Supreme Court of India
S. Jhansi Lakshmi Bai & Ors vs Pothana Apparao & Ors on 17 March, 1969
Equivalent citations: 1969 AIR 1355, 1970 SCR (1) 28
Author: S C.
Bench: Shah, J.C.

PETITIONER:
S. JHANSI LAKSHMI BAI & ORS.

Vs.

RESPONDENT:
POTHANA APPARAO & ORS.

DATE OF JUDGMENT:
17/03/1969

BENCH:
SHAH, J.C.
BENCH:
SHAH, J.C.
GROVER, A.N.

CITATION:
1969 AIR 1355 1970 SCR (1) 28
1969 SCC (2) 91

ACT:
Indian Succession Act, 1925 s. 105-Bequest by will to wife absolutely and residue to other persons-Legatee predeceases testator-Whether device accelerated-Bequeath by will for two purposes-No allocation of amount-One of the purposes fulfilled without the amount-Effect of.

HEADNOTE:
A Hindu executed a will directing his wife to sell, Sch. C property and utilise the amount for celebrating the marriage of one Sitharathnam and for constructing a Ramamandiram in his name, and further devised that his wife shall enjoy Sch. E property absolutely and after her life-time whatever remained out it, it will pass to two named persons. The wife predeceased the testator, and the marriage of Sitharathnam was celebrated in the testator's life-time and expenses in that behalf were defrayed by the testator. The appellants who were the testator's nearest heirs, claimed the properties contending that the disposition of the Sch. C & E properties lapsed, because the wife who was the legatee of the properties died before the testator and that there was nothing in the will providing for the acceleration of Sch. E property in case of the legatee's dying in the

testator's life-time.

HELD : (i) The wife had no beneficial interest in Sch. C property. She was merely appointed to sell the property and to, utilise the proceeds for the purposes specified in the will. There was no "joint bequest" of Sch. C properties. In the absence of allocation of the amounts to be utilised for celebrating the marriage of Sitharathnam and for constructing a Ramamandiram, it must be presumed that the fund was to be utilised in equal moieties for the two purposes. Failure of one of the purposes will result in a moiety of the amount devised falling into the residue. Since no part of the fund was needed for the marriage of Sitharathnam the legacy failed pro tanto and fell into the residue. Under the will the wife was made the owner of the residue, but by her death during the life time of testator the residuary bequest lapsed and vested as on intestacy in the nearest heirs of the testator. The devise of a moiety of the fund to be applied for the construction of a Ramomandiram however stood good and the trust had to be carried out. The wife died during the life time of the testator but on that account the charitable trust was not extinguished. [31 E; 32 D]

Jogeshwar Narain Deo v. Ram Chund Dutt and Others, L.R. 23 I.A. 37, 43, referred to.

(ii) The wife died during the life time of the testator : thereby the estate in Sch. E properties granted to the named persons was accelerated. The nearest heirs of the testators were therefore not entitled to any share in Sch. E properties.

Section 105 of the Indian Succession Act, enacts that a legacy shall lapse and form part of the residue of the testator's property if the legatee does not survive the testator except where it appears by the will that the testator intended that the legacy shall, on the legatee not surviving him, go to some other person. It could not be said that the intention

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of the testator that a legacy shall not lapse may be given effect to only if the testator expressly directs that if the legatee dies during his life time the legacy shall go to some other person, and that intention to exclude lapse cannot be inferred. Section 105(1) does not say, nor does it imply, that the testator must have expressly envisaged the possibility of lapse in consequence of the legatee dying during his life time and must have made a provision for that contingency. [33 F]

Browne v. Hope, L.R. 14 Equity Cases 343; Lowman Devenish v. Pester, (1885) 2 Ch. 348; Dunstan, Dunstan v. Dunstan, (1918) 2 Ch. 304, referred to.

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 445 of 1966. Appeal by special leave from the judgment and order dated March 9, 1964 of the Andhra Pradesh High Court in Letters Patent Appeal No. 2 of 1963.

M. C. Chagla and T. Satyanarayana, for the appellants. P. Ram Reddy and K. Jayaram, for the respondents. The Judgment of the Court was delivered by Shah, J. One Appanna died on March 12, 1953, leaving him surviving no wife or lineal descendant. Subba Rao claiming to be the father's sister's son of Appanna instituted suit No. 64 of 1953 in the Court of the Subordinate Judge, Eluru. for partition and separate possession of his half share in the properties described in Schs. A, B, C, D & E. The plaintiff claimed that Appanna died intestate, and that he and his brother Venugopala Rao were the nearest heirs entitled to the entire estate of Appanna. To this suit were impleaded Pothana Apparao (husband of the sister of Mangamma wife of Appanna), his children, certain relations of Mangamma and the tenants on the lands in suit. Venugopala Rao was impleaded as the 24th defendant. The suit was defended by Pothana Apparao and others contending, inter alia, that Appanna had made and executed a will on July 14, 1948, devising his property in favour of various legatees and the plaintiff's suit for a share in the property was on that account not maintainable. The, Trial Court held that Appanna of his free will and while in a sound state of mind had executed the will on July 14, 1948, whereby he disposed of his properties described in Schs. A, B, C, D & E, but the Court held that the disposition of the property in Schs. C & E lapsed because Mangamma who was a legatee of the properties died before the testator, and that the direction in the will that whatever remained out of the Sch. E property after the life time of Mangamma shall pass to Venkataswamy and Seshagirirao defendants Nos. 3 & 2 respectively or their descendants was void and incapable of taking effect. The learned Judge accordingly passed a decree in favour of the plaintiff and the 24th defendant for possession of properties described in Schs. C & E.

In appeal to the High Court of Andhra Pradesh, Chandrasekhar Sastry, J., allowed the appeal filed by Pothana Apparao and his two sons Venkataswamy and Seshagirirao, and dismissed the claim of the plaintiff in respect of Schs. C & E properties. An appeal under the Letters Patent filed by the plaintiffs against the judgment of Chandrasekhar, J. was dismissed.

It has been concurrently found by all the Courts that when he was in a sound and disposing state of mind Appanna executed on July 14, 1948, the will set up by the defendants. In an appeal with special leave this Court will not ordinarily allow a question about due execution to be canvassed, and our attention is not invited to any exceptional circumstances which may justify a departure from the rule.

The only question which survives for consideration relates to the true effect of the dispositions made by the will in respect of Sch. C and Sch. E properties. The relevant provisions of the will may first be set out:

> "I am now about forty years of age. I do not have male or female issue. . . . My wife is alive. . . . and with the fear that I may not survive I have made the following Provisions in respect of my immovable and movable properties to be given effect to.

> I have given power to my wife Mangamma to sell the immovable property mentioned in the C Schedule hereunder and utilise the amount for celebrating the marriage and other auspicious functions of Tholeti Narsimha Rao's daughter Seetharatnam mentioned in the B Schedule and for constructing a Ramamandiram in Rajavaram village in my name.
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> "The immovable property mentioned in the E Schedule hereunder shall be enjoyed by my wife Mangamma with all powers of disposition by way of gift, sale, etc., Whatever remains out of the said E Schedule mentioned immovable property after her life-time, (the said property) shall pass either to the said Ven-
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> kataswamy and Seshagiri or their descendants..... In the event of my wife taking a boy in adoption the property mentioned in the E schedule hereunder shall pass to the said adoptee with all powers of disposition by way of gift, sale etc. after her life-time.....
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> If, for any reason, the properties and rights do not pass to the individuals mentioned in the aforesaid paras, such properties and rights shall be enjoyed by my wife Mangamma with absolute rights."

Appanna had directed his wife Mangamma to sell the pro- perties described in Sch. C and to utilise the proceeds for two purposes, "celebrating the marriage and other auspicious functions" of Seetharatnam, and "for constructing a Ramamandiram in Rajavaram village" in his name. But the marriage of Seetharatnam was celebrated during the lifetime of Appanna, and expenses in that behalf were defrayed by Appanna, and no expenses remained to be incurred after the death of Appanna. Mangamma had no beneficial interest in Sch. C property. She was merely appointed to sell the property and to utilise the proceeds for the purposes specified in the will. The Trial Judge clearly erred in holding that the estate lapsed because Mangamma died during the lifetime of Appanna. In the view of Chandrasekhar Sastry, J., since there was a joint bequest for two purposes, and one of the purposes for which the Sch. C properties were devised was accomplished by Appanna the bequest in its entirety must enure for the remaining purpose i.e. constructing a Ramamandiram, and the plaintiffs' claim for possession of the C Schedule properties must fail. The learned Judges of the High Court agreed with that view. But there was no "joint bequest" of the properties. In the absence of allocation of the amounts to be utilised for "celebrating the marriage and other auspicious functions" of Seetharatnam and for constructing a Ramamandiram, it must be presumed that the fund was to be utilised in equal moieties for the two purposes. Failure of one of the purposes will result in a moiety of the amount devised falling into the residue.

In Jogeswar Narain Dea v. Ram Chund Dutt and Others(1) a devise under the will of a Hindu testator who had given a fouranna share of his estate to his daughter and her -son for their maintenance with power of making alienation thereof by sale or gift fell to be construed. The Judicial Committee held that on a true construction of the will each took an absolute interest in a two-anna share in the estate. In dealing with the contention that there was a joint estate granted to the daughter and her son the Judicial Committee observed :

> "..... Mr. Branson..... maintained upon the authority of Vydinada v. Nagammal (ILR 11 Mad. 258) that,. by the terms of the will the Rani and the appellant became, in the sense of English law, joint tenants of the 4-annas share of Silda, and not tenants in common; and that her alienation of her share before it was severed, and without the consent of the other (1) L. R. 23 1. A. 37,43.
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> joint tenant,, was ineffectual. The circumstances of that case appear to be on all fours with the circumstances which occur here, and, if well decided, it would be a precedent exactly in point. There are two substantial reasons why it ought not to be followed as an authority. In the first place, it appears to their Lordships that the, learned Judges of the High Court of Madras were not justified in importing into the construction of a Hindu will an extremely technical rule of English conveyancing. The principle of joint tenancy appears to be unknown to Hindu law, except in the case of coparcenary between the members of an undivided family."

That principle applies here. The fund was devised for the construction of a Ramamandiram at Rajavaram village and for "celebrating the marriage and other auspicious functions"of Seetharatnam. Since no part of the fund was needed forthe benefit of Seetharatnam, the legacy failed pro tanto and fell into the residue. Under the will Mangamma was made the owner of the residue, but by her death during the lifetime of Appanna the residuary bequest lapsed and vested as on intestacy in the plaintiff and the 24th defendant. The devise of a moiety of the fund to be applied for the construction of a Ramamandiram however stands good and the trust must be carried out. Mangamma is dead, but on that account the charitable trust is not extinguished The Trial Court must give appropriate directions for utilisation of that moiety for constructing a temple according to the direction of Appanna in the will.

The testator gave to his wife Mangamma an absolute interest in the E Schedule properties, for she was invested with all powers of disposition "by way of gift, sale etc." The will then proceeded to direct that whatever remained out of the E Schedule properties after her death shall pass to Venkataswamy and Seeshagirirao. If Mangamma had survived Appanna, probably the devise in favour of Venkataswamy and Seshagirirao may have failed, but that question does not arise for consideration.

Section 105 of the Indian Succession Act, 1925, which applies to the wills of Hindus provides :

> "(1) If the legatee does not survive the testator, the legacy cannot take effect, but shall lapse and form part of the residue of the testator's property, unless it appears by the will that the testator intended that it should go to some other person.

(2). . . . ."

Mr. Chagla for the plaintiffs contends that the estate in the E Schedule properties devised in favour of Mangamma lapsed, for, there was nothing in the will which expressly provided that in the event of Mangamma dying during the testator's lifetime, the devise in favour of Venkataswamy

-and Seshagirirao shall be accelerated. Counsel relies upon the judgment of Wickens, V. C., in Browne v. Hope(1) and contends that a legacy does not lapse, if the testator does two things-he, in -clear words, excludes lapse; and he clearly indicates the person who is to take the legacy in case the legatee should die in his lifetime. In Browne's case(1) the testator gave, by his will, the residue of his estate to trustees to pay and transfer the same to seven named legatees in equal shares as tenants in common, and their respective executors, administrators and assigns; and he declared that such shares shall be vested interests in each legatee immediately upon the execution thereof, and that the shares of the married women shall be for their separate use. It was held that the share of one of the legatees-a married woman-who died after the date of the will but before the testator, did not belong to her husband, who was her legal personal representative, and it lapsed. Counsel says that the rule of interpretation as enunciated by Vice Chancellor Wickens is incorporated in s. 105 of the Indian Succession Act, 1925. He submits that a legacy will not lapse only if the testator by express direction excludes lapse, and indicates clearly the person who shall take the legacy if the legatee dies during his lifetime. We are concerned to construe the provisions of s. 105 of the Indian Succession Act. That section enacts that a legacy shall lapse and form part of the residue of the testator's property if the legatee does not survive the testator except where it appears by the will that the testator intended that the legacy shall on the legatee not surviving him go to some other person. We are unable to agree that the intention of the testator that a legacy shall not lapse may be given effect to only if the testator expressly directs that if the legatee dies during his lifetime the legacy shall go to some other person, and that intention to exclude lapse cannot be inferred. Section 105(1) does not say, nor does it imply, that the testator must have expressly, envisaged the possibility of lapse in consequence of the legatee dying during his lifetime and must have made a provision for that contingency.

In In re. Lowman Devenish v. Pester (2) a testator, who under a settlement was absolutely entitled to a moiety of the proceeds of a certain real estate under a trust for sale, by his will devised,, (1) L. R. 14 Equity Cases, 343.

(2) [1885] 2 Ch. 348.

that real estate by its proper description, together with certain real estate of his own, to trustees, to the use of H. for life, with remainder to trustees to preserve the contingent remainders, with remainder to the use of the first and other sons of H successively in tail male, with remainder to the use of the first and other sons of his niece E successively in tail male, with remainder to the use of the first and other sons of his niece M successively in tail -male, with remainder to the use of the first and other sons of his niece F successively in tail male, with remainder over. H survived the testator and died a bachelor. M also survived the testator and died unmarried. E was still alive but unmarried and seventy years of age. F had two sons, the eldest of whom died before the testator. It was held that when there are in a 'Will successive limitations of personal estate in favour of several persons absolutely, the first of those persons who survives the tes- tator takes absolutely, although he would have taken nothing if any previous legatee had survived and had taken : the effect of the failure of an earlier gift is to accelerate, not to destroy, the later gift.

This rule was applied in In re. Dunstan, Dunstan v. Dunstan(1). A testatrix by her will gave freeholds absolutely to A, subject to the bequest that whatever out of the freeholds should remain after A's

death shall be given to a named charity. It was held that if A had survived the testatrix the gift to the charity would have been repugnant and void, and A would have taken the freeholds absolutely. But since A died in the lifetime of the testatrix, the doctrine of repugnancy did not apply, and the gift to charity was accelerated and took effect.

Mangamma died during the lifetime of the testator : thereby the estate in Sch. E properties granted to Venkataswamy and his brother Seshagirirao was accelerated. The plaintiffs are therefore not entitled to any share in Sch. E properties.

The decree of the High Court is modified. It is declared that there is intestacy in respect of a half share in the fund arising by sale of Sch. C properties, and the plaintiff and the 24th defendant are entitled to take that half share in the fund. It is directed that the Trial Court will issue appropriate directions for application of the other half of the fund arising by sale of Sch. C properties for constructing Ramamandiram at Rajavaram village as directed by the testator in his will. Subject to this modification the appeal will be dismissed. The appellant will pay 3/4th of the costs of the contesting respondents in this Court.

Y.P. Appeal dismissed.

(1) [1918] 2 Ch. 304.