(1873) 01 CAL CK 0003

Calcutta High Court

Case No: None

Tarrucknath Sirkar		APPELLANT
	Vs	
Prosunno Koomar Ghose		RESPONDENT

Date of Decision: Jan. 3, 1873

Judgement

Sir Richard Couch, Kt. C.J.

1. The suit is brought by Tarrucknath Sirkar who claims the whole of the property, and he asked that it might be declared that, under and by virtue of the will of Hurronundo Sirkar, Luckymoney Dossee had no power to devise the property included therein. Macpherson, J., made a decree in the plaintiff"s favor, holding that the will of Hurronundo Sirkar must be read at merely making over the property to the wife to be held by her in trust for the infant heirs. He says in his judgment "there is no doubt that the question which has been raised is one of great importance to Hindus, as bearing upon the question of the principles upon which the Courts ought to act in construing wills made by Hindus." I quite agree to this; but it appears to me that the principles upon which the Courts ought to act have been authoritatively determined, and in the present case we have only to apply them. In Sreemutty Soorjeemoney Dossee vs. Denobundoo Mullick , the Judicial Committee say:---"The Hindu law, no less than the English law, points to the intention as the element by which we are to be guided in determining the effect of a testamentary disposition; nor, so far as we are aware, is there any difference between the one law and the other as to the materials from which the intention is to be collected. Primarily the words of the will are to be considered. They convey the expression of the testator"s wishes; but the meaning to be attached to them may be affected by surrounding circumstances, and where this is the case, those circumstances no doubt must be regarded. Amongst the circumstances thus to be regarded, is the law of the country under which the will is made, and its dispositions are to be carried out. If that law has attached to particular words a particular meaning, or to a particular disposition a particular effect, it must be assumed that the testator, in the dispositions which he has made, had regard to that meaning or to that effect, unless the language of the will or the surrounding

circumstances displace that assumption. These are, as we think, the principles by which we ought to be guided in determining the case before us; and we must first, therefore, consider what was the intention of the testator to be collected from the words of his will." Although the will was signed by the testator in Bengali, I think it must now be a summed that it was explained to him, and that he understood its meaning. If it was not, and he did not understand what he was signing, there would be no question of "construction, for it would not be his will. Probate of it was granted by the Supreme Court, and its validity has never been questioned. Macpherson, J., says he has no doubt the whole family thought that Luckymoney was absolute owner of the property, and had the right to dispose of it at pleasure. It appears to me that the words of this will unequivocally show that it was the testator''s intention that his wife should because the absolute owner of all his property. That is the meaning which the law has attached to the words he has used, and there is nothing in the language of the will to displace the assumption that he had regard to it; for the appointment of his wife as sole executrix is made with the view to complete the gift and enable her to obtain probate.

2. The surrounding circumstances are, as Macpherson, J., says, that the testator was a Hindu, and that he had at the time two infant sons, and there was no reason why he should desire to disinherit them. We cannot tell what reason he had for making a will, but the fact of his doing so shows, in my opinion, that he intended his wife to be something more than a trustee and manager for the infant heirs, as she would have been such if he had not made a will. It is not to be assumed that he made this will without reason: and if he, a Hindu, thought it right to make a will, it may well be that he thought he might leave to his wife to make a proper disposition of his property amongst his family. The learned Judge has declared her to be a trustee when the will contains no words whatever to create a trust. It is not, in my opinion, necessary that there should be an express declaration of his desire or intention to disinherit his sons, if there is an actual gift to some other person expressed in clear and unequivocal words, and I must respectfully dissent from the dictum of Phear, J., in the case Rooploll Khettry v. Mohima Churn Roy, ante, p. 271 referred to by Macpherson, J. Nor can I agree with him in thinking that there is no indication of a desire to disinherit his sons. Allowing that a Hindu is less likely than any other person to disinherit his sons, it still appears to me that his desire and intention to do so may be shown as in the case of another person by the disposition he makes of his property.

3. Upon the construction which I think I must put upon this will, the point taken by the Counsel for the respondent, the plaintiff, that the property being the gift of a husband to his wife was inalienable, and on her death would descend to the heirs of the husband, does not arise. The husband has given to his wife an absolute power of disposing of the property which she has exercised. This was not an ordinary gift by the husband to his wife to which the authorities cited might apply. I think, therefore, that the decree should be reversed, and the suit must be dismissed with costs on scale No. 2, including the costs of the appeal.

[1] Before Mr. Justice Phear.

Rooploll Khettry and Another v. Mohima Churn Roy.

The 12th Sept. 1870.

"Kisto Chunder Dass, a Hindu, died in March 1864, possessed, amongst other property, of a house No. 8/12, in Rajah Gooroodas" Street, and leaving him surviving three sons, Radhanath Dass, Bonomally Dass, and Troyluckonath Dass. In February 1862, Kisto-Chunder made a will, of which he appointed Radhanath executor, and which was to the following effect:--

"I, Sree Kisto Chunder Dass, execute this willnama, or testamentary instrument, to the following purport or effect:--I being very ill, and my body being inconstant and mortal, knowing this, in my sound mind I make my will. The whole of my estate, both real and personal, and the existing shop which I have, you are the proprietor and owner of the whole, and have appointed you my executor, that is to say, my attorney.

You will supply the expenses of the household, and will supply the food and raiment of the family, and carry on the existing shop; and will perform as usual the religious observances of the family, and you will further per-form the worship of Eshur Sreedhur Thakoor in the manner in which it is now being done, and you will perform my shraddahs, &c. The whole of the religious acts, and the protection of all the real and the personal estate, will be attended to by you, and you will conduct the existing shop, and collect all dues and pay all debts. All power is vested in you. Whatever you do, I agree to; no one else has any power left to him, and I am making my will in sound mind. If, after my decease, any other of my heirs object to this will, the same is inadmissible and void, and you will pay the undermentioned legacies to the undermentioned parties:--

Sree Ramkanaye Dass, station Churruckdangah. Particulars of legacies. (After the witnessing clause, came a list of the legacies.) "Thakoor Soor, &c., Rs. (25) twenty-five; purohit or family priest, Rs. (10) ten. You will give to my eldest daughter, Sreemutty Ranee Dassee, Rs. (200) two hundred. You will give to my second daughter, Sreemutty Woomasoondoree Dassee, Rs. (150) one hundred and fifty. You will give to my youngest daughter, Sreemutty Teencowrie Dassee, Rs. (150) one hundred and fifty."

After Kisto (Thunder"s death, Radhanath applied for probate of his will, but a caveat was entered by Bonomally. An arrangement was then come to between the two brothers, whereby it was agreed (inter alia) that, if Bonomally would withdraw his opposition, Radhanath should pay him Rs. 3,000 and the costs incurred by him; that Bonomally should release his claim against the house No. 8/12; but that, notwithstanding the devise to Radhanath, the house should remain the joint property of the three brothers. The release by Bonomally was drawn up and engrossed, and a decree by consent passed in favor of Kisto Chunder"s will. Radhanath, however, paid only Rs. 1,300 of the Rs. 3,000,

and the release in consequence was never executed. In August 1866, Radhanath died, leaving a son, Megnath Dass, and his two brothers, Bonomally and Troyluckonath, him surviving, and having first made a will, the material portions of which were as follow:--

"I, Sree Radhanath Dass, inhabitant of Rajah Gooroodass" Street, in the city of Calcutta, endite this "will putro" to the following effect:--

For the last three months I am ill and laid up in bed. We cannot tell what may happen to the human being at any time, consequently I, of my own desire, write this "will putro," appointing Sreeman Troyluckonath Dass, the youngest brother, my executor that is "torney," as set out in the following clauses. You, brother, will perform all the business accordingly:--

1st Clause.--The saba (service, worship) of my ancestral Sree Sree Eshur Sreedhur Thakoor, which is in my ancestral batee (house, premises), will be performed as has been done theretofore.

2nd Clause.--My (2) two widow sisters, Sreemutty Ranee Dassee and Sreemutty Woomasoondoree Dassee, will remain as they now are in my ancestral batee. They will get food and raiment as they now get from my family. No person will be able to oppose the same. Should they not agree with my youngest brother, then they will monthly get Rs. (6) six for their food and raiment, that is, each one of them Rs. (3) three a month.

3rd Clause.--With the rent of the tenanted batee which is in the kheerkee (rear or hind portion of house) of the ancestral dwelling-house, the saba of Sree Sree Eshur Sreedhur Thakoor will be performed, and the tax of the nij batee paid; and from the proceeds of the gardens situated in Belgachia, in Zillah 24-Pergunnahs, the family expenses will be paid.

4th Clause.--There is in Rajah Gooroodoss" Street the ancestral tenanted batee No. 8/12 recently purchased in the name of my father, deceased, and newly built, from the rent of which the tax should be paid first; and whatever money remains, the whole of it will be paid towards the family expenses and other disbursements set out in the following clauses, excepting which no other expense will be incurred as a charge therefrom.

7th Clause.--The white thread trade, which was formerly carried on in my own name with Sree Ramkanaye Dass and Sree Troyluckonath Dass has been closed a long time ago, and each party has taken his own share. Subsequently a trade is now going on with Sreejoot Oroon Chunder Ghose in Burra Bazar. The debts and credits you will pay, and realise all.

8th Clause.--Before this my second brother brought an action in the High Court against us, which, having been subsequently settled with him amicably, I gave Co."s sicca Rs. (1,300) thirteen hundred to the brother, and paid his vakeel costs in full. Co."s Rs. (2,000) two thousand are still due to him. Should you be unable to pay the same from other means, then you will either mortgage or sell the new batee No. 8/12 in Rajah

Gooroodass'' Street, and pay his Rs. (2,000) two thousand, and take a release written by him.

10th Clause.--I have gradually borrowed from Sreemutty Bindoobasini Dassee Co.''s Rs. (1,100) eleven hundred, which said rupees I have paid towards the debt of the present shop, and for other debts and for the expenses of the illness. Should you be unable to pay the rupees from other means, then you will either mortgage or sell the batee No. 8/12 in Rajah Gooroodass'' Street, and pay the debt to the said Dassee.''

Troyluckonath applied for probate of this will, the application being opposed by Megnath, the son of Radhanath, but the Court, on the 18th May 1867, decreed in favor of the will, and granted probate to Troyluckonath.

Pending this suit, and prior to decree, Bonomally and Megnath, on the 26th March 1867, mortgaged their two-thirds share in the house No. 8/12, Rajah Gooroodass'' Street, to the defendant, and default having been made in repayment of the mortgage-debt, the defendant, on the 6th January 1868, obtained a decree for payment thereof, or sale of the mortgaged premises. Before this, on the 17th August 1867. Troyluckonath mortgaged the house to the plaintiffs to secure the re-payment of Rs. 6,500 which he had borrowed from them for the purposes of Radhanath''s will. Upon his failure to repay the money at the time stipulated, the plaintiffs instituted a suit for foreclosure, and obtained a decree absolute for foreclosure on the 15th July 1869. Afterwards, on the 9th September 1869, the plaintiffs obtained a decree for possession, and at the time of this suit were in possession of the premises.

The suit was brought by them against the defendant, the mortgagee of two-thirds of the house. In their plaint the plaintiffs alleged that the defendant''s mortgage and decree threw doubt and suspicion on their title, and that their possession was disquieted thereby, and would be still further disquieted by the intended sale by the defendant under his decree. They, therefore, prayed for an injunction to restrain the defendant from proceeding to a sale, and that he might be compelled to enter up satisfaction of his decree, and to bring his mortgage into Court for cancellation.

Mr. Kennedy and Mr. Piffard for the plaintiffs.

Mr. Woodroffe and Mr. Evans for the defendant.

The judgment of the Court was delivery by

Phear, J.--Mr. Kennedy put the case before me as if it belonged to that class in which a Court of Equity will interfere in favor of a plaintiff by causing deeds or documents to be delivered up and cancelled, in order that they may not be used to the prejudice and danger of the plaintiff, and form, as it is said, a cloud on his title. The principle which governs the Court in such cases is sometimes expressed in the phrase "quia timet," and these words sufficiently indicate the nature of the mischief for which the remedy is given. I

may expound them by saying the Court furnishes its aid in cases of this kind to remove out of the way instruments which really are void or inoperative, for fear they might at some future time be used to the prejudice or injury of the plaintiff, when the necessary evidence sufficient to invalid, ate them may be lost. It appears to me that the present case does not fall within that class. There is here an existing conflict between the parties of a substantial character, and I think this suit is in no sense a de bene esse proceeding. It is, in truth, one with which we are exceedingly familiar on the other side of this Court. A plaintiff declares that he is in possession of property, the subject of the suit, and that he is rightfully entitled to it and he complains that the defendant sets up a hostile title, and under cover of that title is committing some overt act of wrong against him, the plaintiff; and on this ground the plaintiff asks for a declaration of right against the defendant. In the present case the plaintiffs seek to have the document delivered up and cancelled. They do not precisely ask here for a declaration of right, but they pray that the defendant may be restrained by injunction from proceeding to sell the house and premises in suit, and also that he may be compelled to bring his mortgage-deed into Court and have it cancelled. It appears to me in this state of things that it is incumbent on the plaintiffs to prove first their possession, and next the title on which they rely.

I think they have sufficiently made out their possession. It seems to me on the evidence pretty clear that the plaintiffs are now in enjoyment of the rent and profits of the house which is the subject of suit.

Then comes the question of title. I may shortly say, the plaintiffs allege they got this property by a mortgage, carried to foreclosure, from Troyluckonath; that Troyluckonath made the mortgage to them by virtue of powers which he obtained as executor of and under the will of Radhanath Dass, and that the mortgaged property had been devised to Radhanath by his father Kisto Chunder, who had himself originally acquired it. Now, assuming for the moment that Radhanath became the actual proprietor of this house by virtue of his father''s will, the powers which Troyluckonath pretended to exercise came to him solely through the will of Radhanath; and this will runs in the following terms:--(His Lordship read the first three clauses of the will, and continued).--Then comes the 4th clause, and this no doubt distinctly gives authority to the executor to deal with this particular property, No. 8/12, for the specific purposes afterwards mentioned in the will. It does also, however, contain this declaration, namely, that "the whole of the proceeds will be paid towards the family expenses and other disbursements set out in the following clauses, excepting which no other expense will be incurred as a charge therefrom." Afterwards the 8th clause says to the executor:-- "Should you be unable to pay the same (i.e., Rs. 2,000 to the testator''s second brother, Bonomally) from other means, then you will either mortgage or sell the new batee, No. 8/12, in Rajah Gooroodass'' Street." Again, the 10th clause gives power to the executor to mortgage the same for the purpose of obtaining funds to pay the debt of Rs. 1,100 to Bindoobasini. The two passages I have now read thus give distinct authority to Troyluckonath, if necessary, to mortgage the premises which are the subject of suit, to secure a sum in the aggregate amounting to Rs.

3,100. The plaintiff''s mortgage is for a much larger sum than this (I think for Rs. 6,500). If, therefore, Troyluckonath''s powers were limited by these two passages, I think it would have been ultra vires on his part to execute the plaintiff''s mortgage. There is, however, another clause which I have not yet mentioned, i.e., the 7th, and I think Mr. Kennedy rightly attached to this considerable importance (reads). Mr. Kennedy argued that this was a direction to the executor to pay the testator''s debts, at any rate the debts of this particular concern, out of the testator''s estate. Now, if this be so, I am not disposed to say that the law which this Court administers in regard to the estates of Hindus would oblige a purchaser from the Hindu executor to see to the exact amount of the debts which the testator directed him to pay, or even to make enquiry whether any such debts actually existed. It would, I think, be inconvenient in practice if the purchaser was obliged to look further than the will itself; and if that will gave the executor or trustee the authority to pay debts out of the estate, I should be disposed to say the purchaser might safely rely on the executor''s power to convey and therefore I think Mr. Kennedy''s argument on the effect of this 7th clause is good to the extent of proving that Troyluckonath under this will had power to make the mortgage to the plaintiffs which is the basis of the plaintiffs'' title.

But then comes the question, which is of cardinal importance in this case, and which I think both sides have considered to be critical i.e., had Radhanath power to make the will, which I have just read and referred to, so as to give Troyluckonath the power to sell or dispose of the whole property, which is the subject of suit? If he had, then he got his power from Kisto Chunder by the will of 1862. Now, this will is as follows:--(His Lordship read the will as set forth above, and continued). It is contended that this will gives the whole proprietary right in the property, which is the subject of it, to Radhanath. It is directed to Radhanath, and the first clause runs as I have read. But if this will is to be construed in the way the plaintiff asks to have it construed, it has the effect of disinheriting two out of the three of the testator''s sons, without a single word expressive of his intention to do so. It seems to me going a very long way to suppose that a Hindu father would disinherit two of his sons without assigning a shadow of a reason or motive after a fashion of this sort. And it is remarkable that the testator makes substantial legacies to each of his three daughters, while he does not even mention in any way the second and third sons, Bonomally and Troyluckonath. Now, not a single suggestion has been made from beginning to end of a reason why the testator should disinherit these two sons, or why he should give the whole property to his eldest Bon, substantial legacies to his three daughters, and yet leave Bonomally and Troyluckonath without the slightest mention. I think a little closer looking at the will clears up the mystery, and shows that he did not disinherit any of his children at all. It is true he has given his whole estate, real and personal, to his eldest son, as mentioned; but what is he to do with it? Not to apply it to his own purpose he is not left the freedom of a proprietor he is told to supply the expenses of the household, food, and raiment of the family; to carry on the existing shop; to perform the religious observances of the family as usual; to perform the worship of Eshur, &c.; to perform the testator''s shraddh; and one or two of these directions are repeated a second time. I have not the smallest doubt that the testator meant that all his

children should take the benefit and advantage of this property as an united Hindu family; and so far as he constituted Radhanath malik, it was as trustee for himself and the other members of the joint family.

And what have been the facts since the death of Kisto Chunder in this respect? Indisputably the members of the family have lived together as a joint family, even during the time when the contract was going on between Bonomally and Radhanath in respect of this very will. We have it in evidence, and it is, I think, not disputed by the plaintiffs, that when Radhanath first put forward this will and claimed exclusive rights under it, there was instantaneous opposition raised by Bonomally, and I believe also by Troyluckonath. When he applied for probate, caveats were entered, and in the end probate was consented to by Bonomally and Troyluckonath upon certain terms of agreement. Either Mr. Kennedy or Mr. Piffard, on behalf of the Plaintiff--I forget which--expressed much anxiety that I should not take this agreement between the members of the family as in any way modifying the disposition made by will. I do not think that that agreement can in law have any effect in modification of the will itself, but it may have very considerable effect as a contract obliging Radhanath to exercise such powers as he got under the will in favor of a member of the family. Several letters which passed between the attorneys of the disputing parties were admitted in evidence. From these it is very clear for what terms the parties were stipulating. These letters led up to a conveyance or release, engrossed but not executed, which, at the time when it was offered I thought inadmissible for want of registration. I now think I was wrong on that point; because it has been made to appear since that that document, although in form an absolute conveyance or release of property, was of design not executed by the parties, and did not in any way represent an actual instrument of title. Eventually, however, the viva voce evidence of Troyluckonath supplied the materials which the exclusion of this deed at first prevented from coming before the Court. And these materials are, think, valuable for the right understanding of Radhanath''s own will. It seems to me very certain, on the whole of the evidence, that whatever doubt there might be in the beginning among the children of Kisto Chunder with regard to the effect of their father''s will, Radhanath agreed to hold the property for the benefit of himself and brothers jointly, and that the negotiation for the conveyance and release stood entirely on this footing; and not only that, but, as a conveyance or release was never executed, the brothers continued all along (certainly up to the date of the plaintiff''s mortgage) in the joint enjoyment of this property. The evidence seems to me all one way on that point, and I myself don''t doubt, even from Rooploll Khettry''s own testimony, that he was entirely aware of that fact. He and his advisers disregarded it and relied solely upon the title which could be given by Radhanath''s will because they thought that that was sufficient in law to give a valid foundation for the plaintiff''s mortgage. And when we look to the terms to Radhanath''s will by the light of the facts which I have just mentioned, it is clear enough. I think that will was written in view of them, and on the footing of that which had taken place between the brothers. He, like his father, disposes of the property for the benefit of the family. He speaks of the family as "we" and "us;" and he mentions them all by name, excepting Bonomally, as members of

the family. And Bonomally he treats as an outsider (reads the 8th Clause.) It is, I think, quite clear that he looked on Bonomally as having separated and agreed to give up his share of the property for the consideration there referred to; and on that footing he directed Troyluckonath as trustee and manager of the property to dispose of it for the benefit of the other members of the family, exclusive of Bonomally. But Bonomally had not in fact given up his share. He had abstained from executing the conveyance or release; and had remained in continuous joint enjoyment of the property with his brothers and it appears to me that, from the time of Radhanath''s death up to the date of the execution of the plaintiff''s mortgage, Bonomally was entitled to his one-third share of the property. If this be right, the plan-tiffs are clearly not entitled to have the defendant, who claims from Bonomally, restrained from dealing with the property in the way he proposes. I have said enough to show in strictness that this suit should be dismissed. I ought, however, to add that I think Radhanath''s will is conclusively proved, and the other will is proved by consent of the parties.