

APPEAL FROM ORIGINAL CIVIL.

Before Derbyshire C. J. and Costello J.

BIBHA BATI DEBEE

v.

MAHENDRA CHANDRA LAHIRI.*

1936

July 9, 10, 13, 15,
17.

*Will—Hindu testator—Bequest to daughters, their sons and grandsons—
Construction—Life interest—Gift to unborn persons.*

Where there was a previous definite decision of the High Court that the gift of one Government Promissory Note in the will of one G. P. G. to his daughter N. K. was not an absolute gift, but was a bequest of no more than a life interest so far as the testator's daughters were concerned and where neither the present plaintiffs nor their grandmother N. (the testator's youngest daughter) were parties to that particular suit,

held that, though in one sense it was not a matter of *res judicata*, it was nevertheless a judicial decision of the High Court given not only on an analogous set of facts but on a set of facts, which were identical with the facts in the present case, and it was not open to the plaintiffs to argue that their grandmother had acquired anything else but a life interest as regards the said Government Promissory Note.

Where that will contained the following clause "Neither the daughters nor their sons, grandsons and so forth shall be entitled to give, sell or mortgage the said Government Promissory Notes. Excepting the sons, grandsons and so forth of the daughters, their sons-in-law or their other heirs shall not have any concern with the Government Promissory Notes or interest thereof,"

held that that phrase put the plaintiffs out of Court, as it was impossible in the face of that provision to hold that the testator's daughter or her grandson had acquired an absolute interest in the Government Promissory Note.

The testator could not create something in the nature of an estate tail male, for such a disposition clearly offends against the law, because there could not be a gift to an unborn person under the provisions of the Hindu law prior to the year 1916.

APPEAL FROM ORIGINAL DECREE by the plaintiffs.

The facts of the case and the arguments in the appeal appear fully in the judgment.

Sambhu Nath Banerjee, with him *U. C. Laha* for the appellants.

*Appeal from Original Decree, No. 21 of 1936, in Suit No. 1850 of 1933.

S. C. Roy and *A. K. Hazra* for the respondent
Radha Mani.

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Girija Prasanna Sanyal for the executors and
trustees.

COSTELLO J. This is an appeal from a judgment of Ameer Ali J. whereby he rejected the claim made by the plaintiffs for the delivery up to them of a Government Promissory Note of the face value of Rs. 9,000. This Government Promissory Note passed under the will of one Ganga Prasad Goswami who was a *zemindâr* of Serampore in the district of Hooghly. The will was made in the Bengali language and was dated October 28, 1864. By the will the eldest son of the testator—one Hem Chandra Goswami—was appointed executor of the will. The testator died within a few years of the making of the will. The will was duly proved by Hem Chandra Goswami in this Court and probate of the will was issued to him.

In the present suit, the two plaintiffs, who are the great grand-daughters of the testator, were alleging that their grandmother, one of the daughters of the testator, during her life-time became absolutely entitled to the Government Promissory Note which was the subject matter of the suit or alternatively that, in any event, on her death (which occurred in the year 1920) her son Girish Chandra—the father of the two plaintiffs—became absolutely entitled to it. The two plaintiffs were merely claiming in this suit as the heirs of Girish Chandra and were not claiming that they were entitled to the Government Promissory Note under any other title.

Mr. Banerjee on behalf of the plaintiffs has sought to argue that under the terms of the will of Ganga Prasad Goswami each of his three daughters, Nitya Mayee, Naba Kishoree and Jay Mani became absolutely entitled to a 4 *per cent.* Government Promissory Note of the face value of Rs. 9,000 and

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accordingly on the death of each of these three daughters respectively a Government Promissory Note of the face value of Rs. 9,000 passed to her heirs. Mr. Banerjee has also argued in the alternative that if the three daughters did not take an absolute interest in the Government Promissory Notes in question, then so far as Nitya Mayee is concerned her son Girish—the father of the present plaintiffs—became absolutely entitled to the Government Promissory Note.

The matter we have to determine and which was before the learned Judge in the Court below is—what is the right construction to be given to what is described as the “fourth section” of the will of Ganga Prasad Goswami. That section is in these words—

My eldest daughter Sreematee Nitya Mayee Debee, second daughter Sreematee Naba Kishoree Debee and youngest daughter Sreematee Jay Mani Debee have sons and are child bearing. They shall be maintained in my family as they are now being done. If there be any disagreement then each of the said daughters shall receive for her maintenance with their children a 4 *per cent.* Government Promissory Note of the face value of Rs. 9,000 and each of them shall also receive Rs. 2,000 in cash for building a house in this town. They shall enjoy the interest that would accrue on the said promissory notes with their sons, grandsons and so forth. Neither the daughters nor their sons, grandsons and so forth shall be entitled to give, sell or mortgage the said Government Promissory Notes. Excepting the sons and grandsons and so forth of the daughters, their sons-in-law or their other heirs shall not have any concern with the Government Promissory Notes or interest thereof. God forbid, if owing to misfortune there be no children of any of the daughters, then the Government Promissory Notes shall revert to my estate and my two sons shall be entitled to the same in equal shares. For this purpose I have, of my own accord and being in a good state of body and of sound disposing mind, written (this) deed of will. *Finis.* The year 1271. Twelve hundred and seventy-one, dated Kārtik 13th (October 28, 1864).

Had this been a matter of first impression, the wording of this section would have required a very careful scrutiny before we could dispose of the contention put forward, that upon a proper construction of the will it ought to be held that the testator was minded and intended to give an absolute interest in a 4 *per cent.* Government Promissory Note to each of his three daughters. In support of that point of view Mr. Banerjee has cited to us the

case of *Sarajubala Debi v. Jyotirmayee Debi* (1), where it was held by the Privy Council, in a judgment which was delivered by Sir Dinshah Mulla, that a certain disposition of property created an absolute interest despite the existence in the instrument of gift of words that seemed at first sight to have the effect of cutting down the interest conveyed.

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Mr. Banerjee has argued that the words occurring in the fourth section of the will of Ganga Prasad Goswami "with their sons, grandsons and so forth", which are in Bengali in the original and are equivalent to the fairly common phrase *putra poutrâdikrame*, do no more than constitute words of limitation indicating that the grant to Nitya Mayee was a grant of an absolute interest and not a grant merely of an estate for life. I should not in any event have been disposed to accept that contention having regard to the language of this clause of the will; but, in my opinion, it is not open to us to consider the matter or rather to reconsider the matter as this particular aspect of the plaintiffs' case has already been the subject of judicial pronouncement by a Bench of this Court composed of Sir Richard Garth—the then Chief Justice of this Court—and Mr. Justice McDonell. That judgment was given on appeal from a decree of the Subordinate Judge of Hooghly, which was dated March 9, 1876. In the suit in which that decree was made, Naba Kishoree Debee was claiming that she was entitled to the delivery up to her of a Government Promissory Note of the face value of Rs. 9,000 as against Hem Chandra who was, as I have already stated, the executor of the will of his father, Ganga Prasad Goswami. The decree of the Subordinate Judge of Hooghly was set aside. The judgment of the appellate Court contains this expression of opinion:—

We think that in this case the lower Court was quite wrong in directing that the Government Paper for Rs. 9,000 should be handed over to the plaintiff. The will of October 28, 1864, is not a very formal document; but it is clear from the language of it that the testator did not intend the plaintiffs to have

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the disposal of the capital invested in the Government Paper, but that she was only to have the interest of it for her life, and after her death it was either to go to her children or, in the event of her being childless, to revert to his, i.e., the testator's, sons as part of his general estate.

In my view it is quite clear from the definite decision on the part of this Court that the gift to Naba Kishoree Debee and, therefore, by a party of reasoning, the gift to Nitya Mayee, was not an absolute gift of the Government Promissory Note but was a bequest of no more than a life interest so far as each of the testator's daughters was concerned.

Mr. Banerjee has argued that the decision given by Sir Richard Garth and Mr. Justice McDonell does not stand in his way as being in the nature of *res judicata* so as to preclude him once more from agitating the question as to whether or not Nitya Mayee acquired an absolute interest in the Government Paper. With that contention I cannot agree. It is quite true that in one sense it is not a matter of *res judicata*, because neither the present plaintiffs nor their grandmother were parties to that particular suit; but, on the other hand, it is a judicial decision of this Court given not merely on an analogous set of facts but on a set of facts, which are identical with the facts in the present case. Moreover, there were other suits in the Hooghly Court—one brought by Nitya Mayee herself and another brought by the third sister Jay Mani—and they were disposed of upon the footing of the decision given by this Court in Naba Kishoree's case. In my opinion, therefore, it is not now open to the plaintiffs to argue that their grandmother acquired anything else but a life interest as regards the Government Promissory Note for Rs. 9,000.

Mr. Banerjee, when that aspect of the matter was put to him, was obliged to admit that, unless he could persuade us to accept his contention that Girish—the son of Nitya Mayee—acquired an absolute interest, it was impossible for these plaintiffs to succeed, the reason being that, unless

Girish acquired an absolute interest in the Government Promissory Note the position must be that the testator purported to set up a series of life interests in this particular piece of property—a life interest to Nitya Mayee, a life interest to her son and a life interest to the son's sons. If that is the position, which was contemplated, the purported disposition of the property is rendered invalid under the provisions of the Hindu law which at any rate as regards wills made prior to the year 1916 made it impossible for gifts to be made to unborn persons. At the date of the will and indeed at the date of the death of the testator Girish was alive but neither of the present plaintiffs was in existence. In my view there are only two possible ways of reading the fourth section of the will of Ganga Prasad Goswami; first, that in spite of the limitations and restrictions contained in the section the testator really intended to give to each of his daughters an absolute interest in the Government Promissory Note of the face value of Rs. 9,000. That interpretation is ruled out for the reasons I have given. The other interpretation can only be that the testator intended to create and no doubt thought he had succeeded in creating a succession of life interests or life estates beginning with each of his daughters and continuing to their sons respectively and their sons' sons and so forth; in other words, the testator intended to create something in the nature of an estate tail male as regards each of the Government Promissory Notes. Such a disposition clearly offends against the law, because there could not be a gift to an unborn person. Therefore the succession of interests in the notes came to an end upon the death of Girish.

There is one phrase in this clause of the will, which in my opinion entirely puts the plaintiffs out of Court. It is this:—

Neither the daughters nor their sons, grandsons and so forth shall be entitled to give, sell or mortgage the said Government Promissory Notes. Excepting the sons and grandsons and so forth of the daughters, their sons-in-law or their other heirs shall not have any concern with the Government Promissory Notes or interest thereof.

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It seems to me impossible in the face of that provision to hold that Nitya Mayee obtained an absolute interest and equally impossible to hold that Girish acquired an absolute interest.

It is manifest, in my opinion, that the testator thought that he was creating as it were a series of estates in these Government Promissory Notes to his daughters, then their sons, their grandsons, their great grandsons and so on, who would successively enjoy the income derived from these Government Promissory Notes. When the question was categorically put to Mr. Banerjee, he was utterly unable to advance any ground whatever for suggesting, still less for establishing that Girish acquired an absolute interest in the Government Promissory Note which is now being claimed by the plaintiffs. However unfortunate it may be for the plaintiffs, in view of the language of this fourth section of the will of Ganga Prasad Goswami and bearing in mind the decision long ago given by this Court, we cannot do otherwise than come to the conclusion that no interest was created which would pass to the present plaintiffs as daughters of Girish or to them as heirs of Nitya Mayee. Therefore we must hold that the learned Judge was right in dismissing the suit.

The appeal is dismissed. All costs including the costs in the applications, if any, will come out of the estate taxed as between attorney and client.

DERBYSHIRE C. J. I agree.

Appeal dismissed.

Attorneys for appellant: *P. L. Mullick & Co.*

Attorneys for respondent: *I. C. Ghose,*

M. K. Roy Chowdhury.

G. S.