar or

Gopal to be heir, The boy should live with the daughter-in-law as her adopted son.

"2. Cuttack house will pass absolutely to Lalmohan subject to the condition that he lives there with the daughter-in-law and her daughter who shall have the right to live there during life.

"3. Rs. 10,000 should be set apart in a fund the income of which the executors shall apply to the relief of any poor and deserving Karan family or families or individuals in shape of necessities of life in times of distress, medical or educational aid, help for marriage of daughter or such other deserving cause.

"4. The residue to be administered by the executors for the benefit of the heir to pass to him absolutely on his attaining the age of 21 years."

Now, there is considerable difference of opinion among the parties as to the construction and the effect of the first clause. It is argued on behalf of the plaintiff (the appellant in Appeal No. 5) that the bequest under this clause cannot take effect as it is void for uncertainty. Defendants 2 and 9 who are appellants in Appeal No. 6 state on affidavit that a son has been recently born to them (the actual date of birth is stated to be 15th August 1932) and contend in the first place that the newly born son should be taken to be "the heir" referred to in Clause 1 of the will and secondly, that if this contention is not accepted, Clause 1 of the will should be held to be void for uncertainty, and it should be declared that the property left by the testator devolves upon his three daughters who are his natural heirs.

4. On the other hand it is contended on behalf of respondents 3 to 5 that the second son of defendant 3 (Lakshmidhar) is the person who will be the residuary legatee under the will, whereas the case of respondents 6 and 7, the two sons of Gopal, is that defendant 7, the second son of Gopal, will be the residuary legatee. Defendant 10 in her written statement does not admit that Clause 1 in the will is void for uncertainty and adds:

Though Babu Lakshmidhar Mahanty and Babu Gopal Chandra Patnaik had two sons each at the time of death of Rai Bahadur Sudani Charan Naik, yet the intention of the testator was perfectly clear, viz., in speaking of a son of Lakshmidhar or a son of Gopal he meant their second sons.

5. In her evidence also she does not commit herself any further on the point as we shall see presently. We will first deal with the question whether Lalmohan's newly born son can be held to be "the heir" under Clause 1 of the will. The learned Subordinate Judge has dealt with this point as follows:

Now it has been admitted and also proved in this case that defendant 2 and defendant 9 had no male child at the testator's death, so that the first clause is bound to fail. Surely it could not mean that any male child who may be born at any time even after the testator's death should be the heir. This was conceded by the learned pleader who argued defendant 2's case.

In our opinion the view taken by the learned Subordinate Judge is correct. It is argued on behalf of Lalmohan (defendant 2) and his wife that the exception to Section 112, Succession Act, will apply to the present case and reliance is placed on the last clause of the will which provides that:

the residue is to be administered by the executors for the benefit of the heir to pass to him absolutely on his attaining the age of 21 years,

6. It is contended that the object of the testator was to postpone the legacy until the heir in question had attained the age of 21 years and, therefore, it was not necessary that the son of Lalmohan should have been in existence at the time of the testator's death. Mr. B.K. Ray who appeared on behalf of the appellant in Appeal No. 6 soon saw the flaw in his argument. Section 112 lays down in the first instance that a bequest to a person not in existence at the time of the testator's death is void. The exception which follows provides:

If property is bequeathed to a person described as standing in a particular degree of kindred to a specified individual, but his possession of it is deferred until a time later than the death of the testator by reason of a prior bequest or otherwise; and if a person answering the description is alive at the death of the testator, or comes into existence between that event and such later time, the property shall at such later time go to that person, or, if he is dead, to his representatives.

7. In our opinion the exception is wholly inapplicable to the present case. No son of Lalmohan was in existence at the time of the testator's death and it could not have been within the contemplation of the testator that the operation of the bequest should be suspended indefinitely until a son was born to Lalmohan, no matter how long after the death of the testator that event might take place. The testator in fact had in view the possibility that a son might never be born to Lalmohan and so he made an alternative bequest in favour of "a son" of Lakshmidhar or Gopal. The fourth clause on which Mr. B.K. Ray relies does not postpone the operation of the bequest in favour of the residuary legatee indefinitely.

8. On the other hand it clearly implies that the property would vest in the "heir," whoever he may be, as soon as certain legacies have been paid out, but it would be administered by the executors until he has attained the age of 21 years.

Again Section 112 is subject to the restriction No. 1, Schedule 3 of the Act which says:

Nothing therein contained shall authorise a testator to bequeath property which he could not have alienated inter vivos.

In *Dinesh Chandra v. Biraj Kamini Dasi* (1911) 39 Cal 87 which was strongly relied upon by Mr. Ray, Mookerjee, J., pointed out that the cardinal rule governing Hindu wills is that a person capable of taking under a will must be such a person as could take the gift inter vivos and therefore must either in fact

or in contemplation of law be in existence at the death of the testator. Mr. B.K. Ray admits that it had been conceded on behalf of defendant 2 before the trial Judge that a son of Lalmohan could succeed to the estate under the first clause only if he had been in existence at the time of the testator's death. In our opinion Lalmonan's newly born son cannot be treated as the heir within the first clause of the will.

9. There still remains the question of the construction of the remaining part of the first clause.

Mr. Chatterji who appears on behalf of Lakshmidhar and his two sons contends in the first place that extrinsic evidence would be admissible in the present case to show which of the two sons of Lakshmidhar and Gopal were referred to by the testator in Clause 1 of the will and then proceeds to show that defendant 10 has clearly stated in her deposition that the second sons of Lakshmidhar and Gopal respectively were intended to be benefited by the testator and that defendant 10 was not asked a single question in cross-examination to show that her statement on that point was challenged as incorrect. Lastly, it is argued by him that the words "either the son of Lakshmidhar or Gopal" should, in view of the evidence adduced in the case, be taken to mean "the second son of Lakshmidhar or the second son of Gopal;" that the bequest made in this case was an alternative bequest as provided in Section 96, Succession Act, and it meant that the second son of Lakshmidhar was to succeed in the first instance as an heir and that failing him the second son of Gopal was to be the heir.

10. This argument was accepted by the learned trial Judge who has relied in his decision upon a certain passage in Jarman on Wills. This passage was referred to more than once in the course of the arguments in the Court. It runs as follows:

A gift in favour of "one child of A" or "a son of A" may appear from the context to mean the eldest (or only) child of A.... In the case above put of a gift to "one of the sons" of J S, he having several sons, parol evidence is not admissible to remove the uncertainty, because the uncertainty is apparent on the face of the will, the terms of which suppose the existence of more than one son, and moreover show that the testator had not determined which of them to make the object of his bounty. If however the gift is to "the son of my brother A" and it appears that A has two or more sons, extrinsic evidence is admissible in the first instance to show whether the testator had reasons for preferring one son, and if no such evidence is forthcoming evidence is admissible to show which son the testator intended to benefit."

11. This passage refers to three groups of cases in which the beneficiary is referred to either as "a son of A" or as "one of the sons of A" or as "the son of A." The learned Subordinate Judge is of opinion that the present case is similar to the case where the gift was made in favour of "a son of A" and upon the evidence of defendant 10 he holds that the persons referred to are the second sons of Lakshmidhar and Gopal respectively. He seems however to have ignored

the fact that what Mr. Jarman says is that:

A gift in favour of "one child of A" or "a son of A" may appear from the context to mean the eldest (or only) child of A....

There is a good deal of difference between the intention of the testator being apparent from the context and it being necessary to prove it by means of extrinsic evidence.

12. No cases were cited at the Bar, but at pp. 446 and 447 of Jarman and Wills the cases of Powell v. Davies (1839) 1 Beav 532, Ashburner v. Wilson (1350) 17 Sim 204 and Wilson v. Wilson (1847) 1 De G & S 152 are referred to. In Powell v. Davies (1839) 1 Beav 532, the property devised was to be divided into four parts between one child of A, one child of B, one child of C and one child of D. At the time of making the will and at the death of the testator B had only a child, namely, a daughter, but after the testator's death B had a son. At the death of A there were children, both sons and daughters of A, C and D. It was held that the daughter of B and the eldest child of A, C and D respectively, whether a son or daughter, who came into esse after the testator's death were entitled. In Ashburner v. Wilson (1350) 17 Sim 204, the devise to "a son of my nephew A" was held to operate in favour of the first born son of A. In Wilson v. Wilson (1847) 1 De G & S 152 one of the annuities was directed by a will to be paid to the widow so long as she should live and if she had any child born, such sum was to be continued for its life. It was held that the direction applied to the eldest child only.

13. In none of these cases extrinsic evidence appears to have been allowed to prove the intention of the testator. In the present case there is nothing in the will to show which of the two sons of Lakshmidhar or Gopal was intended to be benefited by the testator under will. A case like the present is somewhat different from a case where the son intended to be benefited is particularized and is described as "the son of A," and in our opinion extrinsic evidence is not admissible in order to show which particular son of Lakshmidhar or Gopal was intended to be benefited by the testator. It is not the case of any of the parties to this litigation that the testator might have referred to the eldest son of Lakshmidhar or Gopal.

14. On the other hand the only contention before us is that the testator meant the second son of Lakshmidhar and the second son of Gopal. This contention cannot be accepted without referring to the extrinsic evidence in the case and once it is held that extrinsic evidence is not admissible, there can be no escape from the conclusion that the first clause of the will is void for uncertainty. Assuming however that extrinsic evidence is admissible there still remains the question whether the evidence that has been adduced in this case is of any material assistance in construing the will. The only witness whose evidence throws any light on the intention of the testator is defendant 10.

15. The important passage in her evidence on which reliance has been placed on

behalf of defendant 3 runs thus:

I had a talk with him (the testator) before he executed the will. That was about a month before his death, He told me then thus--that he would make all arrangements for my convenience.... That I should have an adopted son in either Budha or Belu, that they would be regarded as my own son and live with me. That he who would be adopted by me would be regarded as my son.... That I should adopt a son of Lalmohah if a son is born to him. That in case Lalmohan should have no son, I should adopt Budha. Budha is the younger (second son) of Mina Dei, wife of Rai Bahadur Lakshmidhar. That if Budha be not available for adoption I should adopt Belu, the son of Kalyani Dei, wife of Gopal Babu.

Defendant 10 was cross-examined on behalf of defendant 3 as well as of defendants 6 and 7, sons of Gopal. Cross-examined on behalf of "defendants 6 and 7, she made the following statement:

My husband very often expressed the desire to have Belu as his adopted son.... On one occasion there was a talk in the presence of Sudam Babu and myself and the wife of Lakshmidhar about the management of properties. There was a talk then as to who would be the adopted son of myself. It was settled there that Belu would be my adopted son. I cannot say if that decision was in accordance with the wishes of Sudam Babu.

16. This statement would go to show that it had been settled among certain relations on a certain occasion that Belu, the second son of Gopal, would be the adopted son. When cross-examined on behalf of defendant 3 however she made the following statement:

Sudam loved Budha very much. My husband liked Budha very much. He also expressed his desire to adopt Budha as he was saying for others.

These statements as well as some other statements made by her make it difficult for the Court to decide what value should be attached to the evidence given by her as to the intention of the testator. Assuming however that the statement made by her in the examination-in-chief is to be accepted in its entirety the comment which it seems pertinent to make here is that she could not legally adopt either Budha or Belu and this is conceded by all the parties to this litigation.

17. Once it is found that she had no power to adopt for her husband and therefore none of the four boys was legally "available for adoption" one is left to speculate as to the precise intention of the testator. It is said that the testator did not mean that there should be an adoption in the strict and legal sense of the term, but that whoever the boy may be who is selected he should occupy to all intents and purposes the position of an adopted son. This may have been the intention of the testator, but to our mind this introduces a further element of uncertainty in the will because in that case any one of the four boys may at any time come forward and claim that he is available for adoption. Defendant 10

does not say anywhere in her evidence if the fact of a particular boy being available for adoption depends upon the wish of his parents or upon his own willingness to be treated as an adopted child. In our opinion the extrinsic evidence in this case is of a very vague character and even if such evidence as has been adduced is held to be admissible it would be difficult to say with any degree of certainty as to what was really intended by the testator.

18. The appellants in both the appeals have laid great stress upon the fact that the will is not in the form in which an alternative bequest is usually made and the word "either" occurring before "a son of Lakshmidhar" indicates that the testator was himself indifferent as to whether a son of Lakshmidhar or a son of Gopal was to become the residuary legatee and all that he intended was that one of these persons should succeed as an "heir."

We recognise that no undue weight should be attached to the word "either"; but having regard to the whole context and also to the fact that the testator might have well dropped the word "either" if he meant to make an alternative bequest in the sense in which such bequest is contemplated in law, it appears to us that the word "either" does add to the difficulties of the construction. It is no doubt true that the will should be construed as liberally as possible and every attempt should be made to give effect to the intention of the testator, but in this particular case the testator has chosen to draft the will in such a form that the element of uncertainty cannot altogether be eliminated.

19. It is conceded by every one concerned that the testator was a well educated and enlightened person and if by "a son" of Lakshmidhar he definitely meant Budha and by "a son" of Gopal he meant Belu, there was nothing to prevent him from expressing his intention in clearer and more precise terms. Why he left it so vague it is difficult to say. It may perhaps be said that what the testator really meant was that Lalmohan's first child should be the heir and in default of such a child any of the sons of Lakshmidhar or Gopal who might be able to live with his daughter-in-law as her adopted son should be the "heir." Unfortunately however the first clause cannot take effect because no child of Lalmohan was in existence at the time of the testator's death. As regards the second clause if a boy had been adopted or chosen to be treated like an adopted son by the testator's daughter-in-law during the lifetime of the testator something could be said in favour of such a boy. It is however conceded on all sides that defendant 10 has not yet adopted or selected any of the sons of Lakshmidhar or Gopal and there is nothing in her evidence to suggest her own preference for one of these boys over the other.

20. In this state of confusion we are constrained to hold that Clause 1 of the will is void for uncertainty and the law will therefore take its course and the natural heirs of Rai Bahadur Sudam Charan Naik, that is to say, the three daughters, will get the properties.

In Clause 2 of the will the house at Cuttack is given absolutely to Lalmohan

subject to the condition that he lives there with defendant 10 and her daughter. The Subordinate Judge has held that this clause is inoperative because in the first place Lalmohan has not fulfilled the condition, that is to say, he has not been living with defendant 10 and her daughter; and in the second place he has made himself unfit to live with her in the sense in which the testator intended him to live by reason of the fact that he has embraced the Christian religion.

21. A good deal of argument was advanced before us as to whether mere conversion to Christianity would affect his right under the will in respect of the house and it was argued on the one hand that the condition imposed upon him was merely one of residence and not of "messing" with defendant 10 and her daughter and therefore it can yet be easily fulfilled; and on the other, that what the testator intended was that they should live as members of the same family and that such residence involves the idea of being able to live in a common mess. It appears to us that the real object of the testator was that his daughter-in-law who was a widow and her daughter should not live alone in the house but that there should be a male relative to look after them and with this object he chose Lalmohan, one of his sons-in-law to whom he intended to give the house subject to the life estate conferred upon defendant 10. The mere fact, therefore that Lalmohan has become a Christian, although it might perhaps make his relations with defendant 10 less cordial, would not prevent his living in the house with her and looking after her. There however remains the question of fact whether Lalmohan has been living with defendant 10 since the death of Sudam Babu or not. On this question we are inclined to accept the finding of the learned trial Judge who had the advantage of seeing the witnesses who were examined in this case, that Lalmohan has not fulfilled this condition.

22. It appears that Lalmohan is a pleader who was formerly practising at Beharampur, a different district altogether which is at a long distance from Cuttack, and he embraced Christianity a year after Sudam Babu's death and since then he has been working as a preacher. He says that he used to reside at Beharampur when he was practising as a pleader there, but during vacation he used to come to Cuttack. This shows that he has not been living continuously in the house. He admits that after Sudam Babu's death he lived in the house for about two months; then he went away. He further says that after becoming a Christian he lived in the house in May, June and part of July 1927. Reading the entire evidence of this witness as well as of the other witnesses one can see that Lalmohan has not been living continuously with defendant 10 and her daughter in the house at Cuttack and that his visits to Cuttack have not been very frequent and although on certain occasions he probably did stop in that house, on several other occasions he stopped in other houses and that he has not lived in the house for some time past.

23. It is unnecessary to decide whether the condition of residence imposed in this case is a condition precedent or condition subsequent. In our opinion the condition imposed by the testator is one which is contemplated in Section 136,

Succession Act. It is true that the testator has not said in so many words that the bequest shall cease to have effect or that the subject-matter of the bequest shall go to another person if the legatee does not perform certain acts, but it appears to us that this is what in substance was meant by the testator, and his intention must be given effect to. In our opinion the decision of the learned trial Judge is correct on this point and this part of the bequest fails.

24. The only other clause in the will which remains to be construed is what we have described as Clause 3 which directs the executors to apply Rs. 10,000 to the relief of any poor and deserving Karan family or families or individuals. Here also we find ourselves in complete agreement with the learned Subordinate Judge and we think that this part of the will must be held to be operative. The bequest under the clause is merely a charitable bequest and, as has been remarked in many decisions, the essential feature of most of the charitable trusts is that the beneficiaries are an uncertain and indefinite class of persons described in general, often fluctuating and changing in their individual numbers.

25. It appears to us that the words used by the testator here are sufficiently certain and descriptive to indicate the class of persona whom the testator intended to benefit, and the learned Subordinate Judge has rightly held that the principle laid down in *Manorama Dassi v. Kali Charan Banerjee* (1903) 31 Cal 166 applies to this case. Clause 4 of the will has been quoted by us merely because Mr. Ray appearing on behalf of the appellant in Appeal No. 6 relied upon it in construing Clause 1 of the will. So far as the other clauses of the will are concerned they have been all construed by the learned Subordinate Judge and they are not the subject-matter of any of the appeals before us.

26. The result is that the appeals are allowed to this extent: that Clause 1 of the will is declared to be void on account of uncertainty and the decision of the learned Subordinate Judge is varied to that extent and in other respects his decision is upheld. Costs of the suit will not be borne by the parties, but the appellants will get their costs out of the estate in the hands of the executors. Hearing fee in Appeal No. 5 will be assessed at ten gold mohurs and in Appeal No. 6 at 5 gold mohurs.