

CASE NO.:
Appeal (civil) 4153 of 2002

PETITIONER:
Sharad Subramanian

RESPONDENT:
Soumi Mazumdar & Ors.

DATE OF JUDGMENT: 28/04/2006

BENCH:
B. N. Srikrishna & Lokeshwar Singh Panta

JUDGMENT:

J U D G M E N T

SRIKRISHNA, J.

This appeal impugns a judgment of the Division Bench of the Calcutta High Court dated 28.6.2000. That an appeal was itself carried against an order of the learned Single Judge dated 16.2.2000 in Testamentary Jurisdiction allowing an application for discharge of the Joint Executors in respect of the estate of one Reba Mitra and appointing an Administrator pendente lite.

Facts

Phanindra Nath Mitra had two sons, Prabhat Kumar Mitra and Kamal Kumar Mitra, and a daughter, Suhasini Bose. The genealogical tree of the family is as under:

Phanindra Nath Mitra

Prabhat Kr. Mitra (Son)
(Latika Deb-Sabita Bose)
Daughters

Kamal Kr. Mitra (Son)
(Reba Mitra \026 Wife)
(Issueless)

Suhasini Bose (Daughter)

Nieces

Latika Deb
R 5

Sabita Bose (Deceased)

antanu Bose)

(Soumi Mazumdar & Sh

R 1

R 2

Kamal Kumar Mitra entered into an agreement dated 22.5.1988 with T.K. Ramasubramanian (father of Sharad Subramanian, hereinafter "the appellant") by which a tenancy was created in respect of the ground floor flat of certain premises situated at 13/1, Promothesh Barua Sarani, Kolkata (hereinafter "the Suit Property") at a monthly rental of Rs. 5,000/-. A further agreement dated 1.11.1988 was made between Kamal Kumar Mitra and the present appellant-Sharad Subramanian for providing to the tenants the fittings and fixtures in the ground floor at a monthly charge of Rs. 750/-. On 24.2.1989, there was a third agreement between Kamal Kumar Mitra and the appellant-Sharad Subramanian and a fourth on 28.4.1989, by which the former agreed to lease the whole of terrace of the existing construction of the Suit Property to enable the appellant to construct at his cost an additional floor. The demise was for a period of twenty-one years commencing from 1.4.1989 with a renewal clause for a further period of twenty-one years after expiry of every period of twenty-one years. Though the agreement created a

lease for such a long period with a renewal clause, it was not registered.

On 19.3.1991, Kamal Kumar Mitra executed his last Will and Testament under which, he appointed Reba Mitra, his wife, as Executrix and on her death, the appellant and one Subir Kumar Deb as Executors. Under the Will, the Testator had given all his movable properties to Reba Mitra, but she was given only a life interest in the Suit Property. The Will further provided that on the death of the said Reba Mitra, the Executors would execute the Will and realise and collect the rents, issues and profits arising out of the Suit Property and distribute the same in the manner as prescribed in the Will. Kamal Kumar Mitra died on 26.9.1991 leaving behind his wife, Reba Mitra, as his sole heir.

On 21.10.1992, Reba Mitra executed a lease deed in respect of the Suit Property granting certain rights to the appellant. Reba Mitra died on 27.11.1998. The appellant produced a Will dated 21.10.1992 claiming that he had been granted certain rights under the Will. A second Will dated 14.5.1993 and a third Will dated 14.12.1997 were produced by the parties each of whom claimed that the Will in his/her favour was the genuine Will.

On 17.8.2001, Reba Mitra's Will dated 14.12.1997 was granted probate by the District Judge, Alipore. The appellant had been appointed as one of the Executors under the Will of Kamal Kumar Mitra. Soumi Mazumdar and Shantanu Bose (Respondent Nos. 1 and 2, respectively), the legatees under the said Will, by their letter dated 16.4.1999, called upon the appellant and Subir Kumar Deb, Joint Executors, to give assent to the legacy under the Will of Reba Mitra, hand over vacant possession of the first floor of the Suit Property and also distribute all the income of the estate in terms of the Will of the late Kamal Kumar Mitra. On 30.4.1999, Subir Kumar Deb addressed a letter stating that he was not in possession of any legal document and, therefore, he was unable to execute the estate according to the Will of Kamal Kumar Mitra. On 4.5.1999, the appellant wrote back alleging that Reba Mitra had demised the first floor of the Suit Property in the year 1992 in his favour. The appellant also stated that he was going through the various legal implications to examine the demand for disbursement of the income.

On 11.10.1999, the respondent filed an application before the High Court praying for discharge of the Joint Executors, to pay to the appellant the outstanding rent, issues and profits in respect of the Suit Property and also to hand over its possession. On 15.12.1999, a learned Single Judge of the High Court made an order restraining the Joint Executors from dealing with, disposing of and/or encumbering and/or parting with possession or in any way dealing with any portion of the Suit Property till the disposal of the application. On 16.2.2000, an interim relief application taken out was allowed by the learned Single Judge taking serious notice of the fact that the Executors had not filed an affidavit to controvert the allegations made against them. An appeal was filed by the appellant before the Division Bench, which resulted in the impugned judgment dated 28.6.2000, dismissing the appeal. Hence, the appeal before us.

Contentions

Learned Senior Counsel for the appellant Mr. P. Krishnamoorthy Iyer contended that, under Clause 6 of the Will of the late Kamal Kumar Mitra, the Suit Property was bequeathed to Reba Mitra for her life. Under the said Will, after the death of Reba Mitra the Executors and Trustees named in the Will were to collect the rent, issues and profits in the Suit Property, and disburse it to the persons named in Clause 6 of the Will. The contention of the learned Senior Counsel for the appellant is that Kamal Kumar Mitra had created a life interest in favour of his wife, Reba Mitra, which was in recognition and discharge of her right to maintenance from her husband. Counsel further contends that, by reason of sub-section (1) of Section 14 of the Hindu Succession Act, 1956 (hereinafter "the Act"), this limited interest blossomed into an absolute interest. Consequently, he claims that Reba Mitra became the absolute owner of the Suit Property. Further that, Reba Mitra, during her lifetime, absolutely owned the Suit Property and made

dispositions by her Will in favour of the appellant, which were valid and justified. Under the Will, Reba Mitra had demised the first floor of the Suit Property in favour of the appellant, consequently the appellant was entitled to claim lease right in respect of the first floor of the Suit Property. The fact that the appellant was the Executor makes no difference, whatsoever, to the disposition validly made by Reba Mitra in her Will. As an Executor, the appellant had taken no step, in any manner inconsistent with being the Executor of Kamal Kumar Mitra's Will, consequently the learned counsel urged that, the High Court/learned Single Judge was wrong in discharging the Joint Executors and appointing an Administrator pendente lite.

The learned Senior Counsel for the respondents, however, urged that there is no absolute proposition that every time a property is bequeathed in a Will, it would necessarily be in recognition or discharge of a pre-existing right to maintenance; that even under the Hindu Adoption and Maintenance Act, 1956 Reba Mitra had no right of maintenance as against her husband during the lifetime of her husband; that the property bequeathed to Reba Mitra in the Will of her husband, Kamal Kumar Mitra, was only a limited estate during her lifetime; the provisions of sub-section (2) of Section 14 of the Act would, therefore, apply and she would continue to retain only a life interest in the Suit Property. Consequently, she had no right to make a lease in favour of the appellant, hence, the so-called lease in favour of the appellant under the Will of Reba Mitra is invalid and unenforceable. Apart therefrom, the appellant as an Executor of Reba Mitra's Will had set up a title in the Suit Property, which was inconsistent with and injurious to the estate of Reba Mitra. Consequently, under the provisions of the Indian Succession Act, 1925 (hereinafter "the Indian Succession Act") the executors having misconducted themselves, were rightly removed by the Testamentary Court.

Nature of Interest

Section 14 of the Act was enacted by Parliament in order to ensure that the limited estate devolving upon a female Hindu be abolished and the female Hindu who possessed property, acquired before or after coming into force of the Act, should hold it as full owner thereof and not as a limited owner. Section 14 of the Act reads as under:

"Property of a female Hindu to be her absolute Property.\027

(1) Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner.

Explanation\027In this sub-section, "property" includes both movable and immovable property acquired by a female Hindu by inheritance or devise, or at a partition, or in lieu of maintenance or arrears of maintenance, or by gift from any person, whether a relative or not, before, at or after the marriage, or by her own skill or exertion, or by purchase or by prescription, or in any other manner whatsoever, and also any such property held by her as stridhana immediately before the commencement of this Act.

(2) Nothing contained in sub-section (1) shall apply to any property acquired by way of gift or under a will or any other instrument or under a decree or order of a civil Court or under an award where the terms of the gift, will or other instrument or the decree, order or award prescribe a restricted estate in such property. "

A judgment of this Court has recognized that sub-section (2) is in the nature of a proviso to the rule enacted in sub-section (1) of Section 14 of the Act. In *V. Tulasamma and Ors. v. Sessa Reddy (Dead) by L.Rs.*

(hereinafter "Tulasamma") after a complete survey of the Shastric Hindu Law and the changes brought therein by Section 14 of the Act, this Court culled out the principles arising thereunder in the following words:

"(1) that the provisions of Section 14 of the 1956 Act must be

liberally construed in order to advance the object of the Act which is to enlarge the limited interest possessed by a Hindu widow which was in consonance with the changing temper of the times;

(2) it is manifestly clear that sub-section (2) of Section 14 does not refer to any transfer which merely recognises a pre-existing right without creating or conferring a new title on the widow. This was clearly held by this Court in Badri Pershad's case ((1969) 2 SCC 586).

(3) that the Act of 1956 has made revolutionary and far-reaching changes in the Hindu society and every attempt should be made to carry out the spirit of the Act which has undoubtedly supplied a long felt need and tried to do away with the invidious distinction between a Hindu male and female in matters of intestate succession;

(4) that sub-section (2) of Section 14 is merely a proviso to sub-section (1) of Section 14 and has to be interpreted as a proviso and not in a manner so as to destroy the effect of the main provision."

Analysing the scope and extent of sub-section (2) of Section 14 of the Act, which this Court treated as a proviso to sub-section (1), this Court took the view that as a proviso it should be interpreted in such a way so as not to substantially erode sub-section (1) of Section 14 and the Explanation thereto. It was pointed out that sub-section (2) had carved out a completely separate field and before it could apply, the following three conditions must be satisfied:

"(i) that the property must have been acquired by way of gift, will, instrument, decree, order of the Court or by an award;

(ii) that any of these documents executed in favour of a Hindu female must prescribe a restricted estate in such property; and

(iii) that the instrument must create or confer a new right, title or interest on the Hindu female and not merely recognise or give effect to a pre-existing right which the female Hindu already possessed."

Finally, this Court said:

"Where any of these documents are executed but no restricted estate is prescribed, sub-section (2) will have no application. Similarly where these instruments do not confer any new title for the first time on the female Hindu, Section 14(2) would have no application. It seems to me that Section 14(2) is a salutary provision which has been incorporated by the Parliament for historical reasons in order to maintain the link between the Shastric Hindu Law and the Hindu Law which was sought to be changed by recent legislation, so that where a female Hindu became possessed of property not in virtue of any pre-existing right but otherwise, and the grantor chose to impose certain conditions on the grantee, the Legislature did not want to interfere with such a transaction by obliterating or setting at naught the conditions imposed."

After noticing the divergent views of different High Courts, this Court, summarised its conclusion as under:

"(1) The Hindu female's right to maintenance is not an empty formality or an illusory claim being conceded as a matter of grace and generosity, but is a tangible right against property which flows from the spiritual relationship between the husband and the wife and is recognised and enjoined by pure Shastric Hindu Law and has been strongly stressed even by the earlier Hindu jurists starting from Yajnavalkya to Manu. Such a right may not be a right to property but it is a right against

property and the husband has a personal obligation to maintain his wife and if he or the family has property, the female has the legal right to be maintained therefrom. If a charge is created for the maintenance of a female, the said right becomes a legally enforceable one. At any rate, even without a charge the claim for maintenance is doubtless a pre-existing right so that any transfer declaring or recognising such a right does not confer any new title but merely endorses or confirms the pre-existing rights.

(2) Section 14(1) and the Explanation thereto have been couched in the widest possible terms and must be liberally construed in favour of the females so as to advance the object of the 1956 Act and promote the socio-economic ends sought to be achieved by this long needed legislation.

(3) Sub-section (2) of Section 14 is in the nature of a proviso and has a field of its own without interfering with the operation of Section 14(1) materially. The proviso should not be construed in a manner so as to destroy the effect of the main provision or the protection granted by Section 14(1) or in a way so as to become totally inconsistent with the main provision.

(4) Sub-section (2) of Section 14 applies to instruments, decrees, awards, gifts, etc. which create independent and new titles in favour of the females for the first time and has no application where the instrument concerned merely seeks to confirm, endorse, declare or recognise pre-existing rights. In such cases a restricted estate in favour of a female is legally permissible and Section 14(1) will not operate in this sphere. Where, however, an instrument merely declares or recognises a pre-existing right, such as a claim to maintenance or partition or share to which the female is entitled, the sub-section has absolutely no application and the female's limited interest would automatically be enlarged into an absolute one by force of Section 14(1) and the restrictions placed, if any, under the document would have to be ignored. Thus where a property is allotted or transferred to a female in lieu of maintenance or a share at partition, the instrument is taken out of the ambit of sub-section (2) and would be governed by Section 14(1) despite any restrictions placed on the powers of the transferee.

(5) The use of express terms like "property acquired by a female Hindu at a partition", "or in lieu of maintenance", "or arrears of maintenance", etc. in the Explanation to Section 14(1) clearly makes sub-section (2) inapplicable to these categories which have been expressly excepted from the operation of sub-section (2).

(6) The words "possessed by" used by the Legislature in Section 14(1) are of the widest possible amplitude and include the state of owning a property even though the owner is not in actual or physical possession of the same. Thus, where a widow gets a share in the property under a preliminary decree before or at the time when the 1956 Act had been passed but had not been given actual possession under a final decree, the property would be deemed to be possessed by her and by force of Section 14(1) she would get absolute interest in the property. It is equally well settled that the possession of the widow, however, must be under some vestige of a claim, right or title, because the section does not contemplate the possession of any rank trespasser without any right or title.

(7) That the words "restricted estate" used in Section 14(2) are wider than limited interest as indicated in Section 14(1) and

they include not only limited interest, but also any other kind of limitation that may be placed on the transferee."

In this case, it was observed that, the properties in suit were allotted to the appellant-Tulasamma under a compromise certified by the Court; that the appellant had taken only a life interest in the properties under the compromise deed. However, she continued to be in possession of the properties till 1956 when the Act came into force and, therefore, by reason of Section 14(1), the properties were allotted to her in recognition and in lieu of her right to maintenance, which was a pre-existing right. Consequently, it fell out of the ambit of sub-section (2) of Section 14 of the Act as a result of which she became the full owner of the properties involved.

In *C. Masilamani Mudaliar and Ors. v. Idol of Sri Swaminathaswami Swaminathaswami Thirukoil and Ors.* the views expressed in *Tulasamma (supra)* were reiterated as necessary for carrying forward the intention of the Parliament to ensure "that women have an active role in the development process. Appropriate economic and social reforms should be carried out with a view to eradicate all social injustice." Hence, it was held that the limited estate, which had been conferred on the legatee in lieu of the right to maintenance under the Hindu Adoption and Maintenance Act, 1956, was in recognition of the pre-existing right to maintenance known under the Shastric law and it became an absolute right under Section 14(1) and the legatee became the absolute owner of the property.

In *Balwant Kaur and Anr. v. Chanan Singh and Ors.* the right of maintenance of a widowed daughter was recognised under the Will and certain property was demised to her, though as a limited life estate. This Court held that, this was a situation falling squarely within the ambit of sub-section (1) of Section 14 of the Act and was beyond the purview of sub-section (2) and that as the Will itself recognised in express terms and provided that "even after his (the testator) death, his (the testator) other legatee brothers have to look after the welfare of his (the testator) widowed daughter". Hence, sub-section (1) of Section 14 would apply and the limited estate would turn into a full estate.

Mr. Bhaskar P. Gupta, learned Senior Counsel for the respondents, rightly distinguished all these cases, as it was clearly proved therein, that the properties had been given to a female Hindu, either in recognition of or in lieu of her right to maintenance under the Shastric Hindu Law or under the Hindu Adoption and Maintenance Act, 1956. Consequently, these were instances where the dispositions of property, albeit as a limited estate, would blossom into a full interest by reason of sub-section (1) of Section 14 of the Act.

Learned Counsel further contended that, there is no absolute rule that all properties demised to a female Hindu were necessarily in recognition of or in lieu of her right to maintenance. It was possible, even after the Act came into force, to create a limited estate by reason of a gift or will. Such a situation would fall within the ambit of sub-section (2) of Section 14 of the Act as long as it was not in recognition of or in lieu of a right to maintenance under the Shastric Hindu Law or under a statute. Learned Senior Counsel relied on Section 30 of the Act, which recognises the right of a Hindu to dispose of self-acquired property by Will. Mr. Gupta relied on the judgment of this Court in *Bhura and Ors. v. Kashi Ram*, which was also a case of, limited estate conferred on a female Hindu by a Will. This Court held that, upon a proper construction of the Will, the bequeathal in favour of the female Hindu was clearly indicative of:

"the testator's intention of only creating a life interest in her and nothing more and the various expressions used therein are indicative of and are reconcilable only with the hypothesis that the testator was creating an estate in favour of (the female Hindu) only for her lifetime and not an absolute estate."

Thus, in view of the fact that there were no indications, either in the Will or

externally, to indicate that the property had been given to the female Hindu in recognition of or in lieu of her right to maintenance, it was held that the situation fell within the ambit of sub-section (2) of Section 14 of the Act and that the restricted life estate granted to the female Hindu could not be enlarged into an absolute estate. Learned counsel for the respondents relied strongly on this judgment and contended that there was no proposition of law that all dispositions of property made to a female Hindu were necessarily in recognition of her right to maintenance whether under the Shastric Hindu Law or under the statutory law. Unless the said fact was independently established to the satisfaction of the court, the grant of the property would be subject to the restrictions contained therein, either by way of a transfer, gift or testamentary disposition. Learned counsel also distinguished the three cases cited by the learned counsel for the appellant that in each, the circumstances clearly indicated that the testamentary disposition was in lieu of the right of maintenance of the female Hindu. We think that this contention is well merited and needs to be upheld.

Turning to the facts of the present case, we notice that not only was there no material to indicate to the High Court that the property was given to Reba Mitra in lieu of her right of maintenance, but such an argument was not even advanced before the Court. Even the impugned judgment of the High Court observes:

"It is not the case of the appellant that at the time when K.K. Mitra executed the Will, his wife was entitled to enforce her right of maintenance under the provisions of Hindu Adoptions and Maintenance Act or otherwise. She had been undisputedly living with her husband upon her husband's death till the Will was probated, she was enjoying the property as her own. Even in terms of the Will dt. 19.3.1991 she had a right of enjoyment in respect of the entire property."

The High Court then noticed Section 30 of the Act which empowers a Hindu possessed of any property to execute a Will; and confer a grant in favour of another either absolutely or to a limited extent; even to the extent of depriving his natural heirs from enjoying the estate left by him. We think that the High Court was right in taking this view. The High Court also took notice of the fact that there was no material on record from which it could be concluded that the disposition of life estate in favour of Reba Mitra in the Will of her husband, Kamal Kumar Mitra, was in lieu of or in recognition of her right of maintenance. Consequently, we agree with the finding of the High Court that Reba Mitra had only a limited right, namely, life interest in the Suit Property. Thus, she could not have created a long-term lease as she has purportedly done.

Discharge of Executor

Learned counsel for the respondents then referred to the provisions of the Indian Succession Act. He urged that under Section 301 of the Indian Succession Act: "The High Court may, on an application made to it, suspend, remove or discharge any private executor or administrator" and appoint another person in his place where continuance of the executor is detrimental to the estate of the deceased. Further it was pointed out that, under Section 317 of the Indian Succession Act, an executor had to make an inventory and file periodical accounts of the estate. It is contended that the appellant had failed to do so and was also liable to be removed under Section 301 of the Indian Succession Act. Finally, it is urged that the appellant as an executor had set up a claim in the estate, which was inconsistent with the deed of the executor and, therefore, he was unfit to function as an executor; the High Court had rightly discharged him from his office and appointed an Administrator pendente lite.

Conclusion

From the factual circumstances, while the High Court's appointment of an Administrator pendente lite appears to be correct, we need not finally decide as to whether the appellant was unfit to act as an executor of Kamal Kumar Mitra's Will. We are cognizant of the fact that the High court is still seized of the matter and the order passed is only an interlocutory order based

on prima facie considerations. In our view, there was sufficient justification for the High Court to make the order for appointment of the Administrator pendente lite to protect the estate during the pendency of the petition before it. The question as to whether the appellant as the executor has breached his fiduciary duty, can only be determined at the end of the trial. In our view, therefore, the impugned judgment of the High Court is not liable to be interfered with.

We see no merit in the appeal, which is hereby dismissed. No costs.
27711

JUDIS