
(1939) 05 PAT CK 0005
In the Patna High Court

Sudhansu Mohan Sirkar

APPELLANT

Vs

Harish Chandra Dutta

RESPONDENT

Date of Decision : 11-05-1939

Acts Referred:

Succession Act, 1925 — Section 301, 302

Citation : AIR 1940 Patna 194

Hon'ble Judges : Manohar Lall, J; Fazl Ali, J

Bench : Full Bench

Judgement

Fazl Ali, J.—This is an application by one Sudhansu Mohan Sirkar who claiming: to be the adopted son of one Kali Krishna Sirkar has moved this Court under Sections 301 and 302, Succession Act, to direct that the latter's estate, which is at present in the possession of Babu Harish Chandra Dutta, one of the executors appointed under his will, be made over to the petitioner. Kali Krishna Sirkar died on 11th December 1905, after executing a will on the same date. He left behind a widow Srimatya Chandan Bilasini Dasi, an old mother and some nephews. As he apprehended that his wife Srimatya Chandan Bilasini Dasi being young and inexperienced could not manage the estate, he appointed five executors under his will including his father-in-law Babu Dwarka Nath Bose and the opposite party Babu Harish Chandra Dutta, who is the sole surviving executor now. The will is a lengthy document with no less than twenty-one paragraphs, but the only provisions which are material for the purpose of this case are those to be found in paras. 10, 11, 13, 14 and 15. Para. 10 provides that subject to certain legacies and expenses referred to in the preceding paragraphs the whole estate

will belong to my wife....She will take from the executors the usufruct of the properties which will be left after meeting the legal expenses of collection, etc., and she will maintain herself with and spend according to her will that amount but she will not be competent either to encumber the properties or transfer them in any way by sale or otherwise.

Paragraph 11 recites that Srimatya Chandan Bilasini Dasi shall be competent to

adopt a son or sons after the death of the testator but in no case more than two children will be adopted. Para. 13 runs as follows:

After the death of my wife my adopted son or sons together will be owners of all the properties of my wife; but so long as my wife is alive the adopted son or sons will not be competent to be malik with respect to any of the properties.

Paragraph 15 provides that if the executors apprehend that the properties might be wasted owing to the adopted son or sons being of unsound mind or otherwise "unfit," then after making suitable arrangements for the family deity the rest of the properties will be handed over to the Government by the executors on certain conditions.

2. It appears that the petitioner was adopted by Srimatya Chandan Bilasini Dasi after the probate of the will had been taken out in 1906 and it is alleged that on 7th November 1933, Chandan Bilasini Dasi executed a deed surrendering the whole estate to him. The petitioner bases his whole case upon this document and contends that the surrender of the estate by the lady is tantamount to her civil death and so he is entitled to the immediate possession of the whole estate under para. 13 of the will. On the other hand, the case of the surviving executor and Srimatya Chandan Bilasini Dasi who was also represented before us by an advocate is that the deed of surrender was obtained by the petitioner from the latter by fraud and deceitful means and that Srimatya Chandan Bilasini Dasi fixed her thumb impression to it "as desired by the petitioner without knowing anything about the effect of the document."

3. Now, whatever may have been the circumstances under which the deed was executed, it appears that the petitioner did not claim possession of the estate in his own right after the alleged surrender but was satisfied with obtaining a registered power of attorney on 1st December 1933 from Babu Dwarka Nath Bose who according to both the parties was the managing executor at that time. This document authorized the petitioner merely to manage the estate on behalf of the said executor. The case of Babu Harish Chandra Dutta, opposite party No. 1, is that after the death of Dwarka Nath Bose on 9th May 1937 the power of attorney ceased to be operative and the estate was taken over by him from the petitioner. Now although the present application purports to have been made both under Sections 301 and 302, Succession Act yet in the course of the argument before us only the latter Section was relied on by the learned advocate appearing for the petitioner.

4. This Section provides that

where probate or letters of administration in respect of any estate has or have been granted under this Act, the High Court may, on application made to it, give to the executor or administrator any general or special directions in regard to the estate or in regard to the administration thereof.

In some cases it has been doubted whether the High Court is competent on an

application under this Section to determine any disputed question of title inasmuch as the jurisdiction of the Court under it is confined merely to the issue of directions to the executor or administrator relating to the management and administration of the estate: see *Provas Chandra Sinha Vs. Ashutosh Mukherji and Others*, . If this view is correct, then the present application cannot be entertained at all by this Court. But assuming that this Court is competent to decide even disputed questions of title, it would I think be exercising its discretion wisely if it refuses to give a direction in favour of a party who does not come before it with a clear title and where the title set up by him can be more appropriately decided in a civil suit.

5. In my opinion, the petitioner has failed to make out even a *prima facie* case for an Order under Section 302 and his application cannot, therefore, succeed in any event. The first difficulty in the petitioner's way is that the specific provision of the will on which he relies makes no reference to the so-called civil death which is death only by a fiction of law but it refers plainly to death in the ordinary acceptation of the term, that is to say natural death. The words "so long as my wife is alive, the aforesaid adopted son or sons will not be competent to be *malik*" confirm this view, when they are read with para. 10 of the will which provides that Chandan Bilasini Dasi shall not be competent to transfer the estate in any way by sale or otherwise. The estate conferred upon her by the will was not a Hindu widow's estate but only an ordinary life estate: see *Kali Prashad Gope and Others Vs. Ram Golam Sahu and Others*, .

6. If it was a Hindu widow's estate she could accelerate succession to it by surrendering it in favour of the next reversioner, but if it is an ordinary life estate, the matter is governed not by the Hindu law but by the general law, and it appears to me that in such a case any relinquishment or surrender made by her must come within the prohibition contained in the latter part of para. 10 of the will, where it is specifically laid down that she will not be competent to transfer the estate by sale or otherwise. The expression "otherwise" is a comprehensive expression and must include any act by which the widow parts with or terminates her life estate in favour of another person.

7. Again, the will provides that if the executors apprehend that the property might be wasted owing to the unfitness of the adopted son, they must deal with it in the particular manner set out in para. 15. In the present case the learned advocates appearing for the executor as well as for Chandan Bilasini Dasi informed us in the course of their arguments that if we decided to hear evidence in the case, they proposed to resist the present application on the ground of the unfitness of the applicant. These are, however, merely questions relating to the construction of the will and if the case involved no other question we might have perhaps decided them finally in dealing with this application; but apart from these questions, the parties are at issue on another question which goes to the very root of the petitioner's title.

8. That question is whether the deed of surrender executed by Chandan Bilasini

Dasi, who is admittedly a pardah nashin lady, is valid and should be given effect to. In my opinion, a question of this character cannot be properly dealt with in a proceeding u/s 302, Succession Act. It may also be stated here that the petitioner's case as set out in paras. 8 of his application is that in pursuance of the deed of surrender he had obtained possession of the whole estate in his own right but he was dispossessed by the opposite party on 20th May 1937.

9. Thus, on the petitioner's own case, the present application is in effect a suit for the recovery of an estate of which he alleged to have lost possession: in other words, it is virtually a suit in ejectment. For these reasons I am of opinion that the present application should be dismissed with costs.

Manohar Lall, J.

10. The facts necessary for the determination of the question before us have been clearly stated in Order No. 9, dated 9th March 1939, by my learned brother Khaja Mohamad Noor and have also been stated exhaustively in the judgment just delivered by my learned brother and need not be repeated. It is sufficient to say that this is an application by a transferee from a Hindu widow, who was a legatee for life of the estate left by her husband, for a direction upon the executor to make over possession to him of the whole of the estate of the testator Kali Krishna Sirkar. The application is based upon the allegation that the widow Srimatya Chandan Bilasini Dasi executed a deed of surrender of the estate in favour of the applicant who was adopted by her in pursuance of the power given to her under the will within two years of the death of the testator and thereby committed her civil death. The lady repudiates the title claimed by the applicant and urges that she being inexperienced and not conversant with the ways of the world was made to sign this document by the applicant, that she never understood the terms thereof and, therefore, this is not binding upon her. The applicant, on the other hand, contends that the document has conferred full title upon him and he got into possession thereunder but has been dispossessed by the executor in collusion with the lady.

11. I agree with my learned brother that the interpretation of the various clauses of the will lead to the reasonable conclusion that the testator never authorised the widow to effect a transfer by causing her civil death and that he in terms was careful to restrict the power of alienation of the widow for all purposes so long as she was alive. From the above narrative of facts it is obvious that there is a serious dispute between the parties as to whether the title in the properties still remains with the widow or has passed out to the applicant after the so called deed of surrender of 7th November 1933, by which the succession to the estate is supposed to have been accelerated in favour of the applicant. This Court is, therefore, asked to try out a complicated question of fact upon which the parties are seriously in dispute. In *Kamal Kumari Devi v. Narendra Nath Mukherjee* (1909) 9 CLJ 19 a suit was brought by the widow of a testator to set aside an agreement made by the beneficiaries under the will and codicil of the testator. Woodroffe J. in the course of his judgment referred to the practice on the original

side of the Calcutta High Court, in a case where probate is granted and terms of settlement are recorded in a schedule annexed to the decree and said that such terms when they ordinarily are beyond the scope of the suit are not the subject-matter of the decree and if not carried out must be enforced by separate suit.

12. Their Lordships of the Judicial Committee in AIR 1935 203 (Privy Council) approved of this view but pointed out:

There is not however in this case any dispute as to the said agreement, and no suggestion has been made that the terms thereof should not be carried out. The application was for a direction that the Administrator-General, who was not a party to the agreement, but who had accepted probate of the will, should pay Parijat Debi her son's share of the residue in accordance with the terms of the agreement,

and held that the Court in its Probate and Administration jurisdiction ought to have decided the question whether it was necessary for Parijat Debi to produce a succession certificate in order to claim the share of her deceased son there being no dispute as to the agreement which everybody agreed should be carried out.

13. In the present case far from being in agreement the parties are at variance as poles asunder and in my opinion this Court should not embark upon deciding the question of title and fact in such a complicated dispute which can only be settled to the satisfaction of all the parties in a properly constituted title suit. I, therefore, agree that the application should be dismissed with costs.