Privy Council Appeal No. 40 *of* 1940

Patna Appeal No. 37 *of* 1939

Babui Rajeshwari Kuer and another – – – – *Appellants*

v

Babui Khukhna Kuer (since deceased) and others – *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT PATNA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 15TH MARCH, 1943

Present at the Hearing:

LORD ATKIN
LORD THANKERTON
LORD CLAUSON
SIR GEORGE RANKIN
SIR MADHAVAN NAIR

[*Delivered by* LORD CLAUSON]

This is an appeal from a judgment of the High Court at Patna of the 27th October, 1938, affirming with a modification a judgment of the Subordinate Judge of Chapra of the 25th April, 1938, whereby, in effect, he confirmed the attachment, in execution of a decree, of certain interests of the appellants under the will of Tirgunanand Upadhaya (hereinafter called the testator), who died in the year 1915. The substantial contention of the appellants is that their interests in the corpus so attached are contingent interests and therefore, by reason of proviso (*m*) to S.60 (1) of the Code of Civil Procedure, 1908, not liable to attachment. The question at issue turns upon the true construction of the somewhat inartistically drafted will of the testator.

The testator made his will on the 26th July, 1915. He had had one son only who had died some three years previously. At the date of his will and at the date of his death (which occurred shortly after the date of his will) his near living relatives were (*a*) his second wife, Dulhin Ram Sakhi Kuer (*b*) his daughter in law Dulhin Surja Kuer, the widow of his deceased only son (*c*) the present appellants, his two grandchildren, Babui Rajeshwari and Babui Ghagota, daughters of a deceased daughter (*d*) Babui Khukhna, a sister in law, of whom the testator says in his will " she has been living with me from her childhood, and I am quite willing to provide for her comforts."

By his will the testator, after summarizing the state of his family, states that although he had not given up the hope of getting a male issue, still in view of the uncertainty of life, he considers it desirable to make proper arrangement of his estate during his lifetime so that no dispute of any kind might arise on his death likely to ruin his estate. He then provides that if (which did not in fact occur) a male child is born to him he is to become absolute proprietor of all his (the testator's) property. He then proceeds to provide for the event (which in fact occurred) of no male child being born to him, as follows:—his second wife (whom it is convenient to refer to as the widow) is to become proprietor having life interest only of all his properties (with an immaterial exception). She is to pay out of the income of the estate certain specified annual payments to the daughter in law, the two grand-daughters, and the sister in law, and Rs.300 a year

to one Ram Lochan Pande " or she (the widow) shall have the right to set apart properties fetching the above income and put my daughter-in-law and my daughter's daughters in possession thereof: if she does not set apart such properties herself, they shall have the right to recover cash or properties as specified above from my estate by taking the necessary steps in Court." The will then proceeds as follows:—

> " 4. On the death of my wife the whole of my estate [with certain immaterial exceptions] being treated as 16 annas right 3 annas and odd out of it shall pass into the possession of [the daughter in law] but she shall not have the right to transfer the same, 12 annas share shall pass into the possession of the two daughters born of the womb of my daughter who are still living in equal shares, i.e., each will get six annas share and one anna share shall pass into the possession of [the sister in law] as absolute proprietors having the right to alienate, etc., the property. On the death of my wife all the proprietors and my heirs and representatives shall be liable for payment of Rs.300 a year to Ram Lochan Pande aforesaid in proportion to the share held in possession by each.
>
> " 5. On the death of my daughter in law all properties held in possession by her without the right of transfer as laid down in para. 4 of this will shall pass in entirety into the possession of the two daughters of my daughter in equal shares and that of their heirs and representatives as absolute proprietors thereof.
>
> " 6. If for any reason God forbid, any portion of the said estate is not taken possession of by my daughter's daughters and [the sister in law] and they do not get the opportunity of entering upon possession and occupation of it, the entire estate will remain in my daughter in law's possession without the right of transfer and on her death the entire estate shall be treated as my estate with the District Magistrate and Collector of Saran as its manager and trustee."

Then follow certain provisions of the nature of charitable trusts which are to be applicable in the event last stated.

The testator died shortly after the date of his will. The annuity payable under the will to the sister-in-law was however not paid. During a period from 1922 to 1934 the present appellants, the two grand-daughters, acted as administrators of the estate, and under a decree obtained by the sister-in-law in a suit against the present appellants, the latter became liable to pay the sister-in-law a sum of over Rs.26,000 in respect of the arrears of her annuity. The decree, as framed in the Appeal Court, was a personal one and was to be recoverable from any property belonging to the present appellants, including such property as they may have acquired or may thereafter acquire under the will.

The testator's widow is still living. The sister-in-law, originally the first respondent, has died pending the present appeal and is now represented by her infant heirs.

Having obtained her decree against the present appellants the sister-in-law applied for attachment of their interests under the will, and sought to attach what the Subordinate Judge describes in his judgment of the 30th November, 1937, as " the vested remainder that they have in that estate as also the right of annuity which they have under the will of the testator." The learned Subordinate Judge decided that the annuity can be attached in execution of a decree and adds: " I suppose the interest of [the present appellants] over the testator's property whatever the nature of the interest may be is a vested interest and is liable to attachment also ": and he accordingly confirms an order which had apparently been previously made for attachment as asked by the sister-in-law. The present appellants appealed to the High Court at Patna setting out various technical objections to the attachment order which are no longer put forward and raising the two substantial points that (*a*) their right to the 15 annas share under the will was an interest contingent on surviving the widow and not a vested interest and accordingly was exempt from attachment by virtue of proviso (*m*) to s. 60 s.s.1 of the Code of Civil Procedure (1908) and (*b*) that the annuities provided for under the will in their favour were in the nature of future maintenance and accordingly exempt from attachment by virtue of proviso (*n*) to the same subsection. The

High Court, as appears from the judgment of Wort J., were clearly of opinion that the present appellants' interest in the annuities were vested interests and (as it would seem) that they were not exempt from attachment as being merely " rights to future maintenance " within the meaning of proviso (*n*). As regards the 15 annas (i.e. the interest of the grand-daughters in the corpus of the estate subject to the life interests of the widow and daughter-in-law), the Court rejected the contention of counsel that clause 6 of the will operated to govern the previous gift to the grand-daughters so as to make it a contingent interest. There is no reference in the judgment to any argument that the gift to the grand-daughters of the 15 annas interest as appearing in clauses 4 and 5 of the will was so framed as to be a gift contingent on surviving the widow. The High Court dismissed the appeal and confirmed the attachment order, making it clear, however, that the annuity payments would not be liable to attachment before they became due.

On the present appeal counsel intimated that he could not contend that the annuities were exempt from attachment and accordingly that point passes out of the case. As regards the interest in the corpus it was not only contended that clause 6 of the will operated to govern the gift so as to make it a contingent interest, but it was strenuously contended that on the proper construction of clause 4 of the will the interest of the grand-daughters was contingent upon their survival of the widow. This argument was based upon the words " who are still living ", it being suggested that on a fair reading of the context the true interpretation of the words would make them equivalent to " who shall be still living ", i.e., at the widow's death.

Their Lordships, assuming for the moment that clause 4 is so worded as to give the grand-daughters a vested interest, see no reason to differ from the view of the High Court that clause 6 does not operate to govern that gift so as to make it a contingent interest. It is to be observed that the language of clause 5 seems quite clearly to give the grand-daughters a vested interest in the three annas of which the daughter-in-law is tenant for life. Clause 6 secures that the daughter-in-law's life interest in the three annas should be extended to the whole of the 15 annas in case the provision for charity becomes operative: but it is not necessary for the purposes of this case, nor would be proper in the absence of any representative of those interested in the charitable uses, to determine what the events are in which the provision for charity becomes operative. Their Lordships can, however, find no trace in clause 6 of any intention on the part of the testator to make it a condition of the grand-daughters taking the benefits given to them under clauses 4 and 5 that they should survive the testator's widow: and their Lordships are accordingly of opinion that the learned Judges below were correct in rejecting the contention placed before them (or at all events before the Appellate Court) by counsel that clause 6 operates to cut down the gifts to the grand-daughters from vested to contingent gifts.

A somewhat different argument was suggested by counsel before their Lordships. It was argued on the wording of clause 4 that the gifts to the grand-daughters, at all events of the 12 annas, were mere contingent gifts. It was argued that the words " the two daughters born of the womb of my daughter who are still living " should be read as the equivalent of " the two daughters of my daughter who shall be still living when my widow dies." It was said that a common inaccuracy is to use words which strictly denote the present in the place of and as equivalent to words of futurity. That may be so: and no doubt, in a proper context, a future sense may be attributed to words which literally bear only a present sense. But the literal meaning of such words cannot be disregarded unless the intention to use them in a special and inaccurate sense is shown by the context. It was sought to extract such a context from reading clause 6 with clauses 4 and 5. Their Lordships find it quite impossible to extract such a context from clause 6. The most that can be said is, that clause is intended in certain events to divest interests which before those events have already become vested. Even this is by no means clear. It may

be that the clause is merely aimed at dealing with the case of the grand-daughters not surviving the testator, that is to say that it merely operates in case of lapse by death of the grand-daughters in the testator's lifetime. In any case, their Lordships find nothing in clause 6 which would justify them in reading the words " who are still living " in clause 4 otherwise than in their obvious and literal sense, as a statement of the facts as they stand at the moment when the testator makes his will.

Their Lordships would further observe that the question is as to the meaning of language used by a testator in a tongue which is not his native tongue. The argument that the testator has used an ordinary phrase in a special and inaccurate sense, if submitted at all to the Courts below, did not commend itself to the learned Judges. Those learned Judges are of course more familiar than their Lordships can be with documents framed in India in the English language by persons not likely to be perfectly familiar with that tongue. They saw no reason for construing the crucial words otherwise than literally. Their Lordships would hesitate long before overruling Judges in India on such a point.

Their Lordships accordingly see no reason to doubt the correctness of the decision under appeal. They will humbly advise His Majesty to dismiss the appeal. As the appellants are proceeding *in formâ pauperis* there will be no order as to costs.

(25286) Wt. — 150 4/43 D.L. G. 338

In the Privy Council

BABUI RAJESHWARI KUER AND ANOTHER

v.

BABUI KHUKHNA KUER (since deceased) AND OTHERS

DELIVERED BY LORD CLAUSON

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