

(1919) 06 CAL CK 0044
In the Calcutta High Court

Sulochana debi and Others

APPELLANT

 V_S

Jagattarini Debi and Others

RESPONDENT

Date of Decision : 10-06-1919

Acts Referred:

Succession Act, 1925 — Section 111

Citation : 53 Ind. Cas. 602

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

Bench : Division Bench

Judgement

1. This is an appeal by the plaintiffs in a suit for construction of a Will, for administration of the estate covered thereby, and for incidental reliefs.

2. Rai Durgagati Banerjee Bahadur made a testamentary disposition of his properties on the 6th February 1903, and died on the 26th March 1903. His widow as executrix obtained Probate of the Will on the 27th August 1903. She has since then from time to time alienated Immovable properties comprised in the estate of her husband. The present litigation was commenced on the 27th November 1911 by the sons of his two daughters as also the surviving daughter for construction of the Will and for declaration that the alienations will not be binding upon them as reversionary heirs after the death of the widow. The claim has been resisted by the widow and her transferees, on the allegation that she took an absolute interest in the estate under the Will.

3. The relationship of the members of the family will appear from the following genealogical table:

DUROAGAT	BANERJEE			Died	29-3-1903.			
						First wife,	Second wife	
Umamayee	Jagat	Tarini		defendant	No	1.		
						Saudamiiai,	Sulechena	
Kadambini Died 878. plaintiff No. 1. Died, 1882 Married Married Married Annada,								
Annada Kalikrislma, Died 1908. Died 1908. Died 1882. Surabala.								

Manmatha,		plaintiff	No.	7.		
						Framatha,
Suranath, Sibnath, Satinath, Debnath,	plaintiff	plaintiff	plaintiff	plaintiff	plaintiff	
No. 2. No. 3. No. 4. No. 5. No. 6.						

3. The Subordinate Judge has held that the first defendant took an absolute interest in the estate under the Will and has accordingly dismissed the suit, without investigation of the question raised in the fifth issue, namely, whether the alienations were made for legal necessity. On the present appeal, the only question discussed at the Bar relates to the exact nature of the interest taken by the first defendant in the estate of her husband under the terms of his Will.

4. The Will consists of ten clauses. The first Clause recites an earlier Will executed on the 4th April 1882. The second and third clauses mention family events which had happened since then and induced the testator to revoke the first Will. The third Clause recites that his moveable properties, including Government securities and ornaments, were the Stridhan properties of his second wife, who would continue to possess and enjoy them as owner with power of disposition. The fifth Clause contains two recitals, namely, first, that his Immovable properties (enumerated in the schedule) were his self-acquired and exclusive properties, and secondly, that, although some of these properties stood in the name of his deceased first wife, he himself was the real owner and was in enjoyment of the income thereof. The sixth clause, which has formed the center of controversy, is in these terms: On my demise, my present wife Srimati Jagattarini Debi shall get all these Immovable properties and become fall owner {sampurna malik) and enjoy and hold possession thereof; with regard thereto, my daughter or daughter's son or kinsmen shall not be competent to raise objection." The seventh Clause authorises the widow to alienate or sell any portion of the aforesaid Immovable properties (for the purpose of perform ance of religious acts or pilgrimages or necessary expenses) or the whole of the properties in the event of extreme necessity. She is further authorised to grant, if necessary, leases in perpetuity or for a I term. The eighth Clause authorises the widow to sell at a fair price, if necessary, the dwelling house and garden at Sun, to apply the sale proceeds in the purchase or erection of a house in the holy city of Benares or at Calcutta and to reside in it. The ninth Clause provides that on the death of the widow, the surviving daughter sulochana would get, enjoy and bold poession of such of the Immovable properties as shall exist, and on the death of the daughter, her sons who shall remain alive, shall get a moiety share of the said properties, the other moiety to be taken by Manmathanath, the son of the predeceased daughter Saudamini. The tenth Clause appoints his wife as executrix of the Will with authority to pay debts and collect dues.

5. There is, in our opinion, no room for serious controversy that the sixth Clause confers on the widow an absolute interest in the Immovable properties left by her husband. As was ruled by this Court in Kollany .Koer v. Luchmee Pershad 24W. K. 895. and by the Judicial Committee in Lalit Mohun Singh Boy v. Ohukhun

Lai Roy 24 I. A. 76; 24 C. 834) I C. W. N. 387; 7 Sar. P. O. J. 165 (P. C. 12 Ind. Dec. (n. &.))2, . (3) 35 I. A. 17s 30 A. 84; 7 O. h. J. 131j 5 A. h. J. 67; 12 C. W. N. aati 18 M. L. J. 7; 10 Bom. L. B. 69; 3 M.L. T. 141 (P.C.), the effect of the word "Malik" is to confer on the donee a heritable and alien-able estate; but as was observed by the Judicial Committee in *Swajmani v. Babi Nath Ojha* 8 C. L. J. 20. the effect of the word "Malik" may be modified by the context, in other words, the context may qualify or out down the full proprietary rights that the word prima facie imports. Illustrations of such qualification may be found in *Shib Lahhan Bhakat v. Srimati Tarangini Basi* 6 Ind. Cas. 141, 12 O. L. J. 391., *Pnndarpa Nath Ghose Jogendra Nath Bose* (5, *Eunchoo Money Dossse v. Troylucko Mohiney Bosste* 10 C. 342; 8 Ind. Jur. 410; 5 Ind. Dec. (n.s.) 229., *Rara Ku-mart Basi v " Moh"m Ohandra Sarhar l"2 O. W. N 4!2S 7 A. L. J. 540.) 21 B. 376j 11 Ind. Deo. (n. s,) 253, and harilal Pranal v. Bai Bewa* (8). In the case before us, the testator wap, how4 ever, not content with the word "Malik"! he used the expression "Sampurna Malik" t. e., full proprietor, and it is difficult tot imagine what more empha"io and unambiguous expression he might have used if he wished to create an absolute interest in favour of his widow. Now there can be no dispute that the expression "full proprietary, right" implies absolute power of alienation: *Saroda Sundari Dassi v. Kritto Jiban Pal* (9). We must hold accordingly that (he effect of the sixth Clause is to create an absolute interest in favour of the widow, and this view accords with the decision of the Judicial Committee in *Fateh chand v. Rup chand* 37 Ind. Cas. 122; 38 A. 446; 18 Bom, L. R. 900; 20 M. L. T. 481; 21 C. W. N. 102; 4 L. W. 567; (1916) 2 M W. N 57; 26 C. L. J. 183; 43 I. A. 183 (P. C). see also *Padam Lai v. Tek Singh* (29 A. 217; 4 A. L. J. 68; A. W. N. (1907) 19., *Am.are.ndra Nath Bose v. Shuradhany Dasi* 5 Ind. Cas. 73; 14 C. W.N. 458., *Samachandra Rao v. Ramachandra Ilao* 52 Ind. Cas. 94; 42 M. 2S3; 36 M. L. J. 306.. 6. I The question next arises, is there any-thing in the other parts of the Will which qualifies the effect of the sixth clause? Our attention has not been drawn to any specific provision which has such effect; but it has been argued that the seventh and eighth clauses would be superfluous if under the sixth Clause the widow were deemed vested with authority to alienate the estate left by her husband. There is no force in this contention. The seventh and eighth clauses do not contradict or qualify but only confirm and amplify the provisions of the sixth clause. Stress has finally been laid on the ninth Clause which provides for the devolution of the residue, if any, left at the time of the death of the widow. That clearly does not restrict the extent of the interest created by the sixth clause. It is indisputable that not withstanding such a provision, there may be a prior absolute interest in favour of the widow: *Sures Chandra v. Lalit Mohan Dutta* 31 Ind. Cas. 405; 20 C. W. N. 463; 22 C. L. J. 316., where it was pointed out that if the widow took an absolute interest in the estate devised, the gift over of what might remain undisposed of by her would be inoperative in law. See also *Manikyamala Bose v. Nandakumar Bose* 33 C. 1306 ; 4 C. L.J. 357; 11 C. W. N. 12., where reference is made to Section 111 of the Indian Succession Act of. illustration (a) and the effect of illustrations as explained by the Judicial Committee in *Mahomed Syedol Ariffin v. Yeoh Ooi Gark*

(1916) 2 A. C. 575; 86 L. J. P. C. 15; 43 I.A. 266; 115 L. T. 564; 32 T. L. R. 673 (P. C.)., The case is thus very different from (9) 5C.W.N. 300.that before the House of Lords in *Comiskey v. Eowring-Hanbury* (1905) A. C. 84; 74 L. J Ch. 263; 92 h. T. 211; 53 WR. 402; 21 T. L. R. 252. where, although an absolute gift was in terms made to the widow, there was dear indication that the estate was to be kept intact by her for transmission to the nieces of the testator, in whose favour there was an executory gift to take effect on her death. The decision just mentioned, however, illustrates what room there is for divergence of judicial opinion upon the question of construction of ill expressed testamentary instruments.

7. We have been pressed finally to hold that the testa or could not possibly have intended to authorize his widow to alienate all his estate just as she might please. But although, as the Judicial Committee observed in *Moulvie Mohamed Shumsool Hooda v. Shewuk ram* 2 I. A. 7; 14 B. L. R. 225; 22 W. R. 409; 3 Sar. P. O. J. 405; 3 Suth. P. C. J. 43., it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindus with respect to the devolution of property, we cannot override the plain language used by the testator, Our only duty is to discover what was the intention of the testator, and we must make that discovery from the words he has used. As Lord Wensleydale said in *Abbott v. Middleton* (1858) 7 H. L. C. 68 ; 28 L. J. Ch. 110 5Jur. (n. s.) 717; 11 E. R. 28; 115 R. R. 38., the question in expounding a Will is, not what the testator meant, but what is the meaning of his words. To the same effect is the observation of Lord Watson in *Seals v. Rawlins* (1893) A. C. 342 ; 61 h- J. Ch. 421: 66 L. T. 542, "We are not at liberty to speculate upon what the testator may have intended to do, or may have thought that he had actually done. We cannot give effect to any intention which is not expressed or plainly implied in the language of his Will." The truth is, intention and expression of intention are two different things. Those who take under the Will are bound by the expressed intention of the testator. If that expressed intention is unfortunately different from what he really intended, so much the worse for those who wish the actual intention to prevail."

8. As a last resort, the appellants have contended that the sixth Clause is limited in its application to such properties alone as stood in the name of the first wife of the testator. The Subordinate Judge refused, and, in our opinion, correctly refused to place this narrow construction upon the sixth clause; the Immovable properties mentioned there in are all those enumerated in the schedule referred to in the fifth clause. If this view were not adopted, the result would be an intestacy with regard to all the Immovable properties which stood in the name of the testator. We are not prepared to impute such an intention to the testator, in the absence of clear indication to that effect.

8. The result is that the decision of the Subordinate Judge, that the first defendant was given an absolute right to the properties devised by her husband, is affirmed and this appeal is dismissed with costs. The casts in this Court will be

divided in the same manner as in the Court below.