

(1870) 03 CAL CK 0013

Calcutta High Court

Case No: None

Hiralal Mullick

APPELLANT

Vs

Matilal Mullick and
Others

RESPONDENT

Date of Decision: March 21, 1870

Judgement

Sir Barnes Peacock, Kt., C.J.

This suit is brought by Hiralal Mullick to set aside the will of his father, Dwarkanath Mullick, and it is framed upon the ground that the plaintiff is the eldest son and heir-at-law, according to Hindu law, of his father. It appears to me to be clear beyond all doubt that, according to Hindu law, the eldest son is not the heir-at-law of his father, nor do the authorities which have been cited by Mr. Creagh from the Dayabhaga show that the plaintiff can be looked upon or treated as the heir-at-law of his father. After setting out the will of the testator, the plaintiff submitted that the will was not valid; but that if it was valid to any extent, then the plaintiff was entitled to reasonable maintenance.

2. Now the first prayer in the plaint is, "that it be declared that the testator had no absolute power of disposing by will of his entire estate to the exclusion of the plaintiff," I have no hesitation in stating that, in my opinion, the plaintiff is not entitled, in point of law, to any such declaration.

3. It then proceeds "that it may be declared that the trusts and limitations in and by the said will declared, in reference to the immoveable and landed estate of the said testator, and in reference to the residue of the personal estate, are wholly void and invalid; and that the plaintiff is entitled to the said landed estate and immoveable property, and to the residue of the said personal estate discharged from the trusts and devises, and the bequests thereof, in the said will mentioned; and that it be declared that the testator died intestate in respect of the said landed estate, and in respect of the said residue of his personal estate and immoveable property."

4. There can be no doubt that the meaning of that prayer is, that it may be declared that the testator died intestate, upon the ground that he had no power to make a will, and not on the ground that any portion of the devise, in respect of the moveable property, was bad for remoteness.

5. The plaintiff then prays that "it may be declared that he is entitled to a more adequate maintenance than that specified in the said will, and that the amount of such maintenance be ascertained by this Honorable Court, and the payment thereof directed out of the estate of the said testator; and that, in the meantime, and whilst this suit and plaint is being decided upon by this Honorable Court, the plaintiff may have maintenance assigned to him."

6. The third prayer is "that the plaintiff may have such other and further relief in the premises as to this Honorable Court shall seem meet, and the facts and justice of the case may require."

7. The question is whether, under the prayer for general relief, looking to the plaint as filed, contending that the testator had no power to make a will, and that he died intestate, the plaintiff is entitled to have an account taken of the personal property, on the ground that the devise of one-sixth of the personal property to accumulate until the son or sons of the plaintiff, if he shall have any son, shall attain full age, is bad for remoteness.

8. On the appeal being preferred, an objection was made by the respondent that the decree ought not to have declared the will to be valid, with the exception of the particular bequest as to one-sixth of the personal property.

9. I take it that, under a prayer for general relief, a plaintiff is not entitled to any relief which is inconsistent with his plaint. Here the plaintiff says in his plaint that his father had no power to make a will; but it is now contended that the will being valid, the devise of one-sixth of the personality is bad on the ground of remoteness, and that therefore the plaintiff is entitled to one-sixth of that one-sixth.

10. In Story's Equity Pleadings, paragraph 40, it is said:--"The usual course is for the plaintiff in this part of the bill to make a special prayer for the particular relief to which he thinks himself entitled, and then to conclude with a prayer for general relief at the discretion of the Court; the latter can never be properly and safely omitted; because, if the plaintiff should mistake the relief to which it is entitled in his special prayer, the Court may yet afford him the relief to which he has a right, under the prayer of general relief provided it is such relief as is agreeable to the case made by the bill."

11. In paragraph 41 of the same work, it is said "that it has been said that a prayer of general relief, without special prayer of the particular relief to which the plaintiff thinks himself entitled, will be sufficient, and that the particular relief which the case requires may at the hearing be prayed at the bar. This, as a general rule, may be true; but it is not universal. Thus, for example, an injunction will not ordinarily be granted under a prayer for

general relief; but it must be expressly prayed, because the defendant might, by his answer, make a different case under the general prayer from what he would if an injunction were specifically prayed."

12. Paragraph 42 says:--"But even when a prayer of general relief is sufficient, the special relief prayed at the bar must essentially depend upon the proper frame and structure of the bill; for the Court will not ordinarily be so indulgent as to permit a bill framed for one purpose to answer another, especially if the defendant may be surprised or prejudiced thereby. Thus, if a bill is brought for an annuity or rent charge of ■10 per annum left under a will, and the counsel for the plaintiff pray at the bar that they may drop the demand of the annuity or rent charge, and insist upon the land itself out of which the annuity or rent charge issues, the Court will not grant it; for it is not agreeable to the case made by the bill."

13. The plaint in this case being to declare that the testator had no power to make a will, and to declare that he died intestate, it is now contended that the will is good, except as to the bequest of one-sixth of the personal property. The decree declares that the will is valid, except as to that bequest; whereas the plaintiff's prayer was to have the will set aside altogether. It appears to me therefore that, under the prayer for general relief, the plaintiff is not entitled to have an account taken of the personal estate, in order to ascertain the portion of the personal estate to which he would be entitled as one of six sons, that is, to see whether he is entitled to one-sixth of one-sixth, or one-thirty-sixth part of the personal property. I think that the decree ought not to have decreed an account of the personal property, but that it should Have dismissed the plaintiff's suit altogether.

14. It appears to me then, on the whole of this case, that, as the plaintiff has not made out his case that his father was not entitled to dispose of his property, whether ancestral or self-acquired, or that he, as the eldest son, is entitled as heir-at-law to succeed to the property, his suit ought to have been dismissed, and that an account ought not to have been ordered of the personal property, in order to find out what was the plaintiff's one-sixth of the one-sixth share of that property which was devised to the plaintiff's eldest or other son.

15. Then the question arises whether the plaintiff, having brought a suit on the ground that he was entitled, as the eldest son and heir-at-law, to succeed to the property, and having failed in his suit, has a right to charge the estate with the costs of this suit. I am clearly of opinion that he had no such right, and that his suit having altogether failed, he should pay the costs of this unnecessary litigation. I also think it clear that the plaintiff is not entitled to any higher maintenance than that which has been awarded to him in the will. The decree of the learned Judge will therefore be amended, by dismissing the suit of the plaintiff with costs. The plaintiff will also pay the costs of this appeal.