
(1936) 07 CAL CK 0022
In the Calcutta High Court

Sm. Bibhabati Debi and Another

APPELLANT

Vs

Mahendra Chandra Lahiri and Others

RESPONDENT

Date of Decision : 17-07-1936

Acts Referred:

Citation : AIR 1938 Cal 34 : 173 Ind. Cas. 857

Hon'ble Judges : Derbyshire, C.J;Costello, J

Bench : Full Bench

Judgement

Costello, J.—This is an appeal from a judgment of Ameer Ali J. whereby he rejected the claim made by the plaintiffs for the delivery up to them of a Government promissory note of the face value of Rs. 9,000. This Government promissory note passed under the will of one Ganga Prosad Goswami who was a Zamindar of Serampore in the District of Hooghly. This will was made in the Bengali language and was dated 28th October 1864. By that will, the eldest son of the testator, one Hem Chunder Goswami, was appointed executor of the will. The testator died within a few years of the making of the will. The will was duly proved by Hem Chunder Goswami in this Court and probate of the will was issued to him. In the present suit the two plaintiffs who are the granddaughters of the testator were alleging in the alternative that their grandmother, one of the daughters of the testator, during her lifetime became absolutely entitled to the Government promissory note which was the subject matter of the suit and that in any event on her death (which occurred in the year 1920) her son Girish Chunder, the father of the two plaintiffs, became absolutely entitled to it. The two plaintiffs were merely claiming in this suit as the heirs of Girish Chunder and they were not claiming that they were entitled to the Government promissory note under any other claim or right.

2. Mr. Banerji, on behalf of the plaintiffs, has sought to argue that under the terms of the will of Ganga Prosad Goswami each of his three daughters, Nityamoyee, Nobo Kishori and Joymani, became absolutely entitled to a 4 per cent. Government promissory note of the face value of Rs. 9,000 and accordingly

on the death of each of these three daughters respectively, the Government promissory note of the face value of Rs. 9,000 passed to her heirs. Alternatively Mr. Banerji has attempted to argue that if the three daughters did not take absolute interest in the Government promissory notes in question, then so far as Nityamoyee is concerned her son Girish, the father of the present plaintiffs, became absolutely entitled to the Government promissory note. The matter we have to determine and the matter which was before the learned Judge in the Court below is-what is the right construction to be given to what is described as the "fourth section" of the will of Ganga Prosad Goswami? That section is in these words:

My eldest daughter Sm. Nityamoyee Debi, second daughter Sm. Nobo Kishori Debi and youngest daughter Sm. Joymani Debi have sons and are child-bearing. They shall be maintained in my family as they are now being done. If there be any disagreement then each of the said daughters shall receive for their maintenance with their children a 4 per cent. Government promissory note of the face value of Rs. 9,000, and each of them shall also receive Rs. 2,000 in cash for building a house in this town. They shall enjoy the interest that would accrue on the said promissory notes with their sons, grandsons and so forth. Neither the daughters nor their sons, grandsons and so forth shall be entitled to give, sell or mortgage the said Government promissory notes. Excepting the sons and grandsons and so forth of the daughters, their sons-in-law or their other heirs shall not have any concern with the Government promissory notes or interest thereof. God forbid, if owing to misfortune, if there be no children of any of the daughters then tin Government promissory notes shall revert to my estate and my two sons shall be entitled to the same in equal shares. For this purpose, I have of my own accord and being in a good state of body and of sound disposing mind, written (this) deed of will. Finish. The year 1271 (Twelve hundred and seventy one) dated 13th of Kartic (28th October 1864).

3. Had this been a matter of first impression, the wording of this section would have required a very careful scrutiny be-fore we could dispose of the contention put forward that upon a proper construction of the will it ought to be held that the testator was minded and intended to give an absolute interest in a 4 per cent. Government promissory note to each of his three daughters. In support of that point of view Mr, Banerji has cited to us the case in AIR 1931 179 (Privy Council) , where it was held by the Privy Council in a judgment which was delivered by Sir Dinshah Mulla that certain dispositions of property created an absolute interest despite the existence in the instrument of gift of words that seemed at first sight to have the effect of cutting down the interest conveyed. Mr. Banerji has argued, and argued very vehemently, that the words occurring in the fourth section of the will of Ganga Prosad Goswami "with their sons, grandsons and so forth", which are in Bengali in the original and are equivalent to the fairly common phrase putra poutradikrame do no more than constitute words of limitation indicating that the grant to Nityamoyee was a grant of an absolute interest and not a grant merely of an estate for life. I should not in any

event have been disposed to accept that contention having regard to the language of this clause of the will; but in my opinion it is not open to us to consider the matter or rather to reconsider the matter as this particular aspect of the plaintiffs case has already been the subject of judicial pronouncement by a Bench of this Court composed of Sir Richard Garth, the then Chief Justice of this Court, and McDonell J. That judgment was given on appeal from a decree of the Subordinate Judge of Hooghly which was dated 9th March 1876. In the suit in which that decree was made Nobo Kishori Debi was claiming that she was entitled to the delivery up to her of a Government promissory note of the face value of Rs. 9,000 as against Hem Chunder who was, as I have already stated, the executor of the will of his father Ganga Prosad Goswami. The decree of the Subordinate Judge of Hooghly was set aside. The judgment of the Appellate Court contains this expression of opinion:

We think that in this case the lower Court was quite wrong in directing that the Government paper for Rs. 9,000 should be handed over to the plaintiff. The will Of 28th October 1864 is not a very formal document; but it is clear from the language of it that the testator did not intend the plaintiffs to have the disposal of the capital invested in the Government paper, but that she was only to have the interest of it for her life, and after her death it was either to go to her children or, in the event of her being childless, to revert to his, i.e. the testator's sons, as part of his general estate.

4. In my view it is quite clear from the definite decision on the part of this Court that the gift to Nobo Kishori Debi and therefore by a parity of reasoning the gift to Nityamoyee was not an absolute gift of the Government promissory note but was a bequest of no more than a life-interest) so far as each of the testator's daughters was concerned. Mr. Banerji has argued that the decision given by Sir Richard Garth and McDonell J. does not stand in his way as being in the nature of res judicata so as to preclude him once more from agitating the question as to whether or not Nityamoyee acquired an absolute interest in the Government paper. With that contention I cannot agree. It is quite true that in one sense it is not a matter of res judicata because neither the present plaintiffs nor their grandmother were parties to that particular suit; but, on the other hand, it is a judicial decision of this Court given not only on an analogous set of facts but on a set of facts which are identical with the facts in the present case. Moreover, there were other suits in the Hooghly Court, one brought by Nityamoyee herself and another brought by the third sister Joymoni, and they were disposed of upon the footing of the decision given by this Court in Nobo Kishori's case. In my opinion therefore it is not now open to the plaintiffs to argue that their grandmother acquired anything else but a life-interest as regards the Government promissory note of Rs. 9,000.

5. Mr. Banerji, when that aspect of the matter was put to him, was obliged to admit that unless he could persuade us to accept his contention that Girish, the son of Nityamoyee, acquired an absolute interest, it was impossible for these

plaintiffs to succeed, the reason being that unless Girish acquired an absolute interest in the Government promissory note the position must be that the testator purported to set up a series of life-interest in this particular piece of property: a life-interest to Nityamoyee, a life-interest to her son and a life-interest to her son's sons. If that is the position which was contemplated, the purported disposition of the property is rendered invalid under the provisions of the Indian law which at any rate as regards wills made prior to the year 1916 made it impossible for gifts to be made to unborn persons. At the date of the will, and indeed at the date of the death of the testator, Girish was alive but neither of the present plaintiffs was in existence. In my view there are only two possible ways of reading the fourth section of the will of Ganga Prosad Goswami : first, that in spite of the limitations and restrictions contained in the section, the testator really intended to give to each of his daughters an absolute interest in the Government promissory note of the face value of Rs. 9,000. That interpretation is ruled out for the reasons I have given. The other interpretation could only be that the testator intended to create and no doubt thought succeeded in creating a succession of life-interests or life-estates beginning with each of his daughters and continuing to their sons respectively and their sons' sons and so forth; in other words, the testator intended to create something in the nature of an estate tail male as regards each of the Government promissory notes. Such a disposition clearly offends against the law because there could not be gift to an unborn person. Therefore, the succession of interests in the notes came to an end upon the death of Girish. There is one phrase in this clause of the will which in my opinion entirely puts the plaintiffs out of Court. It is this:

Neither the daughters nor their sons, grandsons and so forth shall be entitled to give, sell or mortgage the said Government promissory notes. Excepting the sons and grandsons and so forth of the daughters, their sons-in-law or their other heirs shall not have any concern with the Government promissory notes or interest thereof.

6. It seems to me impossible in face of that provision to hold that Nityamoyee obtained an absolute interest and equally impossible to hold that Girish acquired an absolute interest. It is manifest in my opinion that the testator thought that he was creating as it were a series of estates in these Government promissory notes to his daughters, then their sons, their grandsons, their great-grandsons and so on who would successively enjoy the income derived from these Government promissory notes. When a question was categorically put to Mr. Banerji he was utterly unable to advance any ground whatever for suggesting, still less for establishing, that Girish acquired an absolute interest in the Government promissory notes which are now being claimed by the plaintiffs. However unfortunate it may be for the plaintiffs, in view of the language of this fourth section of the will of Ganga Prosad Goswami, and bearing in mind the decision long ago given by this Court, we cannot do otherwise than come to the conclusion that no interest was created which would pass to the present plaintiffs as daughters of Girish or to them as heirs of Nityamoyee. Therefore we must

hold that the learned Judge was right in dismissing the suit. The appeal is dismissed. All costs, including the costs of the applications, if any, will come out of the estate (taxed as between attorney and client).

Derbyshire, C.J.

7. I agree.