

**(1912) 05 CAL CK 0048****Calcutta High Court****Case No:** None

Mahendra Lal Nandy and Others

APPELLANT

Vs

Rakhal Das Bishai and Others

RESPONDENT

**Date of Decision:** May 30, 1912**Acts Referred:**

- Succession Act, 1925 - Section 111

**Citation:** 16 Ind. Cas. 809**Hon'ble Judges:** Beachcroft, J; Ashutosh Mookerjee, J**Bench:** Division Bench**Judgement**

1. This is an appeal on behalf of the plaintiffs in a suit for recovery of moveable and Immovable properties; they were successful in the primary Court in respect of a portion of their claim and have appealed as to the remainder. The controversy is now limited to a house and to ornaments and a sum of money in cash. As regards the ornaments and the money, in the course of the hearing of this appeal, the parties have come to terms, and agreed to divide equally the subject-matter of dispute. In so far as the house, however, is concerned, they have asked for judgment of the Court.

2. The house in question belonged to one Brojo Nath Das, who made a testamentary disposition of his estate on the 5th May 1889. He left two widows, a widowed daughter and two nephews, the sons of his sister. The nephews are not mentioned in the Will, and, so far as we can gather from his testament, the testator appears to have considered only the claims of his widows and his widowed daughter. In so far as the house is concerned, the provision in the Will is in these terms: "My dwelling house shall remain in the possession of both ray widows. On their death, my daughter, Srimati Surat Mohini Dasi, shall get the same. They will be able to make a gift and sale according to their wishes." In a later part of the Will, there occurs the following passage: "As long as my two widows and daughter, by residing in my family dwelling house, shall continue to be in possession, so long they shall have the

use of the pathway which now exists for going to the back part of the garden house,, whereto Hari Das Hazrah shall not be able to make any objection with his heirs in succession." The Subordinate Judge held that the effect of this, disposition was to confer upon the widows a life-estate and to give a vested interest in the house to the widowed daughter, and, that consequently upon the death of the daughter, the properties passed to the heirs of her stridhan, namely, the brothers of her husband, who are the defendants in this litigation. It may be statid here that the daughter died on the 10th May 1906; her mother died five days later and her step mother on the following day. According to the view of the Subordinate Judge, the daughter took a vested interest, though her possession was deferred, so that upon the death of the testator, the widows came into possession, and upon the death of the -daughter, the interest vested in her descended to her heirs, subject to the termination of the life-estate of the widows. This view has been challenged on behalf of the plaintiffs in this Court, and three possible interpretations of the Will have been suggested on their behalf.

3. It has been contended, in the first place, that the effect of the clause which confers upon the widows and the daughter a power to make gift and sale according to their wishes, was to confer an absolute interest upon them, that u/s 111 of the Indian Succession Act, the widows became entitled to an absolute interest upon the death of the testator and that the gift over in favour of the daughter never took effect, as it could take effect only in the event of the death of the widows during the life-time of the testator. It has been argued, in the second place, as an alternative, that the widows took an absolute interest and the gift over in favour of the daughter was bad, because it is not permissible under the law to create an absolute interest in the grantee, to confer upon him the right to make a gift and sale at his pleasure, and, at the same time, to make a gift over in respect of such portion of the estate as may not be disposed of by the grantee. It has been contended, in the third place, that if the effect of the clause, which confers upon the widows and the daughter a power of gift and sale, is not to create an absolute interest, the widows and the daughter took a life-estate so that upon the death of the daughter and the widows, the plaintiffs, as reversionary heirs to the estate of the testator, became entitled to the house. On behalf of the respondents, the construction adopted by the Subordinate Judge has been supported, and, reliance has been placed upon the decision in the case of *Lallu v. Jagmohan* 22 B. 409. In our opinion, the view taken by the Subordinate Judge cannot be maintained.

4. It is fairly clear that the effect of the clause which confers an absolute power to make a gift and sale upon the widows and the daughter is an index of the intention of the testator to create in their favour an absolute interest. No doubt, as was pointed out on behalf of the appellants, the case of *Hara Kumari Dasi v. Mohini Chandra Sarkar* 7 C.L.J. 540 : 12 C.W.N. 412 shows that a right of alienation may be coupled with a life-estate ; in other words, a testator, when he creates a life-estate in favour of a grantee, may authorise him to effect an alienation to hold good during

the continuance of such estate. But in the case before us, it is worthy of note that the testator authorised the widows and the daughter to make a gift according to their wishes, and it has not been suggested on behalf of the respondents that if a gift was made either by the widows or the daughter that such gift would terminate upon the death of the widows. In our opinion, the clause in question is consistent only with the theory that the testator intended to create an absolute interest in favour of the widows and the daughter. The view we take is supported by the decisions of this Court in the cases of Saroda Sundari Dasi v. Kristo Jiban Pal 5 C.W.N. 300 Lulit Mohun Singh Roy v. Chukkun Lal Roy 24 C. 834 : 24 I.A. 76 : 1 C.W.N. 387 : Lala Ramjewan Lal v. Dal Koer 24 C. 406 : Rajnarain v. Katyayani 4 C.W.N. 337 : 27 C. 649 and Gobinda Chunder v. Binode Chunder 12 C.W.N. 44. The position, therefore, is that the widows took an absolute interest, and, in view of Section 111 of the Indian Succession, Act as interpreted by the Judicial Committee in the case of Norendra Nath Sircar v. Kamalbasini Dasi 23 C. 563 we must hold that the gift over in favour of the daughter could take effect only in the event of the death of the widows during the life time of the testator. The cases of Lallu v. Jagmohun 22 B. 409 and Chunilal v. Bai Muli 24 B. 420 are clearly distinguishable. The learned Judges there pointed out that the words which comprised a gift over in favour of the daughter were not expressed by the testator as contingent but as Certain, therefore, there was no room for the argument that as the widows took only a life-interest, the words must be rejected as meaningless. It is further worthy of note that neither Section 111 of the Indian Succession Act, nor the decision of the Judicial Committee in the case of Narendra Nath Sarkar v. Kamalbasini Dasi 23 C. 563 was brought to the notice of the learned Judges. In this view, we hold that the widows took an absolute interest and that the plaintiffs are entitled to succeed as the heirs-at-law. But we may point out that the same conclusion would follow, if either of the other alternatives put forward on behalf of the appellants, was accepted. It is clear that if the widows took an absolute interest, a gift over in favour of the daughter would be bad. On the other hand, if the widows took a life-estate, notwithstanding the clause which confers upon them an absolute power of gift and sale, the daughter would not be in a better position. The decisions of the Judicial Committee in the cases of Shumsool Hooda v. Shewukram 2 I.A. 7 and Radha Prasad Mullick v. Ranee Mani Dassee 35 C. 896 : 12 C.W.N. 729 : 10 Bom. L.R. 604 : 8 C.L.J. 48 : 5 A.L.J. 460 show that the Court will not favour an interpretation that the daughter had taken an absolute estate, unless there are clear words, as in Surajmani v. Rabi Nath Ojha 30 A. 84 : 5 A.L.J. 67 : 12 C.W.N. 231 : 10 Bom. L.R. 59 : 7 C.L.J. 131 : 3 M.L.T. 144 : 18 M.L.J. 67 and Thakur Parshad v. Jamna Kunwar 31 A. 308 : 6 A.L.J. 420 : 2 Ind. Cas. 464 to indicate the contrary intention; in this view also, the plaintiffs would be entitled to succeed as the reversionary heirs to the estate of the testator. The result is that this appeal is allowed in part and the decree of the Subordinate Judge modified in respect of the house, which is awarded to the plaintiffs. In respect of the ornaments and the sum of money in cash, a decree will be drawn up in

accordance with the terms settled between the parties. Under the circumstances, we direct that each party do bear his own costs throughout the litigation.