

(1961) 10 PAT CK 0020
In the Patna High Court
Case No : A.F.A.D. No. 701 of 1960

Smt. Kapuri Kuer

APPELLANT

Vs

Sham Narain Prasad and Others

RESPONDENT

Date of Decision : 05-10-1961

Acts Referred:

Succession Act, 1925 — Section 119, 120

Citation : AIR 1962 Patna 149

Hon'ble Judges : Raj Kishore Prasad, J

Bench : Single Bench

Advocate : Lalnarain Sinha and Surendra Prasad II, for the Appellant; Ray Paras Nath and Bindeshwari Prasad Sinha, for the Respondent

Final Decision : Dismissed

Judgement

Raj Kishore Prasad, J.—This appeal, by the plaintiff, from a judgment of affirmance, involves the interpretation of the will, Ext. 2.

2. The circumstances, leading up to the present appeal, are these.

The admitted pedigree, of the deceased testator, Churaman is as below:--

Churaman	D.1927	Wives		_____		
Murti Kuer	died	issueless	Lilo	Kuer	died on	17-5-1928 on 3-7-1958
_____					daughter	son
_____					Deonarain	Jageshwar Kuer
D.1914	D.1942	Plff.	W=Radhe		Kuer	D.1948
Deft.1.	Deft.2.					

3. Churaman Manto executed a will on the 1st July, 1918, (Ext. 2), in favour of his two wives, Murti Kuer and, "Lilo Kuer, and, his widowed daughter-in-law, Radhe Kuer, and his two daughters. It is admitted, by both sides that Churapan, by his said will, gave a life-interest to them and an absolute interest to his two daughters--Jageshwar Kuer and Kapuri Kuer born from his second wife, Lilo Kuer.

Churaman died in 1927 and, thereafter, his first widow, Murti, also died in 1928. Deonarain, the only son of Churaman, from his second wife, Lilo Kuer, had predeceased him, having died before the will, in 1914, leaving behind his widow, Radhe Kuer.

4. Lilo Kuer applied for a probate in respect of the said will and she was granted a probate and Letters of Administration on 2-2-29, After the probate, Jageshwar Kuer, one of the two daughters of Churaman and mother of defendants 1 and 2, died in 1942. Radhe Kuer died in 1948, and, thereafter, Lilo Kuer also died on 3-7-56, leaving behind her daughter, Kapuri Kuer, the plaintiff, and, defendants 1 and 2, the two sons of her predeceased daughter, Jageshwar Kuer.

5. After the death of Lilo, the properties of Churaman, which were then in her possession, came in possession of the plaintiff and defendants 1 and 2. Defendants 1 and 2 thereafter, made certain alienations in favour of defendants 3 to 6.

6. There is no dispute regarding the moiety share of the plaintiff in the estate of Churaman. The only dispute, in the Suit, as well as in the appeal, is with respect to the remaining moiety share in the estate of Churaman. The plaintiff claimed that, as Jageshwar Kuer, her sister, had died in the lifetime of her mother, Lilo Kuer, and that at the time of her death, she alone was the sole surviving legatee under the will, the entire estate of Churaman vested in her, and, therefore, she was entitled to the remaining half share also owned and possessed by defendants 1 and 2 in the estate of Churaman. The plaintiff, therefore, brought the present suit in 1957 for a declaration of her title to the remaining half share in the properties in suit which were claimed by defendants 1 and 2, and for a further declaration that the alienation made by defendants 1 and 2 in favour of defendants 3 to 9 were null and void and not binding on her.

7. The suit was contested by defendants 1 and 2 on the ground that both the daughters, Jageshwar Kuer and Kapuri Kuer, got a vested interest in them on the testator's death, and that possession alone was postponed, and, therefore, even if Jageshwar Kuer was dead at the time of the death of Lilo Kuer, defendants 1 and 2, being her sons and representatives were entitled to the remaining moiety share which vested in their mother, Jageshwar Kuer, on the death of her father, Churaman.

8. The courts below, on an interpretation of the relevant clause of the will, concurrently held that the plaintiff had no right to the moiety share in the lands in suit which had vested in Jageshwar Kuer on the death of her father Churaman, and, therefore, defendants 1 and 2, being the sons of Jageshwar Kuer, had acquired the moiety share in the properties in suit. It was further, held that the alienations made by defendants 1 and 2, in favour of defendants 3 to 6, were valid and operative and the plaintiff had no right to challenge them. On these findings, therefore, the suit was dismissed.

9. On behalf of the appellant, it was contended by the learned Government

Advocate that, on a proper construction of the relevant clause of the will, it should be held that, no doubt, Jageshwar Kuer and Kapuri Kuer got absolute Interest in the properties in suit, but that absolute interest vested in them only on the death of Lilo Kuer, and, not on the death of Churaman, as they did not get a vested interest on his death, and; therefore, as admittedly, at the time of the death of Lilo Kuer, Jageshwar Kuer was dead, Kapuri Kuer, the only surviving daughter of Churaman, got the entire estate of Churaman, under the will. In support of his contention, he sought to derive the greatest aid from the Special Bench decision of this Court in *Ram Bahadur v. Jagannath Prasad* 3 pat LJ 199 : AIR 1918 Pat 469 (SB), and, also from a decision of McNair, J. of the Calcutta High Court sitting singly, in *Ganesh Prosad v. Manohar Lal* AIR 1040 Cal 202.

10. The above argument, presented in support of the appeal, was combated by the learned Government Pleader by countering that on a correct interpretation of the material clause of the will, it is plain that the absolute interest of the two daughters of Churaman vested in them on the death of Churaman, and only their possession was postponed, so long as his two wives and widowed daughter-in-law were alive, and, therefore, it was submitted that the fact that Jageshwar Kuer died in the lifetime of Lilo was immaterial, and as such, defendants 1 and 2, being the sons of her predeceased daughter, Jageshwar Kuer, got a moiety share in the estate of Churaman, In support of his contention, he relied on Section 119 of the Indian Succession Act, 1925, and, also on a decision of the Supreme Court in *Lakshmana Nadar and Others Vs. R. Ramier*, , in which the above mentioned Patna decision was distinguished.

11. To answer the question raised, it is necessary, first, to read the disposing words in in the will, which are admittedly contained in Clause 3.

12. The will is in Urdu, and, as I could not read it myself, I got it translated by the official Translator of this court and the official translation of paragraphs 1, 3 and 4, which alone were required by the learned counsel for the parties, is on the record, Clause 3, however, is the pivot round which the entire controversy centres, and, therefore, on its interpretation rests the decision of the appeal. I shall now reproduce Clause 3 in its entirety. It is to the following effect:--

""No. 3. That after the death of both the wives and widow daughter-in-law of me, the executant, one after the other, i.e. if no one of them will remain alive then both the daughters, viz., Jageshwar Kuer and Kapuri Kuer also those daughters who, by the Grace of God, may be born in future will enter into possession and occupation of the entire property moveable and immovable, left by me, the executant together with the property, left by all the three ladies aforesaid with all the rights and appurtenances as absolute proprietors in equal shares, generation after generation descendible to children both in the male and female lines without any objection. No objection, contention and claim in law put forward by any person in any manner, shall be deemed legal or maintainable in court."

There can be no doubt on reading Clause 3 and, as a matter of fact, it was conceded by the learned Government Advocate, that the two daughters namely, Jageshwar Kuer and Kapuri KUER, got absolute interest and that they were to come in possession if alive, otherwise their heirs were to get possession as absolute proprietors in equal shares, only after the three ladies named in the will, who were to remain in possession, for their lifetime had died. It is, therefore, not disputed that, if Jageshwar Kuer, like Kapuri Kuer, would have been alive on the death of Lilo Kuer, both of them would have got the properties in equal shares as absolute owners. The crux of the matter, however, is as to whether the interest of these two daughters vested in them on the testator's death, and, only possession was postponed, or, that their interest vested in them only on the death of Lilo Kuer. There is no dispute that, in the case of the first contingency, the death of Jageshwar in the lifetime of Lilo Kuer would be of no importance, because, she, having a vested interest on the death of her father her sons, defendants 1 and 2, would get a moiety share in the estate of Churaman, but, in the case of the second contingency, the plaintiff alone, being the sole surviving daughter, at the time of the death of her mother, Lilo Kuer, would be entitled to the entire estate of her father. Churaman, to the exclusion of her deceased suiter's sons, defendants 1 and 2.

13. The sole question, for determination in the appeal, therefore, is : What was the intention of the deceased testator with regard to the date of vesting of legacy when possession was postponed?

14. On this question in my opinion, Section 119, of the Indian Succession Act, furnishes a useful guide.

15. Section 119 deals only with cases of legatees who are not entitled to the immediate possession of the thing bequeathed as here, and as such, it has no application to a bequest of absolute interest which gives the legatees a right to possession immediately, it provides that, if by the terms of a bequest the legatee is not entitled to immediate possession of the thing bequeathed, a right to receive it at the proper time shall, unless a contrary intention appears by the will, become vested in the legatee on the testator's death and shall pass to the legatee's representatives if he dies before that time and without having received the legacy, and in such cases the legacy is from the testator's death said to be vested in interest. Illustration (iii), to Section 119 : "A fund is bequeathed to A for life, and after his death to B. On the testator's death the legacy to B becomes vested in interest in B", is very opposite and it applies to the present case.

16. Here, no contrary intention appears by the will, by which it can be said that the testator never intended to give a vested interest to both of his daughters On his death. It is not disputed that if the legacy "vested in interest" in the two daughters from the testator's death then on the death of Jageshwar Kuer, before the death, of her mother, Lilo Kuer, vested interest of Jageshwar shall pass to her sons, defendants 1 and 2.

17. In this connection in order to have a clear idea of the implication of Section 119 of the aforesaid Act, it would be useful to know the distinction between vested interest and contingent Interest.

18. An interest is said to be vested, when it is to take effect on the happening of an event which is certain; whereas, an interest is contingent when the right to enjoyment depends upon the happening of an uncertain event which may or may not happen. A person takes a vested Interest in property on the testator's death when he acquires a proprietary right in it at that time, but the right of enjoyment and immediate possession is only deferred till a future event happens which is certain to happen; but a contingent interest is one in which neither any proprietary interest nor a right of enjoyment is given on the testator's death, but both depend upon future uncertain events. A vested interest is not defeated by the death of the devisee before he attains possession, and his representative will be entitled to its benefit. The question whether particular words create a vested or a contingent interest is one of construction.

19. Here, however, there is no dispute that the two daughters got a vested interest, but the only dispute is with regard to its date of vesting, that is, whether they got a vested interest on the death of the testator or on the death of his last surviving widow, Lilo Kuer, his widowed daughter-in-law, and Lily first widow having predeceased her?

20. The learned Government Advocate, relying on the words "after the death of both the wives and the widow daughter-in-law" and the words "if no one of them will remain alive then both the daughters will enter into possession as absolute proprietors in equal shared", occurring in the will, argued that from the above recitals the intention of the testator was clear that the daughters of Churaman got a vested interest only on the death of the three ladies and not on the death of the testator.

21. For a correct interpretation of the will in question, it would be useful first to examine the cases, relied upon by the parties, and, see if any guidance can be had from any of them.

22. I may at once state that the Calcutta case *Ganesh Prosad Agarwalla and Another Vs. Monohar Lal Mullick and Another*, relied upon, on behalf of the appellant, has no application here, for the simple reason that, in that case the will itself provided.

"I give and devise my real and personal propertyto my beloved wife ..for life....and after her death to vest in my sons or their heirs who may then be in existence."

* * * * "It is my wish that my sons hereinbefore mentioned will not be entitled to my estate during the lifetime of my said wife."

The words "after her death to vest in my sons or their heirs who may then be in existence", occurring in the said will, are very important, and, therefore, it was

held that as the testator, by this will, devised his real and personal property to his wife for life and after her death to vest in his sons or their heirs, who may be then in existence, the intention was clear that the estate was to vest in his sons or their heirs only after the death of his wife. His Lordship McNair, J., further, observed that the words "then in existence" occurring in the said will, strengthened his view that the testator was contemplating the period of vesting as being at a future date, that is, on the death of his wife, and, that the words later in the will, in which the testator expresses his wish that his sons should not be "entitled" to his estate during the lifetime of his wife (Sic) add further support to this construction.

23. Here, that is not the position. There is nothing to indicate in Clause 3, or, anywhere in the will, like the recitals, read above, in the Calcutta case, that the testator intended that his properties were to vest in interest in his two daughters, or their heirs, only after the death of his wives and his widowed daughter-in-law, and, not on his own death. It is important to remember that in Clause 3 of the present will what the testator says is that "after the death of both the wives and the widow daughter-in-law" his two daughters--"will enter into possession and occupation of the entire property". This clearly-shows that only possession is postponed, in my opinion, therefore, this case is of no assistance to the appellant.

24. It is not necessary to specifically deal with the Patna case, because it has been considered in detail by the Supreme Court in Lakshmana Nadar and Others Vs. R. Ramier, and therefore, at the appropriate place the reasons given by the Supreme Court for distinguishing it from the facts before them, which bear a very close resemblance to those before me, will be quoted.

25. In the Supreme Court case, the terms of the will, on the construction of which the decision of the appeal rested, were very much like those in the present case. In that case, the testator, a Brahmin, died leaving him surviving a widow R and a married daughter L who had a number of children They were all alive when the testator died. By his will, the testator gave the following directions:--

"After my lifetime, you the aforesaid R my wife, shall till your lifetime enjoy the aforesaid entire properties, the outstandings due to me, the debts payable by me, and the chit amounts payable by me. After your lifetime, L our daughter and wife of A (the plaintiff) and her heirs shall enjoy them with absolute rights and powers of alienation such as gift, exchange, and sale, from son to grandson and so on for generations. As regards the payment of maintenance to be, made to C, wife of my late son, my wife R shall pay the same as she pleases, and obtain a release deed."

L. the daughter, died during the lifetime of the widow R, and, none of "her children survived her. On these facts, it was held by their Lordships. Mahajan and S. R. Das JJ. as then they were, in a joint judgment, that, though the daughter was not entitled to immediate possession of property, it was indicated with

certainty that she should get the entire estate at the proper time and she thus not an interest in it on the testator's death, and, therefore, she got under this will a present right of future enjoyment in the property and a vested interest in the testator's properties on his death. This Supreme Court decision in my opinion, is a settler on the question under consideration, and, is thus indistinguishable from the facts of the present case.

26. Their Lordships of the Supreme Courts distinguished the Special Bench decision of this Court strongly relied upon by the learned Government Advocate, at pages 306-307, in these words:--

"The will there recited that if a daughter or son was born to the testator during his lifetime, such son or daughter would be the owner of all his properties but if there was no son or daughter, his niece S would get a bequest of a lakh of rupees, and the rest of the movable and immovable properties would remain in possession of his wife until her death, and after her these would remain in possession, of his niece. The remainder was disposed of in the following words:

If on the death of my wife and my niece there be living a son and daughter born of the womb of my said brothers" daughter, then two-thirds of the movable property will belong to the son and one third to the daughter. But as regards the immovable property none shall have the least right of alienation. They will of course be entitled to enjoy the balance left after payment of rent.

"This will was construed as conveying an absolute estate to the son and the daughter of the niece. It was remarked that in spite of an express restriction against alienation, the estate taken by S (the niece) was an estate such as a woman ordinarily acquires by inheritance under the Hindu law which she holds in a completely representative character but is unable to alienate except in case of legal necessity and that such a construction was in accordance with the ordinary notions that a Hindu has in regard to devolution of his property. The provisions contained in this will bear no analogy to those we have to construe. The restraint against alienation was repugnant to both a life estate and a widow's estate and was not, therefore, taken into account. But there were other indications in that will showing that a widow's estate had been given. The fact that the gift over was a contingent bequest was by itself taken as a sure indication that the preceding bequest was that of a widow's estate. There is no such indication in the will before us."

27. For the reasons given by their Lordships, in the just mentioned Supreme Court case, therefore, I would hold that the provisions contained in the will in the Patna case bear no analogy to those we have to construe in the instant case.

28 Here, as will appear from Clause 1 and Clause 4 of the will, Ext. 2, the three ladies mentioned in it, were to hold the property and enjoy its usufruct for their lifetime but were unable to alienate or encumber except in case of legal necessity. The material recitals, in Clause 1 of the will under construction, are in these terms:--

"That after my death, my both the wives jointly with equal rights or anyone of them, who will survive. should remain in possession and occupation of my entire moveable and Immoveable properties till their or her death as proprietors, Mutawalli, Manager and protector thereof.....and both or any one of them shall be competent to appropriate the entire income and profit accruing therefrom. Both or anyone of them shall also be competent to spend the income of the properties "in the manner both or one of them would desire over charity and Tirath etc. besides meeting the private expenses,All these rights and the right of appropriation of the entire income and profit of the property shall remain intact and in force during their lifetime only. Both or any one of them shall not at all be competent to transfer any portion or whole of the property under deed of sale, deed of gift or deed of rehan or create any incumbrance thereon for any illegal debt while having power and remaining in possession and occupation of the properties. No act done by them or any one of them contrary to it, shall be deemed legal."

Later, in Clause 4 of the will, the testator goes on to say as follows:--

"That if both the wives and daughter-in-law of me the executant during the period of their management and possession and occupation of the properties require money shall be competent, with the advice of the reliable well-wishers to take loan under mortgage bond, or deed of rehan with possession to the extent of the money required and meet the necessities and re-pay the same when it be proper (and convenient). But without any legal necessity the incumbrance shall be entirely illegal and their representatives shall not be responsible to repay the same."

29. In the will, here, (as R in the case before the Supreme Court), the three ladies had complete control over the income of the property during their lifetime, but there was restraint against alienations and none of them had any power to deal with the corpus of the estate and it had to be kept intact for the enjoyment of the daughters. Though, under the will, the two daughters were not entitled to immediate possession of the property, it was indicated with certainty that they should get the entire estate at the proper time and they thus got vested interest in it on the testator's death.

30. The canons of construction of a will are by now well established by several decisions of the Supreme Court, the earliest being Gnanambal Ammal Vs. T. Raju Ayyar and Others, , and, the most recent being N. Kasturi Vs. D. Ponnammal and Others, . The principles, which may be extracted therefrom, can be re-stated thus:--

The cardinal maxim to be observed by Courts in construing a will is to endeavour to ascertain the intention of the testator, This intention has to be gathered primarily from the language of the document which is to be read as a whole without indulging in any conjecture or speculation as to what the testator would have done if he had been better informed or better advised. Thus, the intention

of the testator and the effect of the dispositions contained in the will must be decided by construing the will as a whole and giving the relevant clauses in the will their plain grammatical meaning considered together. In construing the language of the will the Courts are entitled and bound to bear in mind other matters than merely the words used. They must consider the surrounding circumstances, the position of the testator, his family relationship, the probability that he would use words in a particular sense, and many other things which are often summed up in the somewhat picturesque figure. The Court is entitled to put itself into the testator's armchair". But all this is solely as an aid to arriving at a right construction of the will and to ascertain the meaning of the language when used by particular testator in that document. So soon as the construction is settled, the duty of the Court is to carry out the intention as expressed and none other. The court is in no case justified in adding to testamentary dispositions. In all cases it must loyally carry out the will as properly construed, and this duty is universal, and is true alike of wills of every nationality and every religion or rank of life, in construing a will it is generally not profitable or useful to refer to the construction of other wills because the construction of each will must necessarily depend upon the terms used by the will considered as a whole, and the result which follows on a fair and reasonable construction of the said words must vary from will to will.

31. Construed in the light of the above cardinal principles of construction, there is no doubt, on reading the will as a whole and giving the relevant Clauses 1, 3 and 4, relied upon by both sides, their plain meaning, considered together, that the intention of the testator and the effect of his dispositions in the will were that his two daughters, Jageshwar Kuer and Kapuri Kuer, should get a vested interest in his property on his death, and, therefore, half of his interest, having vested in interest on his death in Jageshwar Kuer, the fact that she subsequently died, and, was dead at the time of the death of Lilo Kuer, her mother, was of no importance and no consequence whatsoever, and, therefore, the said vested interest of Jageshwar Kuer on her death, before the material time, without having received the legacy, passed on to her sons, the defendants 1 and 2, and, as such, defendants 1 and 2 got a moiety share, in the estate of the testator, which was the vested interest of Jageshwar Kuer on the death of her father. The Court of appeal below, therefore, has correctly interpreted the will, Ext. 2, and, its decision is entirely right.

32. For the reasons given above, there is no merit in the appeal and, accordingly, it is dismissed with costs.