33 Ind. Cas. 102

Calcutta High Court

Case No: None

Sarojini Dassi and Others		APPELLANT
	Vs	
Gnanendra Nath Das and Others Surendra Nath Das Vs Gnanendra Nath Das and Others		RESPONDENT

Date of Decision: Dec. 14, 1915

Citation: 33 Ind. Cas. 102

Hon'ble Judges: Lancelot Sanderson, C.J; John Woodroffe, J; Asutosh Mookerjee, J

Bench: Full Bench

Judgement

Lancelot Sanderson, C.J.
This appeal raises questions as to the true construction of the Will of Sreenath Das, dated 13th January 1904.

2. The first Clause deals with a dedication of certain property to the family idols. I do not refer to the details of the clause, as they have been already so fully discussed in the course of the argument and they appear from the Will itself.

3. It has been argued, first of all, that this clause does not constitute a complete dedication of all the property to the idols, but merely created a charge on the property in favour of the idols: secondly, that there is no valid trust for religious and charitable purposes with regard to the surplus income arising from the so-called debuttar estate.

4. I do not give any decision on the first point, viz., whether the clause contains a complete dedication because it was admitted by the learned Counsel for the appellant that if the clause does contain a valid trust of the surplus, if any, for charitable purposes, the first point becomes immaterial, and that it does not matter whether the Will constituted a complete dedication or merely a charge on the property in favour of the idols, because

the whole of the testator''s interest in the property specified in clause I would be exhausted.

5. In my judgment the clause does create a valid trust for religious and charitable purposes.

6. The ground on which the clause is attacked is as follows: It was argued that the terms of the clause gave to the shebait a power to accumulate the surplus income, which would exist over and above the amount required for the defraying of the expenses specified for the worship of the idols and the management of the properties, to an unlimited extent, and that it imposed no obligation upon the shebait to expend any part of the surplus income. As an instance, it was argued that under the clause it was open to the shebait and his successors to accumulate the surplus income for a thousand years or more and that they need never spend any of the surplus income upon religious or charitable purposes. In my judgment this is not a proper or reasonable construction to put on the Will.

7. The clause relating to accumulation is merely incidental to the provisions relating to the dedication and management of the property, and in my judgment the intention of the testator can clearly be gathered from the terms of the clause, viz., that a power, and it may be said a necessary and reasonable power, is given to the shebait from time to time in the course of the management of the properties to make a safe investment of surplus income and thus increase the debuttar fund, and a direction is necessarily implied that the income not required for the specified expenses shall be used within a reasonable time and in a reasonable way for other religious ceremonies and other charitable work. It is left to the discretion of the shebait to decide the exact time when the income should be so used, but it is contrary to the intention of the testator as expressed in the clause, when read as a whole, that the shebait and his successors should hold up the surplus income and accumulate it for hundreds of years. For this reason, in my judgment, the appeal fails on the points raised in the first clause.

8. The second point raises the question whether there is an intestacy as to certain of the testators property which, I understand, consists of rents uncollected at the testator''s death, mortgage debts outstanding at the said date and shares and securities.

9. It was argued by the appellants'' Counsel first of all that an extended meaning must be given to the word "cash" so as to include the property which I have mentioned already.

10. In my judgment this is not the true construction. "Cash" in the ordinary acceptation of the word has a narrower meaning than money, and when taken in conjunction with the word Government promissory notes," in my judgment, it means cash in the ordinary meaning of the word and nothing more.

11. But a further point is taken, and this, I admit, has caused me some doubt as to the proper construction. It was argued for the appellant that the terms of the Will read as a

whole showed a clear intention of the testator to dispose of the whole of the property. With this I agree. The question remains whether the terms of the Will are sufficient to carry out that intention as to his residuary estate so as to cover the property above mentioned, viz., uncollected rents, mortgage debts and shares. After due consideration of the able argument of Mr. Dass, I have come to the conclusion that Clauses 12, 13 and 14 read together do sufficiently contain a devise of the residuary estate to his two sons, Surendra and Rajendra; and consequently, in my opinion, the judgment of Mr. Justice Chitty, in so far as he held that there was an intestacy as to this property, should be reversed. As to the library at Srinath Das'' Lane, I think it may be said to be included in Clause II.

12. Costs of the appeal to come out of the estate. Executor''s costs as between attorney and client.

John Woodroffe, J.

13. I agree.

Asutosh Mookerjee, J.

14. Two questions have been argued on these appeals, namely, first, was there intestacy in respect of any interest in the properties dedicated by the testator to his family idols, secondly, were the two sons of the testator, Surendra Nath Das and Rajendra Nath Das, constituted residuary legatees under his Will, in respect of properties other than his Immovable properties.

15. The determination of the first question depends upon the true construction of the first Clause of the Will. In the first paragraph of that clause, the testator dedicates certain specified properties to his family idols and directs the performance of the ceremonies named by him. He further prescribes the sums to be spent for this purpose, which amount to an aggregate of Rs. 6,765 a year. In the second paragraph, he directs the revenues, rents, cesses, taxes and costs of management and repairs of the dedicated properties to be paid out of the income thereof, and then states as follows: "if after defraying all the above mentioned expenses any money be left in the hands of the shebait for the time being, the same shall accumulate as a debuttar fund. The shebait for the time being shall meet any emergent and unforeseen expenses out of said fund and shall have power to make any safe investment and to acquire other properties and thus to increase the corpus of the debuttar estate. Out of the income of such fund, the shebait for the time being shall also have power to celebrate the puja of any other god or goddess of the Hindus, to perform any other religious ceremonies, or to perform any other charitable work. The above mentioned properties and the income thereof or any portion of the same shall never belong to any of my heirs or any of the shebaits nor shall the same be in any way liable for his personal debts." The appellants have contended that the properties mentioned in the clause were not absolutely dedicated to the family idols, that they

continued to be secular properties subject to a religious charge of Rs. 6,765 a year, and that there was no valid legal disposition of the remainder, so that there was an intestacy in respect thereof. This contention is, in my opinion, unsound. Reliance has been placed upon the decisions of the Judicial Committee in Sonatun Bysack v. Sreemutty Juggutsoondree Dossee 8 M.I.A. 66 : 11 Suth. P.C.J. 37 : 1 Sar. P.C.J. 721 : 19 E.R. 455; Ashutosh Dutt v. Durga Churn Chatterjee 6 I.A. 182 : 5 C. 438 : 5 C.L.R. 296 : 4 Sar. P.C.J. 58 : 3 Suth. P.C.J. 694 : 3 Ind. Jur. 571 : 3 S. L.R. 32 and Surendro Keshub Roy v. Durga Soondary Dossee 19 I.A. 108 : 19 C. 513. These cases are clearly distinguishable, and do not assist the contention of the appellants. The dispositions there provided for the performance of religious acts and ceremonies, and were followed by a bequest of the surplus to the members of the family of the founder for their own use and benefit; in these circumstances, it was ruled that the dedication was not, to use the language of Sir Arthur Wilson in Jagadindra Nath Roy v. Hemanta Kumari Debi 32 C. 129 : 31 I.A. 203 : 1 A.L.J. 585 : 8 C.W.N. 809 : 7 Bom. L.R. 765 of the completest character, but merely created a charge for religious and ceremonial purposes on property which still retained an essentially secular character. Here the position is entirely different. The testator clearly intended to dedicate his entire interest in the property for religious and charitable purposes. He states explicitly that no portion of the income of the properties shall ever belong to any of his heirs or be in any way liable for their personal debts. I am not unmindful that an expression of this character is not necessarily decisive, for, as Peacock, C.J., said in Ganendra Mohan Tagore v. Upendra Mohan Tagore 4 B.L.R. (0. C.J.) 103 a mere expression in a Will that the heir-at-law shall not take any part of the testator''s estate is not sufficient to disinherit him, without a valid gift of the estate to some one else, or as Willes, J., said in Jatindra Mohan Tagore v. Ganendra Mohan Tagore I.A. Sup. 47 : 9 B.L.R. 377 : 18 W.R. 359 : 2 Suth. P.C.J. 692 : v3 Sar. P.C.J. 85 the heir-at-law, though in terms excluded from benefit under the Will, cannot be excluded from his general right of inheritance, without a valid devise to some other person; this is in conformity with Pickering v. Lord Stamford (1795) 3 Ves. 332 : 30 E.R. 787; Johnson v. Johnson (1841) 4 Beav. 318 : 49 E.R. 361 and Fitch v. Weber (1848) 6 Har 145 : 17 L.J. Ch. 361 : 12 Jur. 645 : 67 E.R. 1117 : 77 R.R. 56. The clause mentioned, however, plainly indicates the intention of the testator, and even if it be assumed that the entire interest in the properties was not dedicated to the family idols, there is no room for dispute that the remainder was dedicated for religious and charitable purposes. This brings me to the question, whether, in this view, the supplementary dedication was valid in law, and, if invalid, whether the heirs are benefited thereby. The appellants have argued that there was a direction for accumulation not permissible under the law. I do not think this is a fair construction of the devise. The testator authorised an accumulation of the surplus and an increase of the corpus of the debuttar estate; but he empowered the shebait to apply the income for religious and charitable purposes and his intention obviously was that it should be so applied. It has been argued, however, that under the words of the Will, it was not obligatory on the shebait to apply the income in this manner, that he might accumulate the income for an indefinite time, and that consequently the direction for accumulation is void. Reliance has been placed in this connection upon a

class of cases of which Williams v. Kershaw (1835) 5 C.F. 111 : 5 L.J. (N.S.) Ch. 84 : 42 R.R. 269 : 7 E.R. 346; Hunter v. Attorney-General (1899 App. Cas. 309 : 68 L.J. Ch. 449 : 80 L.T. 732 : 47 W.R. 673 : 15 T.L.R. 384; Blair v. Duncan (1902) App. Cas. 37 : 71 L.J.P.C. 22 : 50 W.R. 369 : 86 L.T. 157 : 18 T.L.R. 194 and Grimond v. Grimond (1905) App. Cas. 124 : 92 L.T. 477 : 21 T.L.R. 323 : 74 L.J.C.P. 35 may be taken as the type. The principle which underlies these decisions does not assist the appellants; there the bequests were for charitable and for other indefinite purposes, and were, consequently, held void for uncertainty, as the trustees might or might not apply the fund for a charitable purpose; here, on the other hand, the income, if spent at all, must be spent for religious and charitable purposes. Further, I do not accept, the contention that this is a case of a mere power; it is, on the other hand, I think, to use the language of Lord Eldon in Brown v. Higgs (1803) 8 Ves. 561: 4 R.R. 323 : 32 E.R. 473 a case of a power which the party to whom it is given is entrusted with and required to execute. But even if we assume that the shebait is authorised by the clause to accumulate the income indefinitely and that such direction is invalid in law, how does it help the appellants? It is well settled that where there is an unconditional gift to charity, a direction for accumulation is invalid, but the only result is that the income is immediately distributable in charity; the heirs or next of kin are not let in. This was decided by the House of Lords in Wharton v. Masterman (1895) App. Cas. 186 : 64 L.T. Ch. 369 : 11 R. 169 : 72 L.T. 431 : 43 W.R. 449 which overrules the contrary view expressed by Wickens, V.C., in Harbin v. Masterman (1871) 12 Eq. 559 : 40 L.J. Ch. 760. Reference may also be made to a long line of cases which support the view I take: Martin v. Maugham (1844) 14 Sim. 230 : 13 L.J. Ch. 392 : 8 Jur. 609 : 60 E.R. 346 : 65 R.R. 571; Attorney-General v. Poulden (1844) 3 Hare 555 : 8 Jur. 611 : 67 E.R. 501 : 64 R.R.414; Shillington v. Portadown Urban District Council (1911) 1 I.R. 247 : 41 I.L.T.R. 200 : 12 Irish Law Reports 114; Ogilvi v. Kirk of Dundee (1846) 8 Dun 1229; Maxwell v. Maxwell (1877) 5 Ret 248 : 15 Scot. L.R. 155; Chamberlayne v. Brockett (1872) 8 Ch. App. 206 : 42 L.J. Ch. 368 : 21 W.R. 299 : 28 L.T. 248; Swain In re Monckton v. Hands (1905) 1 Ch. 669 : 74 L.J. Ch. 354 : 92 L.T.715. The decision in Ewen v. Bannerman (1830) 2 D.C. 74 : 4 W.S. 346 : 6 E.R. 657 may seem at first sight to support the opposite view; but it has been adversely commented on and plainly disapproved by Lord Chelmsford and Lord Wensleydale in Magistrates of Dundee v. Morris (1858) 3 Mac 134 : There is no room for reasonable doubt that the doctrine recognised by the House of Lords in Wharton v. Masterman (1895) App. Cas. 186 : 64 L.T. Ch. 369 : 11 R. 169 : 72 L.T. 431 : 43 W.R. 449 is based on sound principle; the trustees of a charity are not bound to spend the whole of the income of the charity every year; they can lay by money for an ulterior purpose just as an individual can, provided the purpose is within the scope of the charitable trust [see the observations of Lord Dunedin in Lindsay"s Trustees, In re (1911) 48 Scot. L.R. 470 Consequently, even if the clause were construed as a trust f or accumulation, and the direction were held invalid in law, the heirs would not be benefited. The first question must be answered in the negative.

16. The determination of the second question depends upon the true construction of the last three clauses of the Will. I am disposed to agree with Mr. Justice Chitty that the term

"cash," used by the testator in Clause 12, does not include arrears of rent, debts due and the like properties. But Mr. Mitter has argued that the two sons, Surendra Nath Das and Rajendra Nath Das, were constituted residuary legatees. This contention, I think, must prevail, notwithstanding the able argument of Mr. Das in support of the contrary view. The various dispositions contained in the Will, taken together, point to the conclusion that the testator intended to dispose of all his properties; if there is any doubt, we ought, if possible, to read the Will so as to lead to a testacy, not to an intestacy: Redfern, In re, Redfern v. Brying (1877) 6 Ch. D 133 : 47 L.J. Ch. 17 : 37 L.T. 241 : 25 W.R. 902; Harrison, In re Turner v. Hellard (1885) 30 Ch. D. 390 : 55 L.J. Ch. 799 : 53 L.T. 799 : 34 W.R. 420; Kirby-Smith v. Parnell (1903) 1 Ch. 483: 72 L.J. Ch. 468 : 51 W.R. 493; Edwards In re Jones v. Jones (1906) 1 Ch. 570 : 75 L.J. Ch. 321 : 54 W.R. 446 : 94 L.T. 593. On an examination of the entire scheme of the Will I think it is reasonably plain that Clause 5 disposes of the residue of the Immovable properties, while the last sentence of Clause 12 effectively disposes of the residue of the other properties. This view is to my mind supported by the dispositions in Clause 14; it would be unreasonable to hold that in the contingency contemplated in that clause, the testator burdened his two sons, Surendra and Rajendra, with the funeral expenses, the costs of the Probate proceedings and the legacies though they were not the residuary legatees. The second question must be answered in the affirmative.

17. On these grounds, I agree with the learned Chief Justice in the order he proposes to make in these appeals.