ORIGINAL CIVIL.

Before Buckland J.

PRAMATHANATH SARKAR

v.

SUPRAKASH GHOSH.*

1930

Feb. 19, 21.

Will—Construction of *will in English—Gift to wife—Absolute gift—Administration suit—Parties—Indian Succession Act (XXXIX of 1925), s. 86—Code of Civil Procedure (Act V of 1908), O. XXXI.*

In construing a will, the terms of the grant alone must be considered. In the case of gift to Hindu female, there is no presumption either that the testator did not mean what he said or that words are not to be given their ordinary meaning unless further words are added which, by tautology or emphasis, make it certain that they mean what they express. It may be that where a vernacular will has to be construed, due allowance must be made for shades of meaning not susceptible to exact translation, but where the will is in English no such considerations can arise.

In an administration suit, the executor is the only necessary party and generally it would suffice for a decree to be made against the executor, and legatees can either be brought on the record, or notice can be given to them if that would suffice, at the time of the reference, if their interests were likely to be affected.

Bipradas Goswami v. *Sadhan Chandra Banerji* (1) followed.

ORIGINAL SUIT.

The testator, Lalitmohan Sarkar, died on the 17th December, 1921, leaving a will, dated 21st November, 1921. The testator named his nephew, Suprakash Ghosh, as his executor and residuary legatee. In his will, the testator stated "It is my will and desire "and I direct that my wife, the said Saratbala Dasi, "will get a legacy of Rs. 10,000 out of my estate, if "she survives me." The wife survived the testator and died on the 28th July, 1924, leaving a will dated the 4th July, 1924, by which she appointed the present plaintiffs as her executors. This suit is by the executors of Saratbala for construction of the will of Lalitmohan Sarkar and for the administration of his estate.

*Original Civil Suit, No. 2129 of 1927.

(1) (1927) I. L. R. 56 Calc. 790.

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Probate had been granted of the will of Lalitmohan to Suprakash Ghosh, on his charging his estate in favour of the legatees. In this suit, Suprakash Ghosh, as also all the other legatees, were made parties. Only one of the legatees, Manatosh Sarkar, appeared, by counsel.

Arun Sen (with him *S. Chaudhuri*) for the plaintiffs. The same words are used in a gift to Rebatosh Sarkar and that legacy can only mean that an absolute interest was given. Therefore, by section 86 of the Indian Succession Act, in the absence of a contrary intention appearing, the gift to the wife must also be taken to be absolute. I also rely on sections 95 and 104 of the same Act. No difference should be made simply because the donee is a woman. See *Bipradas Goswami* v. *Sadhan Chandra Banerji* (1).

B. C. Ghose (with him *T. Chatterji*) for the defendant, Manatosh Sarkar. The suit should be dismissed as against me. I am not a necessary party, as the executor and residuary legatee, Suprakash Ghosh, can fully represent the estate. See Civil Procedure Code, Order XXXI. Further, I submit that there is a presumption that a gift to a Hindu female carries only a restricted interest, unless there are express words to show absolute interest. And the same presumption holds for immoveable property as for moveable property. See the cases *Mahomed Shumsool Hooder* v. *Shewukram* (2) and *Bhobatarini Debya* v. *Peary Lall Sanyal* (3).

[Buckland J. But in this case, the will is in English. Is anything further than the word "gift," necessary to show absolute gift?]

Whether the will is in English or in any other language, the same presumption holds. Even if words have been used which ordinarily mean "absolute "gift" in English, I say that is not sufficient. Both the

(1) (1927) I. L. R. 56 Calc. 790. (2) (1874) 14 B. L. R. 226; L. R. 2 I. A. 7.
(3) (1897) I. L. R. 24 Calc. 646.

Privy Council and other courts have come to the conclusion that a Hindu is presumed to know Hindu law and to know that a gift to a female usually carries only life interest and that, if the donor wanted to give absolutely, he should have used unequivocal words to that effect.

S. K. Gupta (with him *I. P. Mukherji*) for the defendant Suprakash Ghosh. I have no funds in my hand. I have no other submission to make.

Arun Sen, in reply. Order XXXI of the Civil Procedure Code does not apply. That applies only to suits between a beneficiary and a third person. Mine is a general legacy. If the executor has not sufficient funds in his hands, I would be entitled to rateable distribution. Therefore, all the legatees are necessary parties.

I admit that, ordinarily, the only necessary party to this suit would be the executor. But in this case, probate was granted to Suprakash, on his charging the estate in favour of the legatees; therefore, they are interested and are necessary parties.

[Mr. Ghose: The estate of Suprakash was charged and not that of the testator. See paragraphs 5 and 6 of the plaint.]

BUCKLAND J. This is a suit for payment of a legacy of Rs. 10,000 to the plaintiffs, as executors of the will of Saratbala Dasi, and for administration of the estate of Lalitmohan Sarkar, deceased.

Lalitmohan Sarkar died on the 17th December, 1921, leaving a will dated 21st November, 1921, in which he had named the defendant Suprakash Ghosh as his executor and residuary legatee, Suprakash Ghosh being in fact his nephew. On the 19th April, 1926, probate was granted to Suprakash Ghosh.

In his will, the testator said "It is my will and "desire and I direct that my wife, the said Saratbala "Dasi, will get a legacy of Rs. 10,000 out of my estate "if she survives me."

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In point of fact she did survive him. She died on the 28th July, 1924, leaving a will bearing date the 4th July, 1924, by which she appointed the present plaintiffs as her executors, to whom probate was granted on the 18th December, 1924. The terms of her will are of no account.

This suit is by her executors in respect of Rs. 10,000, the subject-matter of the legacy to Saratbala Dasi. The suit has been brought not only against the executor of the will of her deceased husband Lalitmohan Sarkar, but also against seven other persons who are legatees under the will of Lalitmohan Sarkar or otherwise named therein.

Learned counsel has appeared on behalf of Manatosh Sarkar, a brother of Lalitmohan Sarkar, and on behalf of Suprakash Ghosh. Nobody has appeared on behalf of any of the other defendants.

Nothing has been argued on behalf of Suprakash Ghosh, who has not urged through his counsel any view to be taken of the clause in question, but it has been stated by learned counsel that there are no funds from which the legacies could be paid. That is a matter which may have to be considered if an order is made for administration of the estate.

On behalf of Manatosh Sarkar, it has been contended that he is not a necessary party to the suit: the argument preferred by reference to Order XXXI of the Civil Procedure Code being that no defendant, other than the defendant Suprakash Ghosh, need have been joined. To this learned counsel for the plaintiff has replied, though he has not cited any authority, that as an order for administration is asked for, all the defendants were necessary parties. To this question I shall return.

On behalf of Manatosh Sarkar it has been contended that by the clause of the will which I have read the testator's widow only obtained a life interest in the sum of Rs. 10,000. I have been referred to the rule that, in construing a deed of gift or will made by a Hindu in favour of female relations, the Court is

entitled to presume that the donor would give only a limited estate unless the contrary appears from the deed or will, and I have been referred to cases in which that view has been expressed.

Learned counsel for the plaintiff has referred to section 86 of the Succession Act and submitted that the words should receive the same construction as that to be found in two clauses later whereby Rebatosh Sarkar, a cousin of the testator, was to get a legacy of Rs. 500, which can only mean that an absolute interest was given. He has also referred me to the recent judgment in this Court in *Bipradas Goswami* v. *Sadhan Chandra Banerji* (1).

With reference to the presumption of a limited interest, I observe that almost invariably it is stated that the question will depend upon the terms of the will which the learned Judges then proceed to construe. I have not referred to the cases, more particularly because the rule that the terms of the grant alone must be considered is well established and there is no over-riding presumption which might, if the argument is sound and carried to its logical extreme, be deemed to have the effect of regarding it to be established that the testator did not mean what he said.

It has been pointed out that words such as "owner," have been construed as meaning that only a limited estate was given. But it may be that, where a vernacular will has to be construed, due allowance must be made for shades of meaning not susceptible of exact translation. Where, however, the will is in English, as in this case, no such considerations can arise. In this particular case, it appears to me that the words in their ordinary grammatical sense mean that the widow was to receive an absolute gift of Rs. 10,000. It was conceded by Mr. Ghose that had this been the will of a European, that proposition would have been indisputable. Hence, the proposition for which he contends may be stated in two ways:

(1) (1927) I. L. R. 56 Calc. 790.

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either the presumption is to over-ride what the words employed clearly state, or in the case of a woman such words are not to be given their ordinary meaning unless some further words are added, which, by tautology or emphasis, make it certain that they mean what they express. Mr. Ghose has not been able to cite any case which goes so far, and in my judgment, the will provided that the widow shall receive Rs. 10,000 absolutely.

There remains the question as to the form of the decree. I am not wholly satisfied as to whether all these various persons are necessary parties. It is only as regards Mr. Ghose's client that the matter is important, for no other defendant has appeared and taken the point which will affect his costs, though the same order may have to be made as regards all defendants other than Suprakash. The case will be set down again on Friday next for further consideration.

The 21st February 1930. It is now conceded, on behalf of the plaintiff, that ordinarily the only necessary party to a suit of this nature is the executor, but owing to the circumstances of this case, it is contended that the defendants other than the executor, and in particular Manatosh Sarkar, are necessary parties even at this stage, though generally it would suffice for a decree to be made against the executor and the other parties either be brought on the record or notice given to them, if that should suffice, at the time of the reference, if their interests were likely to be affected.

The circumstances to which Mr. Sen has referred are that the property of the deceased was charged in favour of the legatees. I have been referred to paragraph 5 of the plaint, where it is said that it was ordered that probate should be issued to Suprakash on his charging *his* estate in favour of the legatee. I am now told that that should be "the" estate. If that is so, the plaint should have been

amended. It is not clear as it is and this should not have been left to be stated at the last stage of the hearing. As it now stands, the charge referred to in paragraphs 5 and 6 of the plaint might have been a charge on Suprakash Ghosh's estate. But assuming it to have been intended as is now stated, I have been asked to refer to the document as if is said to be part of the record. It has not though been produced, and I am told it is with the Registrar and cannot be produced. If there is any substance in this, I can only say that the matter has been presented most unsatisfactorily. Nor have I been referred to any authority. In the circumstances, I hold that the defendants other than Suprakash Ghosh are not necessary parties, and there must be a decree for administration in the usual form and the suit against them will be dismissed.

Manatosh Sarkar is entitled to his costs of two days' hearing to be paid by the plaintiff. Suprakash Ghosh, the executor of the will of Lalitmohan Sarkar, may take costs payable by him out of the estate as between attorney and client, but he must pay the plaintiff's costs including the costs of one day's hearing as between party and party.

I make no order as to the plaintiff taking any costs which he may have to pay out of the estate which he represents.

Further costs reserved.

Decree against executor.

Attorney for plaintiffs: *C. C. Mitra.*

Attorney for defendant, Suprakash Ghosh: *R. M. Chatterji.*

Attorney for defendant, Manatosh Sarkar: *M. M. Chatterji.*

S. M.