Privy Council Appeal No. 69 *of* 1929.
Bengal Appeal No. 39 *of* 1927.

Suresh Chandra Mukherjee and another - - - - *Appellants*

v.

Srijukta Jyotirmoyee Debi and others - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 1ST JULY, 1930.

Present at the Hearing:

LORD TOMLIN.
LORD THANKERTON.
LORD RUSSELL OF KILLOWEN.
SIR GEORGE LOWNDES.

[*Delivered by* LORD RUSSELL OF KILLOWEN.]

The principal question for determination on this appeal is whether on the true construction of a will and in the events which have happened the testatrix died intestate in regard to the one-third share of the properties described in clause 6 of her will, which was given to her niece, Indumayi Debi for life.

The Subordinate Judge at Dacca held that there was no intestacy, and his decision was affirmed (though on different grounds) by the High Court of Judicature at Fort William in Bengal.

There is no dispute as to the relevant facts. The testatrix, Kripamoyi Debi, had no child of her own, but she had three nieces, the daughters of her deceased youngest brother, to whom she had acted as a mother. She had also stepsons and a stepdaughter, the children of her husband by another wife. In those circumstances she made her will on the 18th April, ~~1921~~ 1913.

Clause 2, so far as relevant, is in the following terms :—

" My said deceased youngest brother has left three daughters. The eldest is Indumayi Debi and her husband is alive ; she has three sons and a daughter named Suramasundari Debi. The second daughter is named Jyotirmayi Debi ; she has lost her husband ; she has a son named Jalad Chandra Mukhopadhyaya, and two daughters named Promodebala and Bibhubala Debi. The third daughter is named Taritmayi Debi ; her husband is alive, and a son and a daughter have been born to her. I have brought up my said three nieces from their infancy, and I bear great affection for them and they too respect and regard me as their mother. It is one of my principal objects to make special provisions regarding them by this Will, and it is also my desire to entrust the post of the Shebait to them in succession."

By Clause 3 she made some provision for her stepsons and the sons of deceased stepsons. By Clause 4 she made a disposition of cash, Government notes and book debts, under which benefits were conferred upon her husband, her stepsons, her stepdaughter and the daughters of her three nieces. The residue of the specific property covered by this clause remaining after paying the legacies to the legatees appears to be given to the three nieces absolutely with gifts over if " at that time " any of the nieces be dead.

Clauses 5 and 6 run thus :—

" 5. On my death the executrix shall so long as the estate left by me will be under the management of the executrix, pay to my husband at the rate of Rs. 6,000 per year in four equal instalments. Afterwards from the time when she will, according to the provisions of this Will, make over two-thirds of all the immoveable properties left by me save and except the properties of Schedules (Ka), (Kha), (Ga) and (Gha), to her two sisters, or to any of her sisters and in case any of her sisters being dead, to her sons, the said enjoyers of the properties shall be bound to pay to my husband the said sum of money in equal shares, that is to say, the enjoyers of each one-third share shall pay a one-third share of the said Rs. 6,000, *i.e.*, rupees 2,000 per year in four equal instalments. My husband will get the said allowance so long as he will live. On his death none of his heirs shall get the said money, and he shall not be competent to transfer in any way or sell his right to get the said money, and the same shall not be liable to be attached or sold for his debt. If the enjoyers of the properties fail to pay the said amount according to the instalment, then my husband will be competent to realize the same from the enjoyers of the properties with interest at 8 annas per cent. per month out of the properties left by me.

" 6. As regards such of my moveable and immoveable properties, claims and arrears of rent, etc., as will remain after excluding the immoveable properties of Schedules (Ka), (Kha), (Ga) and (Gha), and after the division in three equal shares, as provided herein, of the cash Tahabil, G. P. Notes, and loans and paying the legacies, and leaving out the amounts to be reserved in the hands of the executrix for carrying out the works provided for above and which cannot be performed within six months, the persons named in paragraph 7 will get the properties described therein, and of the immoveable properties, the right of enjoyment of my dwelling-house shall be regulated by the provisions of paragraph 8. The right of enjoyment and ownership of all the remaining moveable properties except the moveable property described in paragraph 7, and of all the remaining immoveable properties, except the dwelling-house, which is to be controlled by the rules provided in paragraph 8, shall devolve on the enjoyers of the properties in the following manner, that is to say, each one of my nieces will get in

life interest an one-third share of all the said residue of the moveable and immoveable properties. If at the time of my death any of my nieces be dead and her sons, or sons or grandsons of a deceased son, be alive, then they will get, in absolute right, the share of the said niece according to the rules of inheritance of the Hindu Shastras. And in the event of the death of any niece without leaving any male heir born of her line, such as son, grandson, etc., then her other two sisters, *i.e.*, my other two nieces, will get her share equally. If one of them be alive and the other dead then the male heirs of the dead niece born of her line, such as her sons, sons' sons, etc., will, according to the rules of inheritance, get the share which this niece would have been entitled to, and in the absence of any such male heir the only surviving niece will get the said share; and if she, too, be not alive then her male heirs belonging to her line such as sons and sons' sons, etc., will get the said share. The husband, daughter or daughter's children of any niece shall not get her share.

No other portion of the will appears to their Lordships to be of assistance in the solution of the questions discussed before them.

The testatrix died on the 27th April, 1920. Her three nieces all survived her, but the niece Indumayi Debi died on the 29th August, 1920, leaving three sons. She therefore did not die " without leaving any male heir born of her line."

It is the death of Indumayi which has given rise to the present difficulty. The beneficial interest of Indumayi Debi in a third share terminated with her death. Is there a gift over of that share to anyone either expressly or by implication ? or does the share devolve as on an intestacy ?

The Subordinate Judge held in reference to Clause 6 of the will, that :—

" The provision that the two other nieces remaining alive on the death of her other niece (without any limitation regarding the time of her death) should get her share only in case she dies without male descendants, goes clearly to show that if she leaves male descendants they are to get her share."

In other words, he finds an implied gift in favour of the male descendants of Indumayi, or, as he expresses it later :—

" On consideration of the context of the Will, I find that the real intention of the testatrix was that on the death of any of her three nieces who survived her, the share for life left to her out of the residuary immoveable estate was to vest absolutely in her male descendants according to rules of inheritance under Hindu law."

A decree was accordingly made upon the footing that no intestacy had occurred.

This decree save in so far as it related to costs, was affirmed by the High Court, but as it appears to their Lordships, upon different grounds. The Judges in the High Court construed Clause 5 of the will as containing a gift of the property to the three nieces and their sons, who were to form the whole body of residuary legatees. As to Clause 6 their view was thus expressed :—

" What effect then should be given to paragraph 6 of the Will ? In my judgment, paragraph 6, following paragraph 5, only gives directions

as to how the residue should be possessed by the different residuary legatees, in other words, how the interest should be divided between the nieces and their sons, *i.e.*, it says that the nieces would only get life-interest, and necessarily it follows that what is left would belong to their various descendants according to the limitation in the Will. And then the provision follows that if any of the nieces dies before the testatrix what would happen to her share of the property. In this view of the construction of the Will there is no contradiction between one clause and the other and the entire dispositions made under the Will may be reconciled without any difficulty."

In the opinion of their Lordships it is not possible to construe Clause 5 as containing any gift of the property covered by Clause 6 in favour of any person. It only in terms refers to two-thirds of the immoveable property covered by Clause 6, and in relation to the property to which it does refer, Clause 5 is in form narrative only. The object of Clause 5 is to provide a life annuity to the husband of the testatrix, and it may with sufficient accuracy be paraphrased thus :—" So long as the estate is undistributed my executrix is to pay Rs. 6,000 per year to my husband. After my executrix has (according to Clause 6) handed over two-thirds of the immoveable property to her two sisters, or to any of her sisters, and, in case any of her sisters being dead, to the dead sisters' sons, the persons enjoying the properties shall be bound to pay Rs. 6,000."

Their Lordships are unable to agree with the reasons given by the High Court. Nor do they feel able to imply any gift in favour of the male descendants of Indumayi Debi. The portion of Clause 6 of the will which commences with the words " And in the event of the death of any niece without leaving any male heir," is the only possible provision in the will under which such a gift could be implied in favour of male heirs who survived the niece. But even then, the gift could only be implied if the death of the niece took place at a time to which the clause relates. It becomes necessary, therefore, to consider whether the clause relates to death at any time or at some particular time.

Although a reference to death will, *prima facie*, refer to death at any time, the wording of Clause 6 seems to their Lordships to confine that provision to death in the lifetime of the testatrix. Upon no other hypothesis does it seem possible to account for the testatrix (after giving the share to the other two nieces, and, in certain events, to " the only surviving niece ") then proceeding to dispose of the share on the footing that " the only surviving niece " is herself dead. Upon the particular wording of this will their Lordships think that this reference to death must be taken to be a reference to death in the lifetime of the testatrix.

Difficult as it would be to imply the suggested gift if the clause had referred to death at any time, it is in the opinion of their Lordships impossible to make the implication if the clause is confined, as they think it must be, to death in the lifetime of the testatrix.

Their Lordships derive no assistance from any authorities in the construction of the very special language employed in this particular will. The result is that the testatrix has not in the events which have happened made any disposition after the death of Indumayi Debi of the share in which, under Clause 5, she had a life interest, but has died intestate in respect thereof. The same reasoning will apply to the other two shares in which Jyotimayi Debi and Taritmayi Debi the first and third respondents took similar interests, though their life estates are still subsisting.

Their Lordships are of opinion that this appeal should be allowed, and that it should be declared that as regards the one-third share of the property in which, under Clause 6 of the will, Indumayi Debi had a life interest and subject to such life interest, the testatrix died intestate in respect thereof. There should also be a similar declaration in the case of the other two shares. The costs of all parties of this appeal will be paid out of the estate of the testatrix.

The case will be remitted to the High Court in order that the necessary variations in the existing order, including and consequent upon such declarations, may be made.

Their Lordships will humbly advise His Majesty accordingly.

In the Privy Council.

SURESH CHANDRA MUKHERJEE AND
ANOTHER

v.

SRIJUKTA JYOTIRMOYEE DEBI AND OTHERS.

DELIVERED BY LORD RUSSELL OF KILLOWEN.

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