Calcutta High Court
Treeporasoondery Dossee vs Debendronath Tagore on 7 July, 1876
Equivalent citations: (1877) ILR 2 Cal 45
Author: Pontifex
Bench: Pontifex
JUDGMENT Pontifex, J.

1. This case, which has been argued in the settlement of issues, raises many troublesome and difficult questions.

2. Dwarkanath Tagore, who died about the year 1846, left three sons--Debendronath, who is still living and is the principal defendant in this suit; Greendronath, who died in 1854, leaving two sons, Ganendronath, who died in 1869, and Ganendronath, who is a defendant in this suit, and Nogendronath, who died in 1858, without issue, leaving a widow, who is the plaintiff in this suit. Dwarkanath Tagore, by his will made in 1843, appointed a Mr. Gordon and his three sons his executors (all of whom, except Nogendro, proved the will), and, after thereby confirming a certain deed of settlement of the 20th of August 1840, making certain devises and bequests (including a devise of a piece of land and a bequest of Rs. 20,000, for the purposes of building a house thereon, to his son Nogendronath), the testator Dwarkanath gave the beneficial interest in the residue of his real and personal estate in effect, and according, as I am informed, to the construction placed on such residuary devise by the Supreme Court in 1847, to his three sons absolutely, as tenants in common. I shall state later on my reasons for considering that the executors of Dwarkanath's will took there under the whole of his residuary estate as trustees.

3. By the settlement of the 20th of August 1840, referred to in his will, Dwarkanath conveyed very valuable immoveable estate, the whole of it outside the jurisdiction of this Court, to trustees, who, under a subsequent appointment, are now represented by the defendants Sarodaprosad Gangooly, Nilcomul Mookerjea, and Nobin Chandra Mookerjea, whom I shall call the settlement trustees. The trusts of the settlement were that the trustees should, after the decease of the testator Dwarkanath, pay the rents of the lands between his three sons, in equal shares, during their lives, and immediately after the decease of any of them, upon trust, to pay the share of the son so dying to his children, being a son or sons, in equal shares; and the deed provided that if the sons of Dwarkanath, or any of them, or any of their respective sons, should die without having male issue, and without having duly adopted a son but leaving a widow, then the trustees should pay, out of the rents of the settled property, a sufficient sum for the suitable support of such widow during her life and for providing her with a suitable residence.

4. The three sons of Dwarkanath, after his decease, and during their joint lives, received the income of the settled property in equal shares, and after Greendronath's decease, in 1854, it seems to have been assumed by all parties that his two sons, Ganendronath and Ganendronath, were entitled to Greendronath's one-third share, under the deed of settlement.

5. Nogendro, who died in 1858 without issue, left a will; and a certificate under Act XX of 1841 to collect debts was granted by the Court at Alipore to his nephew Ganendro. The will has been

admitted in this suit, by the plaintiff, to be a valid will. The scheme of it is as follows: The testator, Nogendro, gave authority to his widow, the plaintiff, to adopt a son of Ganendro, or a son of Ganendro, and, in default of a fit son of either, then such child as Ganendro should approve. It is clear from the will that Nogendro believed that a son so adopted would succeed to his own one-third share under the settlement, and that he considered that such share would be a provision for himself and Nogendro's widow. The only devise made by the will is to Ganendro, of the testator's one-third share of certain other property, which he refers to as described "in the schedule written under the former will."

6. A document purporting to be a former will has been produced by the plaintiff in this suit under somewhat peculiar circumstances. She does not admit it to be the former will referred to in her husband's last will, but the defendants rely upon it. I think, under the circumstances, and at this stage of the case, I am bound to assume that the document so produced is the former will referred to by Nogendro.

7. After finding that the devise in this will to Ganendro gave him no interest in Nogendro's residuary property, or in anything but the specific items enumerated in the schedule thereto, His Lordship continued.

8. It is to be particularly noticed that the appointment in the admitted will of Debendro and Ganendro as executors is of a very restricted character; whatever may be the exact nature of the interest or power of a Hindu executor appointed by will--whether, as argued on behalf of the plaintiff, he takes no estate, or whether, as argued on behalf of Debendro, he sufficiently represents the entire estate of a testator--it seems to me that, in this particular will, Debendro and Ganendro, though called executors, were appointed only for a special purpose, and for a limited period,--that is to say, only to look after, and take care of, the natural or adopted son of the testator during his minority, and only so far as concerned the property in settlement. They were, in my opinion, only constituted guardians and manager for the son (if any), and took, under the will, no further interest or powers as executors.

9. His Lordship, after referring to certain transactions with reference to the adoption of a son by the plaintiff under an alleged verbal permission from her husband--to the actual adoption of Gunendro under that permission--to a suit brought by him to establish his adoption, which was dismissed in January 1860--to a bill filed by Debendro to set aside the adoption, and to ascertain the rights of the parties in the settled property, to which the plaintiff was a defendant--to a suit brought, pending Debendro's suit, by a creditor, Bazlur Rahim, for administration of Nogendro's estate, in which suit Debendro and Ganendro were made defendants, but to which the plaintiff in this suit was not a party--to a decree made in Debendro's suit in September 1860, whereby it was declared that the adopted son took no benefit under the settlement, that the plaintiff was entitled to Rs. 400 monthly as maintenance, which the settlement trustees from that time continued to pay to her, and that subject to debts and legacies Debendro was entitled to one-third of the surplus of Nogendro's share, Ganendro and Ganendro to another one-third, and as to the third share all parties were to be at liberty to apply--to a consent decree made in Bazlur Rahim's suit in April 1864, which directed that the real estate of Nogendro should be sold, and the Receiver of the Court be appointed Receiver to

collect the out standings of his estate and also the share of Nogendro in the residuary estate of Dwarkanath, continued:

In my opinion, the present plaintiff is not bound by the decree, or proceedings, in the creditor's suit, and the only property of Nogendro which could be affected thereby is the property devised by Nogendro to Ganendro, and any debts of Nogendro which Ganendro was authorised to collect and get in under the certificate granted to him by the Alipore Court. Such certificate applied only to debts and moveable estate, and did not give Ganendro any interest in, or any authority to receive, or represent, immoveable estate; as was decided by Silt Barnes Peacock in the two judgments in Awkinfee v. Mee Nay 8 W.R. 1 and Sivinthia Pellai v. Mootooswamy 8 W.R. 2 with respect to a similar certificate under the Act of 1860 : and if Debendro and Ganendro have no right to recover and no interest in Nogendro's immoveable estate, any decree made in a suit in which they were the only defendants could not affect the immoveable estate or the person really interested in such immoveable estate. The plaintiff, it is true, has asked that this suit may be taken, so far as it relates to the same subject-matter, as supplemental to Bazlur Rahim's suit. But even if it could be so taken, I think, under the circumstances, she is not absolutely bound by that portion of the prayer.

10. Ganendronath died in 1869 without issue, having by his will appointed Ganendronath, Jogesh Prokash Gangooly and Nilcomul Mookerjea executors, and leaving a widow, Samasoondery, who has been made a defendant, but who has not appeared, to this suit.

11. The present plaintiff, on the 12th July 1875, filed her plaint in this suit against Debendronath and his seven sons, Gunendronath and his three sons, Ganendro's widow, Ganendro's executors; and the three trustees of the deed of settlement. In her plaint she charges that her adoption of Gunendro was without her husband's authority, and therefore void, and that Ganendro has never acted upon it; that Debendro is in possession of the whole of Dwarkanath's estate, and has filed no accounts since 1848; that Debendro has bought up the rights of Nogendro's creditors at reduced prices; that Debendro and Gunendro are in possession of the piece of land specifically devised by Dwarkanath to Nogendro, and of certain silk factories, either belonging to Nogendro's estate, or purchased there from, which last appear to be a part of the property mentioned in the schedule to Nogendro's first will; that she is not bound by the decree of the 24th of September 1860; that she, as widow of Nogendro, is entitled, subject to the life-interests created by the said settlement, to one-third of the property therein comprised. She accordingly prays for a declaration that she is not bound by the decree of the 24th September 1860, and that the settlement deed may be now construed, and that it may be declared that she is entitled to one-third part of Dwarkanath's residuary estate and of the settled property; that accounts of the settled property and of Dwarkanath's estate may be taken, and if necessary, that his estate should be administered by the Court; that, so far as Nogendro's estate is unadministered, it may be administered by the Court; that, in respect of any purchases by Debendro of debts due by such estate, he should only rank as a creditor for the amounts expended by him in such purchases; and that the present suit, so far as it relates to the same subject-matter, may be taken as supplemental to Bazlur Rahim's suit. All the defendants, except the widow of Ganendro and one of the sons of Debendro, have appeared. With those exceptions, written statements' have been put in by all the defendants. The plaintiff at this hearing has asked that her suit may be dismissed as against the two defendants who have not appeared, and may be dismissed with costs, as against the

sons of Debendro and Gunendro; and I made an order accordingly.

12. The suit came on to be heard before me in settlement of issues, and Debendro and Ganendro set up three principal grounds why the suit should be dismissed: 1st, that it is multifarious; 2nd, that the plaintiff has no right to sue in respect of any of the matters complained of by her; and 3rd, that the plaintiff is barred by limitation and acquiescence.

13. I propose to take these objections in their order.

14. The plaintiff asks relief in respect of three different matters: the administration of the estate of Dwarkanath; the construction of the deed of settlement; and an administration of Nogendro's estate, which might also involve an administration of Ganendro's estate. Considerable stress has been placed on the fact that, if the plaintiff can combine in one suit these several subjects, she will be able to get a decree with respect to the settled property, which she could not get if she sued separately for an administration of that property, inasmuch as the whole of it is without the local limits of this Court's jurisdiction. This objection would, no doubt, have great force if the plaintiff was attempting to deal only prospectively with the property outside Calcutta. But in fact her case is that, since 1860, the trustees of the settlement have paid a particular share of the rents of the settled property to Debendro, as exectuor of Dwarkanath's will; and her principal object is to get a construction of the settlement with respect to the rents so paid, which construction, no doubt, would incidentally affect future rents, and would be a binding decision on title.

15. Supposing the plaintiff had, in fact, any right or interest under the deed of settlement, and having regard to the wider and more liberal view latterly taken with respect to objection for multifariousness, as shown in the cases of Pointon v. Pointon L.R. 12 Eq. 537 and Coates v. Legard L.E. 19 Eq. 56. I should not have been disposed to dismiss the plaintiff's suit on that ground. But in fact the plaintiff has, in my opinion, no right or interest under the settlement deed, beyond what she has already received, and is now in receipt of, under the decree of the 24th of September 1860. And I think she has neither the right, nor that it would be any material advantage to her, to go behind that decree. She has not the right, because, in my view of the proper construction to be placed on that deed, she was only entitled to maintenance and a residence there under; and, with that exception, the sole person who could sue the trustees, or be affected by any decree made against them, was Debendro--1st, in his character of surviving tenant for life; and, 2nd, as executor and trustee of his father Dwarkanath's will, to whom alone the settlement trustees were liable to account; and the only substantial injury which, as a claimant upon Dwarkanath's estate, she may have received, is that a third share was given directly to Ganendro's sons, which probably would not have been given if the Court had had the advantage of considering more recent decisions, the gift in remainder being to a class, some of the members of which might not be, and, in fact, were not, in existence at the time of the settlor's death. But this construction, if erroneous, may probably be, to a great extent, cured when Debendro's one-third comes to be dealt with, on his death.

16. I think, therefore, that the plaintiff has no cause of action against the settlement trustees, and that her suit must be dismissed against them with costs.

17. The second main objection is that the plaintiff has no right to sue in respect of any of the matters complained of by her,--1st, because the whole of Nogendro's estate was devised by him to Ganendro; 2nd, because Gunendro having been adopted by her in fact, is alone entitled to Nogendro's estate, although his adoption may not have constituted him a cestui que trust under the settlement deed; and 3rd, because the plaintiff has not been constituted the legal personal representative of Nogendra by certificate, or letters of administration, and is therefore under Section 2 of Act XXVII of 1860[1] incompetent to sue.

18. On the first of these objections, I have already held that the devise to Ganendro in Nogendro's will was specific, and not residuary.

19. With respect to the second objection, the parties would be entitled to an issue if Gunendro claimed to be such adopted son. But this objection is only raised by Debendro, for Gunendro absolutely disclaims the status of adopted son; and as he is a party to this suit, and Debendro would consequently be protected by any order made in the suit, I do not think Debendro alone can claim to raise the issue. And, upon the facts stated, it seems to me that it would be impossible to prove or establish such adoption; for a suit in which Gunendro attempted to establish such status has been already dismissed as against the present plaintiff. And, again, if such adoption had been relied on in Debendro's suit on the settlement, the decree of 1860, directing payment to the executor of Dwarkanath, would in all probability have noticed it, inasmuch as it did notice the right of Debendro and the rights of Ganendro and Gunendro representing their father, as beneficially interested in Dwarka-nath's residuary estate. It certainly would require the clearest possible evidence to make me believe that after Nogendro had so carefully by his will limited the selection of an adopted son, he would have given verbal permission to his minor wife to adopt a son of her own exclusive choice; for that is the allegation in the petition put in for her in the Alipore Court, and to my mind it is quite impossible to read the agreement of March 1859 between Ganendro and his mother, and the two petitions filed at Alipore on behalf of the plaintiff, and to believe that the alleged verbal permission to adopt was ever in fact given by Nogendro to the plaintiff. I am, therefore, of opinion, at all events at the present stage of the case, that this objection cannot prevail.

20. With respect to the next objection, that the plaintiff is incompetent to sue, inasmuch as she has neither obtained a certificate nor letters of administration to Nogendro's estate, it appears to me that Section 2 of Act XXVII of 1860 applies to debts and not to claims against executors or trustees. At all events, it does not apply to claims for immoveable property, and therefore, so far as may relate to the residuary immoveable property of Dwarkanath, the plaintiff is not thereby disabled from suing.

21. I now come to the most serious objection of all, namely, that the plaintiff, and, indeed, that any representative of Nogendro, is barred under the Limitation Act. For the objection as to acquiescence as I take it only relates to the decree of 1860, by which I have already held that the plaintiff is bound.

22. Apart from authority, I should have had considerable doubt as to whether the word "legacy," even in Clause 122 of the Indian Limitation Act, applied to a share of residue, the words "distributive share" in that clause applying presumably to undisposed of estate only. But in Prior v. Horniblow 2

Y. & C. Ex. Rep. 200 Mr. Baron Alderson decided unhesitatingly that the word "legacy," in 3 & 4 Wm. IV. c. 27 Section 40 included a share of residue. This seems to have been rather a forced construction for two reasons--first, because a share of residue is not, like a legacy, a liquidated amount, but may depend upon long and complicated accounts; and secondly, because the English statute clearly does not provide for the analogous case of a demand by next-of-kin for a distributive share against an administrator. And it is to be observed that V.C. Knight Bruce in Adams v. Barry 2 Collyer 285 see p. 293 said: "With regard to the case of Prior v. Hornibloiv 2 Y.& C. Ex. Rep. 200 I am not entirely free from doubt, but I am not aware of any decision contradicting it, and I ought not to decide inconsistently with it, unless having a clear opinion that it is not right, which clear opinion I cannot say that I have." But Prior v. Horniblow 2 Y.& C. Ex. Rep. 200 has never been overruled, and in fact it may be said to have obtained legislative sanction, inasmuch as by Section 13 of 23 & 24 Vict. c. 38 claims of next-of-kin against administrators are barred in the same way as legatees under the former statute. I am therefore bound to hold that Clause 122 of the Indian Limitation Act, which applies not only to a legacy, but also to a distributive share of the moveable property of a testator or intestate, includes a share of the residue of a testator's moveable property; and therefore that the plaintiff is not entitled to an account of Dwarkanath's moveable property. It must be observed, however, that Clause 122 applies only to moveable property and the resulting trust under the settlement is undisposed of immoveable estate, which would continue immoveable estate in the hands of Dwarkanath's trustee.

23. The question then arises whether Debendronath, as to immoveable estate, is to be treated as an express trustee under the Act; or whether the plaintiff's claim for immoveable estate is regulated by Clause 145, which gives a period of twelve years from the time that possession became adverse. In either case, it seems to me she would be entitled to an account against Debendro for even in the latter case, his possession can hardly be said to have been adverse while any debts of Dwarkanath remained unpaid, and there was no other estate where out to pay them. And it will be remembered that, by the decree of the 15th May 1860, Debendro specially took his one-third share under the decree, subject to the payment of Dwarkanath's debts and legacies.

24. But I think that upon the true construction of Dwarkanath's will, Debendro must be considered to be an express trustee. For Debendro, Ganendro, and Nogendro were nominated "executors and trustees"; and by his will, Dwarkanath made a number of provisions for strangers, which were to be satisfied at the choice of his executors, either by the appropriation of parts of the testator's own immoveable estate, or by purchases out of his moveable estate. To make these appropriations, the trustees must necessarily be trustees of the testator's immoveable estate, and until these provisions were completed, the claims of the residuary devisees could not be satisfied. The case appears to me to fall within the rule of construction to be found, with the authorities for it, at pages 281 and 282 of the second volume of Jarman on Wills (3rd edition) and at pages 191, and 192 of Lewin on Trusts (6th edition) that if a testator appoints persons to be his executors and trustees and directs them to do certain acts which can only be done by the owners of his residuary estate, the trustees will take such estate, although there be no express devise to them. And this seems to be supported by the decree of the Supreme Court in September 1860, which directed the payment of the surplus rents to Debendro as executor of Dwarkanath; and indeed, in the present case, it was one of the arguments of the defendants, that the plaintiff was not entitled to sue the settlement trustees at first hand, and

that they could only be approached through Dwarkanath's trustee.

25. But even if Debendro was not an express trustee, and if Clause 145 did not apply, the plaintiff would still, in my opinion, and as I suggested to Mr. Evans during his reply, be entitled to an account for twelve years of the surplus income paid to Debendro by the settlement trustees under the decree of September 1860. In Adams v. Barry 2 Collyer 285 see p. 293 V.C. Knight Bruce says, in continuation of his judgment already quoted: "It is however, I suppose, not inconsistent with Prior v. Horniblow 2 Y. & C. Ex. Rep. 200 to say, that if after April 1822" (being twenty years before the filing of the plaintiff's bill, the corresponding date in this case being the 12th of July 1863), "Thomas Wilson possessed himself of any part of the assets of Samuel Wilson, which ought to have been paid or delivered by Thomas to Sophia Wilson--her claim against Thomas' estate in that respect was not barred when the bill was filed."

26. So, in this case, Debendro is, under any circumstances, liable to account to the plaintiff for so much of the income of the settled property as has, since the 12th of July 1863, been paid by the settlement trustees, under the decree of September 1860, to Debendro "as executor of the will of Dwarkanath."

27. But, upon the whole case, I am of opinion that the plaintiff is entitled to a general account of Dwarkanath's residuary immoveable estate; and that she is barred by limitation from claiming an account of a share in his residuary moveable estate, and from claiming any pecuniary legacy, or specific devise, by Dwarkanath to her husband.

28. I am also of opinion that she is not bound by the decree in Bazlur Rahim's suit; and that, therefore, it is unnecessary, at this stage of the case at all events, to deal with Debendro's purchases of the debts proved in that suit.

29. And whether the plaintiff is entitled to an unlimited account against Debendro as an express trustee, or to a limited account under Clause 145 of the Limitation Act, or only in respect of payments made to Debendro under the decree of September 1860, and within twelve years from the time of instituting this suit, in any of these three cases, if Debendro claims that any part of the property so to be accounted for has been needed for payment of Dwarkanath's debts or legacies, general accounts of both the moveable and immoveable estate of Dwarkanath must be taken by the Court, to prove whether, and to what extent, Debendro is liable to the plaintiff for the residuary immoveable property so to be accounted for.

[1]
[Section 2: No debtor of any deceased person shall be compelled in any Court to pay h
debt to any person claiming to be entitled to the effects of an
No debt recoverable deceased person or any part thereof, except on the production o
without a certificate. certificate, to be obtained in manner hereinafter mentioned or
probate, or letters of administration, unless the Court shall b
opinion that payment of the debt is withheld from fraudulent or vexatious motives, and n
from any reasonable doubt as to the party entitled.]