The Official Trustee of West Bengal Vs Manichoor Ghosha and Others

Originating Summons Suit No. 389 of 1972

Court: Calcutta High Court

Date of Decision: May 30, 1975

Acts Referred:
Succession Act, 1925 â€" Section 74

Citation: AIR 1975 Cal 424

Hon'ble Judges: Sabyasachi Mukharji, J

Bench: Single Bench

Advocate: K.S. Roy and N. Mitter, for the Appellant; P.K. Roy and J. Pugalia, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

Sabyasachi Mukharji, J.
This is an originating summons for construction of the will of one RAI Bahadur Ganendra Chandra Ghosh, since deceased. It appears that he executed a Will on the

3rd February, 1934 in respect of movable and immovable assets. By the said will the testator had revoked his previous dispositions and the predecessor-in-interest of the plaintiff, that is to say, the

Official Trustee of Bengal became the sole executor and the trustee. Clauses 16 and 17 of the said Will provide as follows :

16. I give, devise, and bequeath the rest and residue of my estate and effects of whatsoever natural and wheresoever situated which I shall be seized and possessed of and not hereby or otherwise

disposed of hereinafter referred to as ""my residuary estate"" unto my Executor and Trustee upon Trust to collect the whole of the Income thereof and pay the same to the following persons

(hereinafter referred to as the "beneficiaries") for and during the term of their respective natural lives according to the shares mentioned against their respective names:

1. My nephew Asoke Sri Ghosha l/6th (one sixth)

2. My nephew Krishna Kishore Ghosha 1/6th (one sixth)

3. My nephew Joyatsen Ghosha 1/6th (one sixth)

4. My nephew Ranatsen Ghosha 1 /6th (one sixth)

6. My grand nephews Debabrata Ghosha, and Bhagabati Charan Ghosha in equal shares 1/9th (one ninth)

6. My Grand nephews Debabrata Ghosha, Satyabrata Ghosha, Priyabrata Ghosha and Sibabrata Ghosha in equal shares 2/9th (two ninth).

17. I will and direct that upon the death of any of the "beneficiaries" hereinbefore mentioned my Executor and Trustee shall make over the share in the corpus in my residuary Estate represented by

the income payable to him as mentioned in the last preceding clause hereof to his lineal male descendants then living per stirpes and not per capita absolutely and for ever provided nevertheless that if

such beneficiary or beneficiaries shall die without leaving any lineal male descendants him or them surviving the benefit hereby intended to be conferred on his or their lineal male descendants shall be

taken by the surviving beneficiaries and the lineal male descendants of such of the beneficiaries as may have died leaving such descendants absolutely and for ever.

Thereafter in October, 1934, first of several codicils was executed by the testator. By Clause 8 it revoked Clause 17 and substituted another bequest and added one Sm. Nalini Ghosha. On the 9th

February, 1935, the testator executed another 3rd codicil whereby he revoked the said Clause 8 of the first codicil and restored the bequest contained in Clauses 16 and 17 of the said will. None of

the several codicils touched Clauses 16 and 17 of the will. On the I7th May, 1942 the testator died. On the 18th May, 1942 the said will of the testator along with the several codicils was probated

by this Court and since the grant of the probate the plaintiff being the Official Trustee of West Bengal has been administering the estate in terms of the provisions contained in the said will. Some of

the beneficiaries have died which will he clear from the genealogical table which is as follows:

Hare Chandra Ghosh (Dead)

Commissioner.

_____ _____|_____

| | | | | | | |

Paratp Ch. Sarat Ch. | | D D D D

dead) (dead) | Ganendra Ch.

_____|_____ | | Testator (dead)

| | | | | | | | __|____

Bhupendra Sri Jogendra Sri Bharata Sri D D D D | | | | |

(dead) (dead) (dead) | | D D D

| | | | |

| ____|____ ____|_____ | |

| | | | | | | | | | | | | | |

| D D D D Daba Satya Priya Shiva D D D D | |

| | died | | Stephanos

___|_____ _|_____ 28/12 | | Nirmalendu

| | | | | | 43 | | (dead)

Durgagat Bhagabati D D D D D | |

died | | |

17/12 _____|_____ _____|___ |

61 | | | | | | | | | | | | | | |

| Dilip D D D D Asoka S S S Krishna D D D D |

___|__ Sri died 1/7 |

| | died 71 |

D D 20/10 ___|____ |

45 | | | |

| D D D |

_____|_____ |

| | | | | | | |

Mani Ratan Indra Sankha Hira D D |

|

_____|

|

Debendra Ch. (dead)

_____|_____

| | | | | | |

Jayat died S Ranat died D D D D

28.11.59 17-12-60

_____|_____ _____|_____

| | | | | | | | | | | | | | |

Sanat S Ajit Ashit Tarit Ranjit Bidyut Lallit D D D Benukar D D

|

died in or

after 1964

D -- Daughter

S -- Other sons.

On the 17th December, 1961, Durgagati died leaving two daughters and his widow, On the 1st July, 1971. Krishna Kishore died leaving him surviving three daughters and his widow and no lineal

male descendants. The surviving beneficiaries were claiming payment of Durgagati''s share in the corpus of the residuary estate of the testator. In the premises, the Administrator General has taken

out this originating summons for consideration of the three following questions :

(a) In the facts and circumstances of the case are the defendants herein and the legal representatives of the said Asit Kumar Ghosha deceased and Krishna Kishore Ghosha deceased to the

exclusion of all others entitled to the distribution among themselves of the share of Durgagati in the corpus of the said residual estate.

(b) If so is such distribution to or devolution upon the said defendants and the said legal representatives of the said Ashit Kumar Ghosha and Krishna Kishore Ghosha both since deceased governed

by the principle of per stripes?

(c) If not, should such distribution be made or devolution take place as per capita and/or in equal shares amongst the said defendants and the said legal representatives of the said Ashit Kumar

Ghosha and Krishna Kishore Ghosha both since deceased.

On the first question there is no dispute that the answer should be in the affirmative. It is also apparent on the construction of the relevant clauses of the Will and in the facts and circumstances the

answer to the first question must be by saying ''yes''.

2. The main question, however, is whether such distribution or devolution in the facts and circumstances of the case that happened, should be governed by the principle of per stirpes or not. That will

depend on the construction of Clause 17 of the Will set out before. The testator has provided that upon the death of any of the beneficiaries mentioned the executor-trustee shall make over the share

in the corpus represented by the income payable to him in Clause 16 to his lineal male descendants then living per stirpes and not by per capita. By a proviso he has stipulated that if such beneficiary

or beneficiaries should die without leaving any lineal male descendants, him or them surviving, the benefit thereby intended to be conferred on his or their lineal male descendants should be taken by

the surviving beneficiaries and the lineal male descendants of such beneficiaries as might have died leaving such descendants absolutely for ever. If the two situations, that is to say, the situation

contemplated by the main clause of the said Clause 17 and the situation contemplated by the proviso are treated as part of the same clause and the proviso being treated only as an exception to the

main clause, then it was argued that as the testator had mentioned that the lineal male descendants then living should take by per stirpes and not by per capita, that intention should also guide the

proviso. It is indisputable that normally if there is no specific or clear expression, the devolution should take place by principle of per capita and not by principle of per stirpes. These principles are

well settled. Reliance in this connection may be placed on the observations in the case of In re: Jeeves -- Morris -- Williams v. Haylett (1949) 1 Ch 49; in the case of Jeffrey (deceased) Welch v.

Jeffrey (1948) 2 All ER 131; and Jarman on Wills, 8th Edition 1583. Therefore, here in this case the testator was obviously aware of the normal rule and, therefore, by use of clear expression in the

first part of Clause 17 he has eliminated the operation of the principles of per capita and has provided for the principle of per stirpes. The question, is, whether the proviso should be guided by that

principle of the substantive provision.

3. If the proviso is treated as merely a proviso and part of the main clause then there being clear expression of the testator the principle of per stirpes and not per capita should be the guiding factor.

If on the other hand, the proviso is construed as an independent provision though contained in a proviso to guide a different situation then contemplated by the main part of the clause, then there

being no expression of the testator that the said situation would also be guided by the principle of per stirpes and not the normal principle of per capita, in my opinion, it should be governed by the

principle of per capita. In construing the entirety of Clause 17 it appears to me that the situations contemplated by the main substantive part of Clause 17 and the proviso are really two independent

provisions of the Will and the latter provision should not be construed as merely a proviso to the first provision though couched in the expression of the proviso. If these two are intended to be two

substantive provisions, then there being no express will of the testator that the principle of per stirpes should govern, in my opinion, the principle of per capita which is the normal rule should govern.

There is a further aspect to be borne in mind. The descendants are now the beneficiaries upon whom the interest has devolved upon the death of Durgagati. It would be more equitable to construe

that the testator intended that they should share equally in the contingency that has happened. Reliance in this connection may be placed on the observations of the Judicial Committee in the case of

Venkata Narasimha Row v. Parthasarathy Appa Row (1913) 41 IA 51 (PC). In the aforesaid view of the matter I answer question (b) in the negative and question (c) in the affirmative.

4. Therefore, I answer question (a) -- yes, question (b) -- no and question (c) -- yes.

5. Cost assessed at 30 GMs. to each of the appearing parties to come out of the assets.