
(1924) 07 CAL CK 0051

Calcutta High Court

Case No: None

Indubala Debi

APPELLANT

Vs

Manmatha Nath Roy
and Others

RESPONDENT

Date of Decision: July 3, 1924

Acts Referred:

- Succession Act, 1865 - Section 161, 173, 174, 175, 176

Citation: AIR 1925 Cal 724 : 87 Ind. Cas. 404

Hon'ble Judges: Sanderson, C.J; Walmsley, J

Bench: Full Bench

Judgement

Sanderson, C.J.

This is an appeal by Sm. Indubala Debi, the wife of Mohendra Nath Roy, one of the defendants in the suit against the judgment of my learned brother Mr. Justice Greaves dated the 20th of March, 1923. The suit was brought by Manmatha Nath Roy.

2. The plaintiff and Mohendra are sons of G.B. Roy and Girijamoni Debi. The pedigree of the family of G.B. Roy is set out in the plaint. Kuntala Debi, the defendant No. 6, is the daughter of Bimalabala. The 2nd defendant Mohendra is an insolvent, and the Official Assignee was joined as a defendant.

3. In the suit the plaintiff claimed that the shares and rights of the parties in the estate of the testator and in particular in the properties set out in Exhibit B annexed to the plaint be ascertained and declared.

4. A further prayer was for a declaration that the defendants Nos. 3, 4 and 5 have no interest or right in the estate of the testator and in particular in the properties set out in Exhibit B annexed to the plaint.

5. There were other reliefs asked for, such as partition, etc.

6. The question in this appeal relates to 3 houses, viz., 45, Guru Prosad Chowdhuri Lane 1, Raghu Nath Chatterjee Street and 46, Guru Prosad Chowdhuri Lane.

7. The issues were as follows:

(1) Did the premises No. 45, Guru Prosad Chaudhuri Lane, No. 1, Raghu Nath Chatterjee Street belong to Ganga Bishnu or to his wife Girijamoni?

(2) Is the plaintiff estopped from questioning the title of Girijamoni to No. 45, Guru Prasad Chaudhuri Lane.

(3) Were premises No. 46, Guru Prosad Chaudhuri Lane purchased by the executors of Ganga Bishnu on the 1st October, 1894, out of funds of Ganga Bishnu's estate in their hands?

(4) Did Girijamoni elect to take under her husband's "Will."

8. Strictly speaking the 3rd issue should be confined to a portion of 46, Guru Prosad Chowdhuri Lane.

9. The learned Judge held that No. 45, Guru Prosad Chowdhuri Lane, and 1, Raghu Nath Chatterjee Street belonged to G.B. Roy: that on the 2nd issue no case of estoppel was made out. The 3rd issue was answered in the affirmative: and, the learned Judge said that if it were necessary to deal with the 4th issue he should answer that in the affirmative.

10. Indubala has appealed against this decision. Her interest in the premises arises under the will of Girijamoni which was dated 18th May, 1919. By this will Girijamoni, devised the two houses mentioned in paras. 1 and 3 of the schedule of the will to Indubala.

11. These two houses are 45 and 46, Guru Prosad Chowdhuri Lane. Girijamoni devised No. 1, Raghu Nath Chatterji Street to Sukritibala for her life and after her death to Mohendra's sons, who are the defendants 4 and 5. Sukritibala is dead.

12. The plaintiff's case was that though No. 45, Guru Prosad Chowdhuri Lane and No. 1, Raghu Nath Chatterjee Street stood in the name of Girijamoni at the time of G.B. Roy's death, these premises were the property of his father G.B. Roy, and consequently neither Indubala nor the sons Mohendra have any interest in the premises.

13. As to No. 46, Guru Prosad Chowdhuri Lane the plaintiff's case was that the premises were purchased by the executors of G.B. Roy on 1st October, 1894.

14. The appellant's case was that these premises were purchased by Girijamoni and that under Girijamoni's Will she was entitled to 45 and 46, Guru Prosad Chaudhuri Lane and the sons of Mohendra were entitled to 1, Raghu Nath Chatterjee Street. G.B. Roy died on the 27th April, 1890, having executed a Will dated the 2nd April, 1890.

15. The material paragraphs of the will are:

1. I do hereby nominate, constitute and appoint my eldest brother Babu Nrito Gopal Roy, my cousin Babu Radha Nath Bagchi son of Srikristo Bagchi of Santipore in District of Nadia but at present of No. 44, Guru Prosad Chowdhuri Lane in Calcutta and my father-in-law Babu Bhuban Mohan Dhole of Serampore executors of this my Will.

3. "I do hereby direct that all properties movable and immovable standing in the name of my wife Girijamoni Debi including the house No. 45, Guru Prosad Chowdhuri Lane in Calcutta and all house-hold furniture and articles of domestic use shall remain in the possession of my said wife who shall during her natural life enjoy all the income and profits arising therefrom. But my said wife shall have no power to sell, mortgage or dispose of any such property, After the death of the said Sm. Girijamoni Debi the same shall form a part of the residue and remainder of my estate and shall be divided equally amongst my sons.

6. "I do hereby declare that my said executors will have full discretion, power and authority to sell, let, mortgage or otherwise dispose of all or any portion of my properties movable and immovable for the benefit of my estate.

7. "I further dictate that my wife Sm. Girijamoni Devi shall during her natural life receive a share equal to the share of a son in all the income and profits of the residue of my estate.

16. It was argued by learned Counsel on behalf of the plaintiff-respondent that it was not necessary for the Court to investigate the question whether the two properties 45, Guru Prosad Chowdhuri Lane, and 1, Raghu Nath Chatterjee Street belonged to G.B. Roy or to Girijamoni, because even assuming that they were the property of Girijamoni, she had elected to confirm the disposition of these premises in the will of G.B. Roy by the acceptance of benefits which has been provided for her by G.B. Roy's will. Reliance was placed upon Sections 161, 173, 174, 175 and 176 of the Indian Succession Act, 1865.

17. It was urged that the executors had made certain payments for Girijamoni. Among other payments reference was made to sums amounting to Rs. 1,300 or Rs. 1,500 which were paid for the purchase of certain premises called 6, Brindabon Mullick Lane on the 12th January, 1891.

18. In the first place it is to be noticed that the payments were made out of the profits of the business, in which G.B. Roy had a share, and which the executors were carrying on, and that they were debited to G.B. Roy's estate. This house was purchased in Girijamoni's name for Rs. 6000. Part of the purchase money was provided by the sale of 218, Cornwallis Street on the 7th January, 1891, as is proved by the number and amounts of the Government Currency Notes, 218, Cornwallis Street had been purchased on the 5th April, 1889, i.e., before the death of G. B. Roy. But the deed shows that Girijamoni was the purchaser. The deed of the 7th January, 1891 by which Girijamoni sold 218, Cornwallis Street was the subject of much comment during the course of the

argument. The learned Counsel for the respondent contended that the recitals were consistent with Girijamoni being merely the benamidar of the property. On the other hand, the learned Counsel for the appellant contended that they were inconsistent with that position, and that by this sale Girijamoni was asserting her own title to the property, and she was thereby dissenting from the disposition of the property by the will of G.B. Boy. The executors of G.B. Boy's will were parties to the deed, and they thereby made themselves responsible for the statement contained therein that the property was purchased by Girijamoni. If in fact this property was held by Girijamoni as benamidar, I see no reason why it should not have been so stated in the deed; instead of this being done the executors of G.B. Boy's will agreed that the property belonged to Girijamoni herself. The joinder of the executors as parties, may be explained by the fact that Girijamoni was a purdanashin widow and the purchaser's advisers would not unreasonably insist upon the executors of G.B. Boy's will being added as parties so as to avoid any question in the future as to Girijamoni's title. No. 6, Brindabon Mullick Lane was sold by Girijamoni on the 1st April. 1903. The deed recited that she was the real owner of the property having purchased it with her stridhan money, that she had no co-sharers and that the property was not included in her husband's estate. The executors of G.B. Boy's estate, the plaintiff in this suit, and Girijamoni's other sons were witnesses to the deed. In my judgment these deeds and the explicit statements made therein show that 218, Cornwallis Street, and No. 6, Brindabon Mullick Lane were purchased by and were the property of Girijamoni herself and the evidence obtained from these formal deeds, should not be displaced by the verbal evidence given in this case so many years after the event.

19. No. 218, Cornwallis Street was one of the properties, standing in the name of Girijamoni at the time of G.B. Roy's death and by selling the property, by asserting her right as the owner of the property, by using the proceeds for the purchase of No. 6, Brindabon Mullick Lane, and by subsequently selling No. 6, Brindabon Mullick Lane as her own property with the consent of the executors and the plaintiff in my judgment, Girijamoni dissented from the disposition of 218, Cornwallis Street by the will of G.B. Boy. The executors of G.B. Roy's estate had no power under the will to purchase property; the Rs. 1,300 or Rs. 1,500 alleged to have been advanced for the purchase of 6, Brindabon Mullick Lane could not have been made by the executors in pursuance of the provisions of the will. One entry in the book shows the payment as having been made out of the funds of the business to the estate of G.B. Boy as earnest money for purchasing a house belonging to B.C. Boy. In my judgment it has not been proved that by reason of the advance of the Rs. 1,300 or Rs. 1,500, Girijamoni accepted a benefit under the will of G.B. Roy. In my judgment the other matters on which the respondent relied as showing an election by Girijamoni to confirm the dispositions under G.B. Roy's will are in the same position. It has not been shown that any of the payments prior to 1901, when some profits of the business were divided, was made in pursuance of the will of G.B. Roy. Further, even if they were, it has not been shown that Girijamoni was aware of the provisions of the will. She was a purdanashin lady and no evidence has been given that the will of her

husband was explained to her; and, in my judgment, it has not been proved that she knew that she was accepting any benefit under the will.

20. In my opinion therefore the point that Girijamoni elected to confirm the disposition of the properties made by G.B. Roy's will has not been made out. On the contrary, I have already said, by her sale of 218 as Cornwallis Street, if she knew of the provisions of the will, she showed her dissent from them. I have had an opportunity of reading the judgment about to be delivered by my learned brother; and I agree with his conclusion that the premises No. 45, Guru Prosad Chaudhuri Lane belonged to G.B. Roy; the facts relating to the purchase of this property seem to me, for the reasons given by my learned brother, to be sufficient to support the plaintiff's case in respect of this pro-patty.

21. The position as regards No. 1, Raghu Nath Chatterjee Street is different. All the documents go to show that Girijamoni was the purchaser. The receipt for the earnest money dated 4th July, 1888 and the conveyance were in the name of Girijamoni. That of course is not conclusive when the question is whether the transaction was benami. But it appears that the bill of costs in respect of this purchase was made out to Girijamoni as the debtor. The attorney's letter of the 10th September, 1888, returning the title deeds and the conveyance was sent to Girijamoni. The notice under the Land Registration Act recites that Girijamoni had applied for registration of her name as owner of the premises, and notice was given that all persons who disputed the character and extent of the interest claimed by Girijamoni must state their objections by the date specified therein. It is to be noted that the date of the notice is December 12th, 1906, long after the death of G.B. Roy. Further, the plaintiff took no objection to this application for registration by Girijamoni, on the contrary it appears from the evidence that he concurred in it. I am by no means satisfied that the plaintiff has discharged the onus of showing that Girijamoni was not the real owner: and, with much respect to the learned Judge who tried the case I am unable to agree with his conclusion in respect of this property, viz., No. 1, Raghunath Chatterjee Street. No. 46, Guru Prosad Chaudhuri Lane was purchased on the 1st October, 1894.

22. At this time G.B. Roy was dead. The agreement for purchase dated the 4th July, 1894, was in the name of Girijamoni. The conveyance dated the 1st of October, 1894 also was in the name of Girijamoni, the purchase price was Rs. 2,550 which the deed recited was paid by Girijamoni. It was alleged by the plaintiff that this property was purchased by the executors of G.B. Roy's will.

23. The first question which naturally arises is why should the executors enter into the transaction in the name of Girijamoni? In my opinion, no satisfactory answer was given to this question. It is further to be noted that the executors had no power under the will to purchase immovable property; and it ought not to be assumed that they would commit a breach of trust. It was alleged however, that the entries in the cash book and the ledger F. 1 and E. 1 showed that the purchase price was paid out of the estate. The entry in the cash book shows that the Rs. 2,500 was paid "to the estate of G.B. Roy." It was agreed

that the entry meant that the money came from the business which was still being carried on and the money was debited to the estate of G.B. Roy. The accounts seemed to have been kept on the principle that the business was regarded as a kind of banker for the estate of G.B. Roy, and any money which was paid out of the business to any member of the family seems to have been debited to the estate of G.B. Roy. Therefore, although it may be that the Rs. 2,500 came out of the business, it does not" show that the property bought with the money, belonged to the estate of G.B. Roy. These entries are in my opinion consistent with the case of both sides. As far as the evidence shown by the entries goes,-it may be that the money was advanced to Girijamoni to enable her to purchase the property, or it may be that the money was used by the executors for the purchase of the property- these entries at any " rate in my opinion are not enough to displace the evidence contained in the agreement and the conveyance, especially when it is the fact that no sufficient reason has been given why the executors of G.B. Roy"s estate should make the purchase of the property in the name of Girijamoni. I have already said that in my judgment it has been established that it was Girijamoni who purchased with her own stridhan money No. 6, Brindaban Mullick"s Lane. The deed of sale, when that property was sold on the 1st April, 1903 recites that fact. Yet the entries in the book show that the estate of G.B. Roy was debited on the 2nd December, 1890, with Rs. 1,000 as earnest money for purchasing the house, which must have been an advance to Girijamoni for the purpose of the purchase. It seems to me that the Rs. 2,500 may well have been on the same footing as the Rs. 1,000 to which I have referred. The document Exhibit K which Girijamoni was induced to sign, seems to have treated the Rs. 29,100 as if Girijamoni had merely a life-interest therein, which was of course not correct:-that sum belonged to her.-Yet Girijamoni is made to declare that the plaintiff was entitled to 1/4th share of that sum after Girijamoni"s death. In the same way in the document Exhibit L, the plaintiff stated that his interest in this property was 1/4th and that this share remained. I am by no means satisfied that Girijamoni appreciated what she was doing by these documents. These documents show that plaintiff in 1915 was anxious to make it clear that he would claim one quarter"s interest in the properties. The will of Girijamoni is inconsistent with the allegation that she recognised the plaintiff"s right in this respect.

24. The learned Counsel for the plaintiff in this Court based his case as regards the property No. 46, Guru Prosad Chowdhuri Lane on estoppel. He argued that Girijamoni and her representatives were estopped from denying that the property belonged to G.B. Roy"s estate, by reason of the fact that Girijamoni had accepted the sum of Rs. 2,500 from the executors of G.B. Roy"s estate for the purchase of the property. I am unable to accept this argument. In the first place, as already stated, it has not been proved that the payment was anything more than an advance to Girijamoni in order that she might purchase the property. In the second place, I find no evidence of any declaration or act of Girijamoni which can be said to have caused the executors to believe something to be true and to act on such belief which would prevent her and her representatives from denying the truth of that thing so as to bring the case within Section 115 of the Evidence Act. In my opinion, therefore, the appeal should be allowed so far as it concerns" the two

properties No. 1, Raghu Nath Chatterjee Street and 46, Guru Prosad Chowdhuri Lane and the decree of the trial Court should be varied accordingly.

25. The result will be that as regards the immovable properties the decree will stand in respect of No. 45, Guru Prosad Chowdhuri Lane, and the suit will be dismissed as regards No. 1, Raghu Nath Chatterjee Street and 46, Guru Prosad Chaudhuri Lane. No question in the appeal has been raised as regards the movables, the shares of the respective parties or the decree for partition. The decree, therefore, with regard to these matters will stand.

26. As regards costs the result of our judgment is that the plaintiff has succeeded as regards one property, namely No. 45, Guru Prosad Chowdhury Lane, and the defendant has succeeded as regards two of the properties, mentioned in the plaint. It is desirable that this Court should make an order as to costs which will not give rise to any further enquiry. Both the parties agree to that: and, the only question is what would be the proper order to make with regard to the costs of the suit and of the appeal. It is true that the plaintiff has succeeded as regards one property only, out of the three. On the other hand, the plaintiff had to bring his suit in order to establish his case in respect of that property. In the ordinary course, I should have thought that he would have been entitled to the general costs of the suit and the costs as regards the issue with reference to that property. But in this case it would be impossible for the Taxing Officer to ascertain the costs which should be allocated to the different issues.

27. As regards the costs of the suit my learned brother and I have come to the conclusion that the fair and proper order to make is that each party should pay his or her own costs of the suit. As regards the costs of the appeal we are of opinion that the appellant is entitled to 4/5ths of her taxed costs.

28. The sum of Rs. 750 deposited with the Registrar as security for the costs of the appeal under order dated the 23rd of July, 1923, will be paid to the appellant's attorney.

Walmsley, J.

29. This appeal is directed against a judgment of my learned brother Mr. Justice Greaves by which he decreed the plaintiff's suit. The appellant is the third defendant, Indubala Dabi sister-in-law of the plaintiff.

30. [His Lordship stated facts and after dealing with the evidence proceeded as follows:-]

31. There remains the question whether Girijamoni can be said to have "elected" to take under the will. The rules relating to election are contained in Chapter 27 of the Succession Act (Act X of 1865). The argument is that by the will Ganga Bishnu gave his widow a life-estate in his immovable properties standing in his name and a share equal to a son's share in the income of his business, and that as Girijamoni has received her share in the income in accordance with the will she cannot claim the immovable property

in opposition to the will.

32. According to Section 173 acceptance of a benefit given by the will constitutes an election by the legatee to take under the will, if he has knowledge of his right to elect and of those circumstances which would influence the judgment of a reasonable man in making an election, or if he waives enquiry into the circumstances, and in the following section it is said, "such knowledge or waiver of enquiry shall in the absence of evidence to the contrary be presumed if the legatee has enjoyed for two years the benefits provided for him by the will without doing any act to express dissent." Now Girijamoni undoubtedly knew that there was a will, but there is no evidence that she knew anything about its contents beyond the fact that it appointed certain executors. But it is argued that she took the benefits for two years, and therefore u/s 174 we must presume that she had the necessary knowledge or waived enquiry. It is true that Girijamoni received benefits at the hands of the executors, but I feel very doubtful as to whether they can be referred to the will, as benefits provided by the will. The executors treated the widow very generously, but the distribution of 1901 seems to be the only act which can be said to be dictated by the will. Further I think we can say that the [presumption is rebutted by the circumstances. Girijamoni was a purdanashin lady of slight education. There is no evidence that the will was ever explained to her, and the executors never called upon her as they are required to do u/s 176 to make her election. I think therefore that Girijamoni did not have the knowledge that is essential to election.

33. Counsel for respondent, however, relies on the provisions of Section 175 which runs "Such knowledge or waiver of enquiry may be inferred from any act of the legates which renders it impossible to place the persons interested in the subject-matter of the bequest in the same condition as if such act had not been done." This section differs from Section 174 in that it only permits an inference. Apart from that I do not think that the receipt of money at any time rendered it impossible to place the parties in the same condition as if the money had not been taken. Further there is the fact that in 1915 the surviving sons made effective arrangements for depriving her of all power to deal with anything more than the interest arising from her investments.

34. My conclusion therefore is that the principle of election is of no avail to the plaintiff.

35. To sum up, my findings are (1) that the property No. 45, Guru Prosad Chowdhuri Lane really belonged to Ganga Bishnu Roy at the time of his death although the title deed was in the name of Girijamoni; (2) that it has not been proved that Girijamoni was not the real owner of No. 1, Raghu Nath Chatterjee Street, and that she and her successors are not precluded from claiming it as her property by the principle of election: (3) that so far as No. 46, Guru Prosad Chowdhuri Lane is concerned no question of benami arises, and that neither election nor estoppel debar the defendants from resisting the plaintiff's claim to it.

36. I would therefore agree with the learned Chief Justice in the modification of the decree which he proposes.