

33, 1949

P.C. Appeal No. 13 of 1947.

In the Privy Council.

UNIVERSITY OF LONDON
W.C.1.

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INSTITUTE OF ADVANCED
LEGAL STUDIES

APPELLANTS CASE

ON APPEAL

FROM THE SUPREME COURT OF FIJI

30925

IN THE MATTER of the Estate of NANHU son of BIRMA of Nasea, Labasa (partner in the firm of JAGANNATH NANHU & COMPANY) in the Island of Vanua Levu in the Colony of Fiji, Merchant, deceased.

BETWEEN

10 JADURAM (father's name Lallu) of Labasa in the Colony of Fiji Executor of the Will of JAGANNATH (son of BIRMA) now deceased Executor of the Will of the said NANHU deceased (Defendant) *Appellant*

AND

RAMDASSI, widow of the said NANHU deceased (Plaintiff) *Respondent.*

Case for the Appellant.

RECORD.

1. This is an appeal from a judgment of the Supreme Court of Fiji p. 16. dated the 11th October 1946 on an originating summons in the matter of p. 1. the estate of Nanhu deceased.

2. Jagannath and Nanhu were brothers and partners in a firm of Jagannath Nanhu & Co. Both are now dead, Bacheoni is the widow of Jagannath and the Respondent Ramdassi is the widow of Nanhu. The Appellant Jaduram is the son-in-law and Executor of Jagannath.

3. Nanhu made his Will on the 21st August 1937 as follows:— pp. 29, 30.

30 " THIS IS THE LAST WILL AND TESTAMENT of me NANHU son of BIRMA of Labasa on the Island of Vanualevu in Fiji Merchant I hereby Revoke all former Wills and other Testamentary writings by me heretofore made And I Declare this to be my last and only Will and Testament I Appoint my brother Jagannath Son of Birma Merchant who is also my partner to be my sole executor and trustee I Give Devise and Bequeath unto my said trustee all real and personal property of whatsoever nature and wheresoever situate

of or to which I may be entitled or over which I may have a disposing power at the time of my decease absolutely save only with the proviso that he shall, during her lifetime, allow my wife Ramdassi to live in the Dwelling house at Nasea where she and I now live and shall supply her out of my estate with money and goods sufficient to maintain her during her lifetime in the manner in which she has lived with me in my lifetime but having regard always to the state of our business and to any economic conditions which may affect the same and further that he shall himself make a Will leaving the whole of his Estate to me should he predecease me and otherwise 10 to be divided equally between my said wife Ramdassi and Bacheoni the wife of the said Jagannath or, in the event of the death of either, to the survivor of them Should my said brother Jagannath predecease me I Give Devise and Bequeath the whole of my estate including such property as I shall inherit from the said Jagannath and remain possessed of at the time of my decease to be divided equally between my said wife Ramdassi and Bacheoni the wife of the said Jagannath And I Direct that if either the said Ramdassi or the said Bacheoni shall predecease me that the whole of my estate shall go to the survivor of them and, in such an event or 20 events, I Appoint the said Ramdassi and the said Bacheoni or the survivor of them, to be my executrices and trustees."

p. 28.

4. Jagannath made a Will also dated 21st August 1937 which was substantially in similar terms *mutatis mutandis*, that is it was a Will appointing Nanhu executor and trustee and giving him all Jagannath's property absolutely, with a similar provision as to residence and maintenance in favour of his own wife Bacheoni and a similar provision as to Nanhu making a Will in favour of Jagannath, or, if Nanhu should predecease him, then for the two wives. The only difference was that Jagannath did not, in the event of Nanhu predeceasing him, appoint the two wives 30 executrices.

p. 8, ll. 30-38.

5. Nanhu died on the 27th May 1943 and Jagannath proved his Will on the 3rd March 1944. His estate was sworn at £6,030 17s. 5d. being the value of Nanhu's half interest in the partnership of Jagannath Nanhu & Co.

p. 8, l. 39—
p. 9, l. 30.

6. Jagannath, after Nanhu's death, took for himself as his own property the half share of Nanhu in the partnership property and later took his son-in-law Jaduram into partnership and later still made over to him his whole interest in the partnership, subject to encumbrances securing to Ramdassi her right of residence and to her, to himself and to Bacheoni annuities of £120 each. 40

pp. 1-3.

7. On the 17th June 1946 Ramdassi took out an originating summons to which Jagannath was Defendant, which, as amended, raised the following questions :—

(A) Whether on the true construction of Nanhu's Will and in the events which had happened a trust was created.

(B) Whether the trust was revocable by Jagannath, who had accepted the benefit of the bequest in his own favour.

(C) Whether, in view of the fact that Jagannath had accepted the benefit of the bequest in his own favour, the trust attached to the estate of Nanhu or also to Jagannath's own property belonging to him at the time of Nanhu's death.

(D) If the trust attached to the properties of both Nanhu and Jagannath, whether Jagannath took only a life interest in the properties.

10 (E) If Jagannath took a life interest only, whether he held the remainder in trust for Ramdassi and Bacheoni in equal shares absolutely, and, if so, whether the said interest in remainder was vested from the moment of Nanhu's death or was contingent on both or either of Ramdassi and Bacheoni surviving Jagannath and the survivors or survivor of them taking the whole property absolutely.

(F) If the trust attached only to the estate of Nanhu, whether the trust conferred any interest in the trust property on Jagannath.

(G) If the answer to (F) was in the negative, whether Jagannath held the trust property in trust for Ramdassi and Bacheoni in equal shares absolutely.

20 (H) If the answer to (F) was in the affirmative, whether Jagannath took only a life interest with remainder over to Ramdassi and Bacheoni in equal shares absolutely, and, if so, whether the said interest in remainder was vested from the moment of Nanhu's death, or contingent on both or either of Ramdassi and Bacheoni surviving Jagannath and the survivors or the survivor of them taking the whole property absolutely.

(I) Whether Jagannath, whatever the nature of the trust, had any power to dispose of the trust property contrary to the terms of the trust.

30 8. Bacheoni was not made a party to the summons.

9. An affidavit was filed by Jagannath, there was an agreed statement of facts signed by the Solicitors of both parties and there was an affidavit of H. B. Gibson, the Solicitor who prepared the two Wills, which stated the facts above referred to. pp. 4-6.
pp. 7-9.
pp. 10, 11.

10. On the 7th June 1944 Jagannath had in fact made a new Will, but this fact was not in evidence. The question of the effect (if any) of the making of this will does not arise in these proceedings.

11. The case came before Thomson J. on the 18th and 19th September 1946 and he delivered a reserved judgment on the 11th October 1946. pp. 12-15.
pp. 16-20.

40 12. The learned Judge, after reading Nanhu's Will, continued as follows :—

“ What was the intention of the testator when he made his will in these terms ? That intention is, if possible, to be deduced from the terms of the will itself and, to my mind, to do so is not a task of undue difficulty. He appoints Defendant to be ‘ my sole p. 17, l. 1-
p. 18, l. 17.

executor and trustee,' and gives to his 'said trustee' the whole of his estate 'absolutely save only with' a certain 'proviso.' That proviso is divided into two parts. The first is that Defendant shall allow Plaintiff to live in a certain dwelling-house and supply her 'out of my estate' with a sufficient maintenance, and the second is the Defendant shall make a will leaving his whole estate to the testator, should he survive Defendant, or, should testator first die, to testator's widow and Defendant's widow to be divided equally between them or, in the event of the death of either, to the survivor.

If the foregoing be a fair summary of the terms of the will, 10
how can it be said that no trust was intended by the testator as regards the interest that passed under it? . . .

In my view, then, it is clear on the terms of the will considered in detail and as a whole that the testator intended to create a trust, and on the face of it there are no grounds for saying that it is bad for want of certainty . . .

Nor is it any less clear that Defendant accepted the trust. Whatever its terms be, and I am coming to that presently, he took probate of the will as executor and he accepted substantial benefits under it, and in these circumstances he cannot be heard now to say 20
that he did not accept the trusts imposed upon him.

To answer the question of what these trusts are it is necessary to revert to testator's intentions so far as they are to be deduced from the terms of the will but only in so far as they related to the circumstances as they existed at the time of his death, that is to say with Plaintiff, Defendant and Defendant's wife Bacheoni all alive, for it is as at the time of his death that his will must be supposed to speak.

As far as these three persons are concerned it seems abundantly clear that the intentions of testator were as follows. Plaintiff, for 30
the joint lives of Defendant and herself, was to have her maintenance as described in the will, and on the death of Defendant, if she survived him, was to take either the whole or a half share of the balance of the estate according to whether Bacheoni was or was not then alive. Bacheoni, if she survived Defendant, was to have either the whole or a half share of the balance of the estate according as to whether she did or did not survive Plaintiff. And Defendant was to have the rest. That is to say, for the joint lives of himself and Plaintiff, he was to have all that was left out of the life interest in the estate after satisfying the maintenance of Plaintiff. If he 40
survived Plaintiff he was to have the whole interest in the estate subject only to the succession rights of Bacheoni, and if these rights determined during his lifetime by reason of the death of Bacheoni he was to have the whole estate absolutely.

These, in my opinion, were the intentions of testator as regards his own estate, these are the trusts which I find in his will and these are the trusts upon which Defendant must be held to have accepted the trusteeship to which he was appointed by the Will."

13. The learned Judge then passed to the question whether any trust had been created affecting the property of Jagannath, which had at no time formed part of the estate of Nanhu, and he continued :—

“ Whether or not there was an agreement made between the testator and the Defendant in 1937 to make mutual wills, there can be no doubt that when on the death of the testator in 1943 Defendant took probate of the will and acted as executor of it and took benefits under it he did so subject to the conditions contained in it. One of these was that he would make a will leaving the whole of his estate to Plaintiff and Bacheoni. It is admitted that that is a condition with which he was bound to comply, it is admitted that some years before the death of testator he had in fact made a will which did comply with it, and I understand it to be admitted that that will has, up to the beginning of these proceedings at any rate, not been revoked. On the authorities cited on behalf of the Plaintiff, it may well be that he is not at liberty to revoke the will, or at any rate that on his death the Court will, if so moved, intervene to see that his estate is dealt with as if it had not been revoked.

p. 18, l. 23-
p. 20, l. 2.

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It is, however, an altogether different thing to say that the condition in Nanhu's will as intended by the testator and understood by the Defendant was that as from testator's death Defendant's estate other than what he took under the will should be subject to trusts of any sort . . .

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On a consideration of the authorities cited by counsel the conclusion cannot be avoided that the question is not a question of what does or does not arise by mere operation of law but a question to be decided on the facts of each individual case. In *Gray vs. Perpetual Trustee Co.* (1928 A.C. 391) Viscount Haldane . . . stated the conclusion of the Board in the following words : ‘ The case . . . is one in which the evidence of an agreement, apart from that of making the wills in question, is so lacking that they are unable to come to the conclusion that an agreement to constitute equitable interests has been shown to have been made . . . The mere fact of making wills mutually is not, at least by the law of England, evidence of such an agreement having been come to. And without such a definite agreement there can be no more a trust in equity than a right to damages at law . . . ’

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In this present case, so far as the estate of testator is concerned, the position is clear but it cannot be said that there is anything approaching the same degree of clarity regarding Defendant's own property. Nothing is to be drawn from the recital of the will beyond the fact that Defendant was testator's brother and partner, there is not a scrap of evidence as to the terms of the partnership between them, there are no words anywhere in the will even suggesting, far less making, a specific imperative condition that Defendant should set up any sort of trust affecting his own estate during his lifetime or that anything should be paid to anybody out of his estate during his lifetime.”

p. 20, ll. 12-41.

14. The learned Judge then intimated that the answers to the questions raised in the Summons would be as follows :—

(A) On the true construction of the Will of Nanhu and in the events which had happened, a trust was created.

(B) The trust could not be revoked save either under the sanction of the Court or with the consent of all parties interested under the trust and being *sui juris*.

(C) The trust attached only to the estate of Nanhu.

(D) Subject to the life interest of Ramdassi, Jagannath took a life interest in the property to which the trust attached together 10 with an interest in the whole estate absolutely contingent on his surviving Ramdassi and his wife Bacheoni.

(E) As Jagannath did not take a life interest only, this question did not arise.

(F) The trust conferred an interest on Jagannath as set out previously.

(G) As the answer to (F) was in the affirmative, this question did not arise.

(H) The interest taken by Jagannath was as set out in (D) above. Subject in the case of each of them to their surviving 20 Jagannath, Ramdassi and Jagannath's wife Bacheoni took an interest absolutely to the trust property as it existed at the death of Jagannath, each of them as to one-half of the said property, or, if only one of them survived Jagannath, then such one as to the whole of the property.

(I) Jagannath had no power to dispose of the property which was affected by the trust save under the sanction of the Court or with the consent of all parties interested under the trust and being *sui juris*.

15. No formal order was drawn up.

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pp. 23, 24.

p. 25, ll. 27, 28.

16. Jagannath and Ramdassi each obtained leave to appeal from the said judgment to His Majesty in Council, but Ramdassi abandoned her appeal.

pp. 26, 27.

17. Jagannath died and his son-in-law Jaduram, as his Executor, was substituted as Appellant.

18. The Appellant contends that the judgment of the learned Judge is erroneous in at least two and possibly three respects :—

(1) The provisions for the maintenance of Ramdassi are too vague and uncertain to be enforced and are void for uncertainty.

(2) Alternatively, if and so far as the Judge decided that the 40 provision for the maintenance of Ramdassi continued after the death of Jagannath, this was an error ; such maintenance continued only during the joint lives of Ramdassi and Jagannath.

(3) There is nothing in the Will of Nanhu justifying the conclusion that Jagannath took only a life interest contingent on surviving Ramdassi and Bacheoni, but on the contrary, having survived Nanhu, he took an absolute interest in the whole of Nanhu's estate, subject only to Ramdassi's right of residence in the house and (if the Appellant is wrong on (1) above) her right of maintenance and the condition as to the will he was to make.

19. The Appellant submits that this Appeal should be allowed and it should be declared that the provision in Nanhu's will for the maintenance
 10 of Ramdassi was void for uncertainty (or alternatively that it operated only during the joint lives of Ramdassi and Jagannath) and that Jagannath took Nanhu's estate absolutely subject only to Ramdassi's right of residence in the house in Nasea and to the effect (if any) of the condition as to the Will he was to make, for the following among other

REASONS.

- (1) BECAUSE the provision in Nanhu's will as to the maintenance of Ramdassi is void for uncertainty.
- (2) BECAUSE in any event it extended only to the joint lives of Ramdassi and Jagannath.
- 20 (3) BECAUSE the High Court erred in holding that Jagannath took a life interest only.
- (4) BECAUSE there is no appeal from the portion of the decision of Thomson, J., that no trust was created of the property of Jagannath.

MILNER HOLLAND.

R. J. T. GIBSON.

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ON APPEAL
from the Supreme Court of Fiji.

IN THE MATTER of the Estate of NANHU
son of BIRMA of Nasea, Labasa (partner in the
firm of JAGANNATH NANHU & COMPANY) in
the Island of Vanua Levu in the Colony of
Fiji, Merchant, deceased.

BETWEEN

JADURAM (father's name Lallu) of
Labasa in the Colony of Fiji
Executor of the Will of JAGANNATH
(son of BIRMA) now deceased
Executor of the Will of the said
NANHU deceased (Defendant) *Appellant*

AND

RAMDASSI, widow of the said
NANHU deceased (Plaintiff) *Respondent.*

Case for the Appellant.

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