

(1880) 09 CAL CK 0013

Calcutta High Court

Case No: None

Tarokessur Roy, a  
Ward of Court, by his  
Mother

APPELLANT

Vs

Shoshi Shikhuressur  
Roy

RESPONDENT

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Date of Decision: Sept. 9, 1880

Citation: (1881) ILR (Cal) 421

Hon'ble Judges: Richard Garth, C.J; Mitter, J

Bench: Division Bench

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### Judgement

Richard Garth, C.J.

The plaintiff brought his suit to recover possession of an eight-anna share of taluks numberd 278 and 456, under the following circumstances:

These two taluks and another numbered 96, together with several other estates, etc., constituted the joint property of two brothers, Raja Chunder Shikhuressur Roy and Raja Mohessur Roy, each entitled to a moiety. The plaintiff is one of the sons of the latter, and the minor defendant is the sole surviving son of the former. When Raja Chunder Shikhuressur died, Raja Mohessur had five sons living, viz., the plaintiff, Kumar Jugodissur and Kumar Sibessur, being three uterine brothers by a deceased wife, and Bissessur and Kopessur by his then living wife. Chunder Shikhuressur died on the 29th Srabun 1272 (August 1865), leaving him surviving a widow, Ranee Soudamini, and only son, the minor defendant, by the aforesaid Ranee, and two daughters, whether by the aforesaid Eanee or not is not clear upon the evidence. He died at Rampure Bolia, the head-quarters of the district of Rajshahye, having come thither about ten or twelve days before his death, accompanied by only a few servants; not a single member of his family was about him at the time of his death. It is not disputed that 27 days before his death,-i. e., on the 2nd Srabun 1272,-he executed a will at his family residence at Taherpur, distant

about eight or ten hours" journey from the headquarters.

2. It is alleged that, by the 8th clause of this will, Raja Chunder Shikhuressur bequeathed his eight annas share of the taluks in claim, as well as of the taluk No. 96, to the plaintiff and his two uterine brothers. The clause in question is to the following effect:

My brother's sons, Kumar Jugodissur Roy, Kumar Tarokessur Roy, and Kumar Sibessur Roy, shall receive, for defrayment of the expenses of their pious acts, the following out of the properties left by me, to wit: my one-half share in Pargannna Chungoo, recorded as No. 278 is the Collectorate of Zilla Rajshahye in Dihi Dolil, and others appertaining to Tuppa Byas, and recorded as No. 456; and in Mouza Dihi Govindpur in Pargana Sautool, recorded as No. 96 in the touji or rent-roll of the Collectorate of Zilla Dinagepore. The said three nephews shall hold possession of the above in equal shares, and shall pay the Government revenue of the same into the Collectorate. They shall have no right to alienate the same by gift or sale, but they, their sons, grandsons, and other descendants in the male line shall enjoy the same, and shall perform acts of piety as they respectively shall think fit for the spiritual welfare of our ancestors. If any of them die without leaving a male child (which God forbid), then his share shall devolve on the surviving nephews and their male descendants, and not on their other heirs.

3. The plaintiff further alleged that, after the death of his uncle his father was allowed to take possession of the eight annas share of all these three taluks as guardian of his three sons. But from the month of Bysack 1273 B. S., Ranee Soudamini, on behalf of her minor son, the defendant in this case dispossessed him from the aforesaid eight annas share of the two taluks claimed, in this suit; that, subsequently, when the whole estate of the minor defendant was taken charge of by the Court of Wards, the disputed share of the two taluks also came into their possession.

4. The plaintiff's elder brother, Kumar Jugodissur Roy, and his younger brother, Sibessur Roy, having both died on the 24th Maugh 1279 B. S. (February 1873) and the 5th Kartick 1276 (October 1869) respectively, without leaving any male issue, the plaintiff claims the whole eight annas share under the terms of the will. The taluk No. 96 is not included in this suit, because it is alleged that, out of the share bequeathed by the will, he is in possession of four annas, the other four annas being in possession of the Court of Wards, not on behalf of the minor defendant, but on behalf of the widow of his elder brother Kumar Jugodissur Roy.

5. According to the provisions of the Act relating to the Court of Wards, the suit was brought against the minor defendant represented by the manager appointed by the Court of Wards, viz., Horo Gobind Bose. But the Court of Wards, by an order dated the 28th May 1877, authorized Ranee Soudamini, the mother of the minor defendant, to appear as his guardian, instead of the aforesaid manager, and

thenceforward the suit was defended by the Ranee on behalf of her minor son.

6. Her defence was that the 8th clause and several other clauses of the will, upon which the plaintiff relies, are not genuine, but were substituted by, some of the amlahs of the deceased Baja shortly before his death in the place of certain other clauses -of the original genuine will. It was further stated in the defence that, supposing the clause in question is genuine, the bequest is in many respects invalid, and that, at any rate, the plaintiff is not entitled to more than a life-interest in a one-third share of the eight annas which the clause in question purports to bequeath.

7. The lower Court, overruling the defence, decreed the plaintiff's suit. On appeal, all the points raised in the defence have been raised before us, and with reference to them two questions call for decision: First, whether the 8th clause of the will produced in this that of the Raja Chunder Shikhuressur, is genuine or not? and secondly, if it is genuine, upon a correct construction of it, what are the rights of the contending parties under it in respect of the eight annas share of the two taluks which form the subject-matter of this suit?

8. (After considering the evidence, the learned Chief Justice continued.)

9. On the whole, upon a careful consideration of the evidence we think that the conclusion of the lower Court upon the question of the genuineness of the will filed in this case is correct.

10. The next question is, what are the rights of the contending parties under the 8th clause with reference to the taluks in suit. The gift in the first place is to the three brothers, including the plaintiff, and to their succeeding generation in the male line. There is this further condition that, should any of the brothers die without leaving a male child, then his share shall devolve on his surviving brother or brothers and their male descendants.

11. We are of opinion that the condition imposed upon the gift, that its subject-matter should devolve on male descendants only, is invalid. In *Jotendro Mchun Tagore v. Ganendro Mohun Tagore* 9 B. L. R. 377 pp. 394, 395 and 396 the Judicial Committee observe:-"It follows directly from this, that a private individual, who attempts by gifts or will to make property inheritable otherwise than the law directs, is assuming to legislate; and that the gift must fail, and the inheritance take place as the law directs." Further on they say:-"If, on the other hand, the gifts were to a man and his heirs to be selected from a line other than that specified by law, expressly excluding, the legal course of inheritance, as for instance, if an estate were granted to a man and his eldest nephew, and the eldest nephew of such eldest nephew, and so forth for ever, to take as his heirs, to the exclusion of all other heirs, and without any of the persons so taking having the power to dispose of the estate during his lifetime, here, inasmuch as an inheritance so described is not legal, such a gift cannot take effect, except in favour of such persons as could take under a gift

to the extent to which the gift is consistent with the law. The first taker would in this case take for his lifetime, because the giver had at least that intention. He could not take more, because the language is inconsistent with his having any different inheritance from that which the gift attempts to confer, and that estate of inheritance which it confers is void."

12. Applying the principle enunciated in these observations to the terms of the will in this case, it is clear that, under the bequest, the three brothers, including the plaintiff, received the taluks in equal shares for their respective lives, and that the course of succession which was subsequently indicated by the testator being contrary to Hindu law, the particular estate of inheritance which he attempted to create was void.

13. Therefore, on the testator's death, a one-third share of the eight annas of the taluks in suit devolved upon the plaintiff, enjoyable by him for his life, and the remaining two-thirds in equal shares devolved upon his two brothers, enjoyable by them in equal shares for their respective lives.

14. But then these brothers died, one after the other, without leaving any male issue. Kumar Sibessur died first on the 5th Kartick 1276 (October 1869), leaving him surviving the plaintiff and his elder brother Kumar Jugodissur. On the happening of such a contingency as this, the will provides that the share bequeathed to the deceased was to devolve upon the surviving brothers and their male descendants. This latter limitation being contrary to Hindu law, is void. But the gift over to the surviving brothers is not invalid according to Hindu Law: see *S. M. Soorjeemoney Dosse v. Denobundoo Mullick* 9 Moore's I. A. 123 and the observations of The Judicial Committee upon that case in *Tagore v. Tagore* 9 B. L. R. 377 see pp. 399, 400.

15. For similar reasons, upon the death of Kumar Jugodissur without leaving any male issue, his original share (viz. 1/3) devolved upon the plaintiff. It is somewhat doubtful whether, along with Jugodissur's original share (viz. 1/3), the share received by him on the death of Sibessur also did not pass to the plaintiff. But having regard to the provisions relating to the legacy as a whole, we think that it was the intention of the testator that the whole augmented share should pass to the plaintiff, who was the sole surviving brother. The language used relating to this gift over to the surviving brother or brothers is not inconsistent with this intention.

16. We, therefore, come to the conclusion that the whole eight annas share of the two taluks, the subject-matter of this suit, has devolved upon the plaintiff under the provisions of the will of Raja Chunder Shikhuressur. But we do not agree with the lower Court that the plaintiff's right thereto is absolute. His interest will determine with his death, and, upon the happening of that event, the disputed share of the taluks in question will revert to the legal heir of the testator.

17. In modification of the decree of the lower Court, we decree the possession of the disputed share of the two taluks, which is the subject-matter of this suit, and declare

that the plaintiff has therein only a life-interest. We do not interfere with the decree of the lower Court as to mesne profits, but, under the circumstances of the case, we think that each party should bear his own costs in this as well as in the lower Court.