

Harendra Chandra Lahiri Vs. Basanta Kumar Maitra and ors.

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Court : Kolkata

Decided On : Jan-07-1918

Reported in : 43Ind.Cas.991

Judge : Fletcher and ;Shamsul Huda, JJ.

Appellant : Harendra Chandra Lahiri

Respondent : Basanta Kumar Maitra and ors.

Judgement :

Fletcher, J

1. This is an appeal from the decision of the learned Subordinate Judge of Rungpur, dated the 23rd November 1914. The suit was brought by the plaintiff to recover possession of certain properties mentioned in the schedule to the plaint on establishment of title and also for mesne profits. The learned Judge of the Court below decreed the suit as regards the recovery of possession on establishment of title but refused to award mesne profits. The main portion of the case turns on the construction to be placed upon the Will of one Harish Chunder Lahiri, which was dated the 23rd Pous 1306 corresponding with 6th January 1900. Before proceeding to consider the terms of the Will, it is necessary to state shortly the relationship that Harish Chander had with the parties to this suit. Harish Chander was the son of one Iswar. Chander Lahiri. Iswar Chander had been dead many years apparently and we are not concerned with him at all. Besides Harish

Chander, Iswar Chander had three other sons, namely, Hari-Prasanna Hari Prasad and Ananda. Ananda was a Step brother of Harish Chander and his two other brothers. Ananda died on the year 1884-85 leaving him surviving his widow Sukhoda Sundari, who is still alive. Hari Prasad died in the year 1300, corresponding with the year 1893-94, leaving behind him his widow Bama Sundari, who died on the 24th Agrayan 1308 corresponding with 6th February 1902. Hari Prasanna died in the year 1301, leaving behind him his widow Bhageswar, who died in the year 1303 corresponding, with the year 1896-97. Harish Chander died on the 12th Sraban 1307 corresponding with the 27th July 1900. He left behind him his widow Magnamaya, who is still alive and is the defendant No. 2 in the present proceedings. The defendant No. 1 is the adopted son of Harish Chander. Harish Chander, after the death of his brothers by a kalala, dated the 20th Chaitra 1302, acquired from Bhageswari and Sukhoda Sundari their interests in certain properties and the properties that were dealt with were set out in the schedule to the kalala. This document is referred to in the Will of Harish Chander. For the purpose of preparing that document a list (Exhibit 21) had been prepared and several properties that appear in Exhibit 21 do not find a place in the kalala of the 20th Chaitra 1302. Now, Harish Chander in those circumstances, made his Will, dated the 23rd Pous 1306 corresponding with the 6th January 1900. Subsequently, he executed a codicil on the 27th Assar 1307 corresponding with 27th July 1900. The terms of the codicil are not material in the present case. The Will, so far as it is material; states as follows: First of all in Clause 12 of the Will, which is the material clause in the present suit, the testator states the fact as to the purchase of shares in the properties from Bhageswari and Sukhoda Sundari and he mentions there the properties referred to as 'the aforesaid three classes of properties.' Then he proceeds in the following terms: On my death my youngest brother's widow the said Bama Sundari Debi and when she is dead her daughter my niece Knsu Kumari Debi will get one-fourth share of all the self-acquired immoveable properties which I have other than my aforesaid immoveable properties. Now, the first matter that has been chiefly in consideration in the present appeal is, what is the correct translation of the words that I have referred to? The appellant wishes to translate the clause in this way: 'On my death, my youngest brother's widow the said Bama Sundari Debi; if she is dead, her

daughter, that is, my niece Kusum Kumari Debi, will get one-fourth share of all the self-acquired immoveable properties which I have other than my aforesaid immoveable properties.' The literal translation is as follows: When I am absent, that is, on my death my youngest brother's widow the said Bama Sandari Debi and when she is absent, that is, on her death, her daughter, that is, my niece Kusum Kumari will get one-fourth share of all the self acquired immoveable properties which I have other than my aforesaid rmmoveable properties.' It is quite clear that the translation that has been attempted to be put forward by the appellant is useful in support of the argument that the gift comes within the terras of Section 111 of the Indian Succession Act, namely, that this was a gift on an uncertain contingency and the uncertain contingency must take place, as in the present case, before the death of the testator so that the gift might take effect. There is a good deal to say before such a translation is accepted. But after hearing Mr. Chuckerburttty in support of the appeal and having had the benefit of the advice of Mr. Justice Shamsul Huda, I have no doubt that the construction that has been attempted to be placed on this clause either on the words 'in the event of her death' or if she dies is not the accurate one but that the accurate translation is, 'when she dies or on her death.' If that is so, it seems to me quite clear that the testator was not making a substitutional gift to Kusum Kumari in the event of her mother Bama Sundari predeceasing him. The gift that he was making was a gift of successive interests, that is, the interest was to go first to Bama Sundari and then, on her death, the property was to go to her daughter Kusum Kumari. I do not feel any doubt that the words that the tes tator intended to use were words implying a gift of successive interests.

2. Then a further point was raised and it was said that the gift in favour of Bama Sundari was a gift of an absolute interest and the gift over on her death to her daughter Kusum Kumari was repugnant to the form of gift to BAMA, Sundari and, therefore, could not take effect. Section 82 of the Indian Succession Act no doubt states that a gift would ordinarily pass the whole interest of the testator unless a contrary intention appears from the Will. There are many cases in the books where a gift apparently absolute was cut down to a life-estate by a subsequent direction that on the death of the person to whom the estate was first given the property would go over to some one else. There are many cases in the books of such a gift,

and that rule has been recognized. The cases are given in note (k) in Jarraan on Wills, page 566. I have no doubt myself that the effect of this Will was to give to Bama Sundari an interest for life in the self-acquired properties of the testator with a gift over on her death of an absolute interest to her daughter Kusum Kumari. The matter is of importance, because on the death of Kusum Kumari, this interest in the self-acquired properties of the testator would under the gift in the Will pass to the plaintiff who is her husband, whereas as regards the ancestral properties the plaintiff would not be entitled to the share which Bama Sundari or Kusum Kumari took on the death of Hari Prasad. But as regards the properties that passed under the terms of the Will I think it is quite clear that Kusum Kumari on the death of her mother Bama Sandari took an absolute interest and, on her death, it passed to the plaintiff as her heir.

3. The next point that has been urged in the appeal is this, It has not been shown that these properties were the self-acquired properties of the testator, although it is admitted that the case put forward by the appellant in the Court below was much too high and that the evidence does show that some of the properties, even if they were not in fact the self-acquired properties of the testator, were treated by him as being such. Now, as regards the Will itself, it is quite clear that the testator with regard to his immoveable properties distinguished them in this way, namely, the properties of three classes. These are the three classes that are mentioned in the kabala of the 20th Chaitra 1302 executed by Bhageswari and Sukhoda Sandari in favour of the testator and they are the properties referred on the Will as the properties of three classes. In addition to that, the testator considered that he had certain other properties outside the three classes mentioned in the kabala, which he referred to as his self-acquired properties. The learned Judge in the Court below says that it may be difficult to show that all these properties were in fact the self-acquired properties of the deceased but he says that the evidence shows that the testator treated and considered them as being such. I think that the evidence clearly shows that the testator did treat and consider these other properties as his self-acquired properties. The evidence shows, first of all, that before the kabala, that is, Exhibit 21 was executed, a list of properties was drawn up and from the list of these properties, the schedules to the kabala, Exhibit 21, were prepared and that list of properties contained many items that were not included in the terms of

the kabala. It cannot be suggested that it was meant that the two ladies Bhageswari and Sukhoda intended to keep any interest in these properties, and it was subsequently conceded in this appeal that as against these two ladies Bhageswari and Sukhoda, it would not be open to them after the kabala to set up the case that these other properties were joint properties and not the properties of the testator Harish Chander. The evidence also shows that with regard to certain items the testator Harish Chander in applying for registration under the Land Registration Act in his application stated that those were his separate properties and that he had no co-sharers. It is said that with regard to portions of properties there was no such petition and that the absence of the petition for registration shows that they were joint properties. I do not think that that is so. You cannot separate one portion of the property from the other in that way. These properties seem to stand more or less together and it appears, at any rate, from the terms of the kabala, Exhibit 21, and from the terms of the Will that the testator was quite clearly treating the whole of the properties in which he held an interest other than those which he called the three classes of properties in his Will as being properties which were his own and self-acquired. I feel no doubt in this case that the testator was, in fact, considering that these properties were in fact self-acquired, and, if the testator considered that they were self-acquired, it is not denied that the testator had a sufficient interest in these properties to make a bequest of a' four-anna share to Bama Sundari for life with remainder to her daughter Kusum Kumari absolutely. That being so, the testator had a sufficient interest to bequeath in that way without considering any question of election as to whether the defendant should be called upon to give effect to the bequest or not. No such question arises in the present case. These items seem to have been considered for a considerable time as the separate property of the testator. The only item that has occasioned any difficulty is, what has been claimed in the plaint as item No. 9 coming under the list of jote properties. That is the homestead land in Nilpharaari; and the question arises in this way. The testator Harish Chander bequeathed or purported to bequeath two houses which apparently he was not entitled to wholly to his adopted son, the defendant No. 1, and this, it is said, was a part of the property held with the house in Nilphamari This point was not raised in the Court below nor was it raised in the grounds of appeal here, that this land item No. 9

under the jote properties in the schedule to the plaint was included in the devise of the house at Nilphamari to the defendant No. 1. The plaintiff-respondent says that rather than having a remand to the lower Court to ascertain whether or not this property is held with and forms a portion of the house at Nilphamari he would give up his claim to such portion. Therefore, as regards item No. 9 under the list of jote properties in the schedule to the plaint, the plaintiff-respondent not asserting any title and agreeing to give up his claim, the appeal will be allowed as regards that portion of the property. As regards the other items of property, the judgment of the Court below will be confirmed. Subject to this slight variation as regards item No. 9 of jote properties mentioned in the schedule to the plaint, the present appeal fails and must be dismissed with costs.

Shamsul Huda, J.

4. I agree.

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