

(1922) 04 CAL CK 0004
In the Calcutta High Court

Ramkamal Banik Saha

APPELLANT

Vs

Syam Sunder Banik Saha

RESPONDENT

Date of Decision : 12-04-1922

Acts Referred:

Citation : 75 Ind. Cas. 41

Hon'ble Judges : Chotzner, J;Asutosh Mookerjee, J

Bench : Division Bench

Judgement

1. This appeal is directed against a decree of dismissal made in a suit for construction of a Will. One Krishna Prosad Saha Banik, the father of the plaintiffs and the first defendant made a testamentary disposition of his properties on the 30th April 1897. Probate was taken by the executors on the 13th September 1897. The present suit was instituted on the 15th August 1919 for construction of the Will and for a declaration that the testator has died intestate with regard to all his properties except what he had specifically bequeathed to his widow, and that the plaintiffs had thereupon become entitled to two-thirds share of the estate left by their father by right of inheritance. The suit was defended on a variety of grounds which need not be enumerated for our present purpose. It is sufficient to state that the suit has been dismissed as barred by limitation. The Subordinate Judge has held that right to sue for declaration that the father of the plaintiffs had died intestate and that they had thereupon taken shares as heirs to the properties left by him, must be deemed to have arisen from the time when the first defendant, the surviving executor, put in an application for Probate of the Will or at the latest when the will was proved.

2. The point in controversy in the present appeal is whether this view of the law is well-founded. The plaintiff has not disputed that the period of limitation applicable is that provided in Article 120 of the Second Schedule to the Indian Limitation Act which provides that a suit for which no period of limitation is provided elsewhere in the Schedule must be instituted within six years from the date when the right to sue accrues. The defendant also has invoked the aid of

the Article; but the parties are not agreed as to the interpretation of the provision in the third column, namely, what is the point of time when the right to sue accrues in cases of this description where the plaintiff seeks to have construction of a Will. The question appears to have been considered by this Court in the case of Chukkun Lal Roy v. Lolit Mohan Roy 20 C. 906 : 10 Ind. Dec. 509. In that case a suit was instituted for the construction of a Will alleged to have been executed by Saroda Prosad Roy on the 17th September 1865. A codicil was added on 18th March 1868 just before the death of the testator. As the Will has been executed before the Hindu Wills Act came into operation, no application for Probate was made. The suit for construction was commenced on the 13th February 1889. The plaintiff prayed as follows: namely, first, that the Will and codicil of the late Saroda Prosad Roy be construed and the rights and interests of Lalit Mohun and of all other parties, if any, respectively, under the Will be declared; secondly, that, subject to such dispositions as may be determined by the Court to have been validly made by the Will, the rights and interests of the plaintiffs as heirs to the estate of Saroda Prosad Roy, deceased, under the Mitakshara Law of inheritance maybe declared; and, thirdly, that all necessary declarations and directions may be made and such reliefs may be granted as under the circumstances of the case, may be fit. The suit was defended on the ground, amongst others, that the claim was barred by limitation. Thereupon the third issue was raised in the following terms: Is the suit barred by limitation? The District Judge discussed the question in the following terms: "regarding the suit as one for a declaration, the question of limitation is not so easy to decide, for I find no provision in the Act expressly referring to, suits of this kind generally though there are provisions respecting some particular kinds of such suits. Article 120 of the Second Schedule is the only one which seems to apply. This provides a limitation of six years from the date when the right to sue accrues, for all suits for which no period of limitation is provided elsewhere in this Schedule. The question then is, when the right to sue accrued." For the solution of this question, the District Judge relied upon the judgment of Sir Richard Garth, C.J., in the case of Kristomoni Dasi v. Nripendra Krishna R.A. Nos. 29 and 30 of 1884 unreported. Where the Chief Justice had made the following observation: "In my opinion, u/s 42, Specific Relief Act, a person who is entitled to any right to property may, as a rule, institute a suit against any other person for a declaratory decree on any occasion when by word or deed, such other person may deny his right within the meaning of that section. There is, therefore, in the present case a recurrent cause of action on every refusal or neglect to pay over the surplus profits of the estate. Not only Section 23 but also Section 10 of the limitation Act applies to the case and the suit is, in my opinion, not barred as regards any part of the relief sought." The District Judge then proceeded to construe the Will, and his decree embodied a declaration as to the effect of the provisions contained in the testament. An appeal was next referred to this Court. Mr. Woodroffe who appeared on behalf of the respondent contended that the view taken by the District Judge upon the question of limitation was not correct. He formulated his argument in the following terms. "As to limitation, I say six

years from the death of the testator is allowed. Article 141 does not interfere with this, as I have the estate against the heiress. My estate was adverse to her when I kept her out. I have held for myself from the death of Saroda; and if the Will does not give me an interest, I have been in possession for more than 20 years before suit." In reply, Mr. Charles Paul argued that as to limitation the suit was one for construction of a Will, and the cause of action did not arise when the widow was alive; the plaintiffs asked for a declaration and for an account. Mr. Justice Ghose, who delivered the judgment of the Court, overruled the contention that the suit was barred by limitation and observed as follows: "The suit is not for possession but for construction of the Will and codicil, and for a declaration of the plaintiff's rights, as heirs to Saroda Prosad. Except in the few cases especially provided for in the Limitation Act (e.g., a suit to obtain a declaration that an adoption is invalid, or that an alienation by a widow is not binding on a reversioner) a suit for a declaratory relief of this nature cannot be held to be barred so long as the right to the property in respect of which the declaration is sought is a subsisting right. So long as the widow was alive, the plaintiff's right as reversionary heirs was a subsisting right. The right to bring a suit to construe the Will and codicil and for a declaration of the plaintiff's right, is a continuing right and may be claimed within the statutory period (whether it be 12 years or 6 years under Article 120) from the time when the plaintiffs become entitled to possession or other consequential relief. This suit having been instituted within six years is amply within time." The Court then proceeded to construe the provisions of the Will and adopted a construction contrary to that which had found favour with the District Judge. The matter was next taken on appeal to the Judicial Committee; *Lalit Mohun Singh Roy v. Chukkun Lal Roy* 24 C. 834 : 24 I.A. 76 : 1 C.W.N. 387 : 7 Sar P.C.J. 155 : 12 Ind. Dec. 1224 . The question of limitation does not appear to have been argued, although it was the interest of the respondent to support the judgment of the High Court on that ground. The judgment delivered by Lord Davey deals with the question of construction and the view adopted by the Judicial Committee was that the construction adopted by the High Court could not be supported. The Judicial Committee accordingly proceeded to restore the decree of the District Court with a slight variation. It is inconceivable that the Judicial Committee should have considered the case on the merits, if the suit was obviously barred by limitation. We are consequently of opinion that the decision of this Court in *Chukkun Lal Roy v. Lolit Mohan Roy* 20 C. 906 : 10 Ind. Dec. (N.S.) 509 is an authority for the proposition that a suit for construction of a Will is governed by Article 120 of the Schedule to the Limitation Act, but that the right to sue does not accrue from the death of the testator or the date of the Probate of the Will. The case clearly shows that, so long at least as the estate is in the hands of the executor and the administration has not been completed, the right to obtain construction of the Will is a continuing right.

3. This view appears to have been recognised impliedly in numerous cases of construction of Will to be found in the reports. Reference may be made to the

case of the Will of Haridas Dutt which was executed on the date of the death of the testator, the 30th October 1875. The Probate was taken out on the 20th December 1875. The suit for construction was instituted on the 19th December 1904. There was no suggestion that the suit for construction was barred by limitation. The case was heard in the first instance by Woodroffe, J., then by a Special Bench and ultimately by the Judicial Committee. The judgments will be founded reported as *Radha Prasad Mullick v. Ranee Mani Dassee* 33 C. 947 : 3 C.L.J. 502 : 10 C.W.N. 695 *Radha Prasad Mullick v. Ranee Mani Dassee* 33 C. 896 : 8 C.L.J. 48 : 12 C.W.N. 729 : 35 I.A. 118 : 4 M.L.T. 23 : 18 M.L.J. 287 : 3 A.L.J. 460 : 10 Bom. L.R. 604 . Although the suit had been instituted after the lapse of nearly 30 years from the death of the testator, some of the questions of construction had to be reserved and were reserved, following the precedent of the Judicial Committee in *Lalit Mohun Singh Roy v. Chukkun Lal Roy* 24 C. 834 : 24 I.A. 76 : 1 C.W.N. 387 : 7 Sar P.C.J. 155 : 12 Ind. Dec. 1224 the result was that there was another litigation for construction of the Will, for the determination of one of the questions which had been left open. [See the cases of *Radha Prasad Mullick v. Ranimoni Dasi* 8 Ind. Cas. 1061 : 38 C. 188 : 13 C.L.J. 183 : 15 C.W.N. 113 and *Srimutty Ranimoni Dassi v. Radhaprasad Mullick* 23 Ind. Cas. 713 : 41 C. 1007 : 20 C.L.J. 348 : 26 M.L.J. 653 : 18 C.W.N. 873 : (1914) M.W.N. 624 : 16 M.L.T. 217 : 1 L.W. 731 : 16 Bom.L.R. 787 : 20 C.L.J. 348 : 41 I.A. 176 (P.C.). It is worthy of notice that even in this last judgment another possible question of construction has been left open and may give rise to a further litigation. Reference may also be made to the case of *Puma Chandra Bysack v. Gopal Lal Sett* 8 C.L.J. 369 which arose out of a suit Instituted in 1904 for the construction of a Will executed on the 29th May 1841. It was not suggested before this Court or the Judicial Committee, *Gopal Lal Sett v. Puma Chandra Bysack* 67 Ind. Cas. 561 : 49 I.A. 100 : 36 C.L.J. 57 : 20 A.L.J. 625 : 43 M.L.J. 116 : 49 C. 459 : 24 Bom. L.R. 937 : AIR (1922) (P.C.) 253 : 16 L.W. 963 : 27 C.W.N. 174 that the suit was barred by limitation. Reference may again be made to the cases of *Jehangir Dadabhoy v. Kaikhusru Kavasha* 27 Ind. Cas. 53 : 42 I.A. 71 : 39 B. 296 : 28 M.L.J. 167 : 2 L.W. 208 : 13 A.L.J. 217 : 19 C.W.N. 420 : 21 C.L.J. 210 : 17 Bom. L.R. 197 : 17 M.L.T. 203 : (1915) M.W.N. 633 and *Kaikhushru Bezoni Nanabhoy Capadia v. Shirnibai Bezoni Capadia* 51 Ind. Car. 481 : 45 I.A. 257 : 43 B. 88 : 21 Bom. L.R. 130 : 23 C.W.N. 419 : 9 L.W. 485 (P.C.) where the suits for construction of Will would, have been obviously barred by limitation if the view adopted by the Subordinate Judge in this case and urged by the respondent had been the law.

4. The view we take is in no way inconsistent with the decision of this Court in *Mohabharat Saha v. Abdul Hamid Khan* 1 C.L.J. 73 where reference is made to the decision in *Chukkun Lal Roy v. Lolit Mohan Roy* 20 C. 906 : 10 Ind. Dec. 509; on the other hand, it is in agreement with the view adopted by Chatterjee and Richardson, JJ., in *Tarak Nath Roy v. Syama Charan* 36 Ind. Cas. 292. We are consequently of opinion that the suit should not have been dismissed as barred by limitation on the ground that the suit had been instituted after the lapse of

more than six years from the death of the testator or the application for grant of Probate or the issue of Probate. The plaintiff contends that the administration of the estate has not yet been completed. The first defendant, the surviving executor, also urged in his written statement that the administration of the estate has not yet come to an end. In such circumstances, it is plain that the questions of construction may arise and may require decision, if for no other purpose, at least for the purpose of guiding the executor in the discharge of his duties.

5. It is now necessary to consider two further points. In the first place, an objection was taken in the Court below that the necessary parties are not before the Court. No opportunity was allowed to the plaintiffs to bring such parties before the Court. The plaintiffs have offered to add as defendants all persons who are likely to be interested in or affected by the determination of the question of construction of the Will. This will accordingly be done as soon as the record reaches the Court below.

6. In the second place, it was suggested that the suit could not be maintained as a suit for declaration without consequential relief in view of the provisions of Section 42 of the Specific Relief Act. We are of opinion that there is no force in this contention. The true effect of Section 42 was explained by this Court in *Joy Narain Sen v. Suchitra Deby* 65 Ind. Cas. 8 : 26 C.W.N. 206 : 33 C.L.J. 592 : AIR 1922 C 8. The expression used by the Legislature is not "other relief" but "further relief." A suit for a declaratory decree should not be dismissed on the ground that it is barren by the proviso to Section 42 or the Specific Relief Act, unless it is quite clear that the plaintiff should seek further relief which he has failed to claim, although such relief flows directly and necessarily from the declaration sought for. The proviso to Section 42 forbids a suit for a pure declaration without further relief, but it does not compel a plaintiff to sue for all the reliefs which could possibly be granted or debar him from obtaining a relief which he wants, unless, at the same time, he asks for a relief which he does not want. In the present case, it is impossible for us to say that the plaintiffs at the present time, required any relief other than the construction of the Will. If the plaintiffs are not successful in maintaining their view of the legal effect of the provisions of the Will, no further question arises. If they are successful, it would be for them to determine what relief, if any, they should seek on the basis of the construction which may ultimately be adopted by the Court. If they are successful in this litigation and thereafter institute a suit for further relief, such questions as may arise will be decided, including the question of limitation, in relation to any possible claim for administration, accounts or possession. It is to be distinctly understood that if the plaintiffs succeed in maintaining their view of the legal effect of the Will, there will be no declaration in the decree to the effect that they had a subsisting title at the date of the commencement of this litigation. The sole question for decision is, what is the legal effect of the provisions made by the testator in his Will. Such construction cannot prejudice the determination of other controversies which may arise between the parties in future.

7. The result is that this appeal is, allowed, the decree of the Subordinate Judge set aside and the case remanded to him for construction of the Will.

8. The appellants are entitled to their costs of this Court. The costs in the Court below will abide the result of the trial of the suit.