

33, 1949

No. 13 of 1947

IN THE PRIVY COUNCIL.

UNIVERSITY OF LONDON
W.C.1.

O N A P P E A L

12 NOV 1956

FROM THE SUPREME COURT OF FIJI INSTITUTE OF ADVANCED
LEGAL STUDIES

IN THE MATTER of the ESTATE of NANHU son of BIRMA 30924
of Nasea, Labasa (partner in the firm of
Jagannath Nanhu & Company) in the Island of
Vanua Levu in the Colony of Fiji, Merchant,
deceased.

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B E T W E E N

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

RESPONDENTS CASE

C A S E

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OF THE RESPONDENT RAMDASSI widow of the above
named NANHU deceased

RECOI

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1. This is an appeal by the substituted appellant
the above named Jaduram (hereinafter called "Jaduram")
the executor of the last Will dated the 7th June 1944
of the original Defendant-Appellant the above named
Jagannath (hereinafter called "Jagannath") from a Judgment pp.16-2
dated the 11th October 1946 of the Supreme Court of Fiji
(His Honour Mr. Justice Thomson) on an Originating
Summons dated the 17th June 1946 issued by the Plaintiff- pp.1-3
Respondent the above named Ramdassi (hereinafter called
"Ramdassi") against Jagannath the executor of the above
named Nanhu (hereinafter called "the Testator") raising
questions relating to the estate of the Testator of
whose Will Jagannath was sole executor and trustee and
relating further to the property of Jagannath.

2. Ramdassi is the widow of the Testator,
Jagannath was the brother of the Testator and died
while this Appeal was pending. The substance of this

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Appeal is whether under the Will of the Testator any and if so what beneficial interests are thereby conferred in the Testator's estate on Ramdassi, and in particular whether Jagannath, having died leaving him surviving Ramdassi and one Bacheoni (wife of Jagannath), the latter are entitled in equal shares absolutely to the estate of the Testator.

p.7 1.16

3. From the year 1925 until the death of the Testator on the 27th May 1943 Jagannath and the Testator carried on business in partnership as merchants and storekeepers at Labasa, Fiji under the style of Jagannath Nanhu & Co. 10

p.7 1.20

4. The Testator duly executed his last Will at Labasa on the 21st August 1937 which was drawn by H.B. Gibson solicitor and was in the following terms:

pp.29-30

"THIS IS THE LAST WILL AND TESTAMENT of me NANHU son of BIRMA of Labasa on the Island of Vanualevu in Fiji Merchant I Heroby 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 where-soever 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 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, 20 30 40 50

in such an event or events, I Appoint the said Ramdassi and the said Bacheoni or the survivor of them, to be my executrices and trustees.

IN WITNESS whereof I have hereunto set my hand this 21st day of August One thousand Nine Hundred and Thirty-Seven.

H.B. GIBSON

NANHU

M. MAHADEO.

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Signed by Nanhu son of Birma the)
testator as and for his last)
and only Will and Testament in)
the presence of us both present)
at the same time who at his)
request in his presence and sight)
and in the sight and presence of)
each other have hereunto sub-)
scribed our names as attesting)
witnesses the foregoing having)
first been interpreted by us to)
him in the Hindustani Language)

NANHU

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H.B. Gibson,
Solicitor,
Labasa.

M. MAHADEO,
Intorpreter,
Labasa."

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5. On the same date namely 21st August 1937 Jagannath duly executed his then last will at Labasa which was drawn by the said H.B. Gibson and was in the following terms:

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"THIS IS THE LAST WILL AND TESTAMENT of me JAGANNATH son of BIRMA of Labasa on the Island of Vanualevu in Fiji Merchant I hereby revoke all former Wills and other Testamentary writings 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 and I declare this to be my last and only Will and Testament I Appoint my brother and partner Nanhu son of Birma of Labasa merchant to be my sole Executor and Trustee I Give Devise and Bequeath unto my Trustee all real and personal property of whatsoever nature and wheresoever situate of or to which I may be entitled or over

pp.4 - 1

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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 Bacheoni 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 to be divided equally between my said wife Bacheoni and Ramdassi the wife of the said Nanhu or, in the event of the death of either to the survivor of them absolutely Should my said brother Nanhu predecease me then I Devise and Bequeath the whole of my estate including anything which I may inherit from the said Nanhu to be divided equally between the said Bacheoni and the said Ramdassi or, in the event of the death of either, then to the survivor of them.

In witness whereof I have hereunto set my hand this 21st day of August 1937 (One Thousand Nine Hundred and Thirty-Seven) (1937)

JAGANNATH
 H. B. GIBSON
 H. MAHADEO.

Signed by the said Jagannath Son)
 of Birma the Testator as and)
 for his last and only Will and)
 Testament in the prosence of)
 us both present at the same time)
 who at his request in his)
 presence and sight and in the)
 sight and presence of each other) JACANNATH
 have hereunto subscribed our)
 namos as attesting witnesses the)
 foregoing having first been)
 interpreted by us to him in the)
 Hindustani language, the word)
 "amongst" having first been)
 crossed out on the reverse side)
 herooof:)

H. B. Gibson,
 Solicitor,
 Labasa.

M. Mahadeo,
 Interpreter,
 Labasa."

6. The Testator died at Labasa on the 27th May 1943 and Jagannath proved and registered the Testator's said Will in the Probate Registry of His Majesty's Supreme Court of Fiji on the 3rd March 1944. p.8 1.30
p.29
7. The estate of the Testator was sworn by Jagannath for the purpose of assessment of death duty thereon at £6,030.17. 5 which according to his Declaration was the value of the Testator's half interest and share in the said partnership. p.8 1.35
- 10 8. Jagannath after the death of the Testator took for himself as his own property the half share of the Testator in the property of the said partnership comprising : p.8 1.39 to
p.9 1.17
- (a) All stock in trade of the said business.
 - (b) Furniture and fittings.
 - (c) Book debts.
 - (d) "Talkie" moving picture equipment.
 - (e) Cash in hand,
- 20 and further in September 1944 procured the transfer to himself as proprietor of the Testator's undivided half share in the seven leasehold properties (with all buildings thereon) of the said partnership.
9. On the 25th June 1945 Jagannath sold one of the said leasehold properties for the sum of £25. On the 27th July 1945 Jagannath transferred the other six leasehold properties to Jaduram (his son in law whom he had taken into partnership with him in the said business on the 1st July 1944) in consideration of natural love and affection and simultaneously gave and transferred to Jaduram all his Jagannath's interest and share in the said business and assets. p.9 1.18
p.9 2.20
- 30 10. On the 10th August 1945 the said transfer of the six leasehold properties to Jaduram was registered in the Register of Land Titles together with three encumbrances thereover securing to Ramdassi to Jagannath and to the said Bacheoni respectively an annuity of £120 each. p.9 1.24
- 40 11. Ramdassi on the 17th June 1946 caused the Originating Summons herein to be taken out against Jagannath as Defendant as executor of the Testator raising (as duly amended on the 8th August 1946) the following questions p.2 1.7
p.3 1.26

viz:

"(A) Whether upon the true construction of the following provisions contained in the will of the said Nanhu deceased, namely:-

"I appoint my brother Jagannath son of Birma Morchant 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 had 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 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 said 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 events, I appoint the said Ramdassi and the said Bacheoni or the survivor of them, to be my executrices and trustees"

and in the events which have happened a trust is created?

(B) Whether the trust in question is revocable by the defendant Jagannath who has accepted the benefit of the bequest under the said provisions in his own favour?

(C) Whether in view of the fact that the defendant Jagannath has accepted the benefit of the

bequest in his own favour the said trust attaches only to the estate of the said deceased or to the defendant's own property belonging to him at the time of the death of the said deceased as well?

(D) If the said trust attaches to both the aforesaid properties, whether the defendant takes only a life interest in the said properties?

10 (E) If the defendant takes a life interest only, whether he holds the remainder in trust for the plaintiff Ramdassi and the defendant's wife Bacheoni in equal shares absolutely; and, if so, whether the said interest in remainder is vested from the moment of Nanhu's death, or contingent on both or either of the plaintiff and the defendant's wife Bacheoni surviving the defendant after his death and the survivors or the survivor of them taking the whole property absolutely?

20 (F) If the trust attaches only to the estate of the said deceased Nanhu, whether the said trust confers any interest in the said trust property of the defendant?

(G) If the answer to (F) is in the negative, whether the defendant in that case holds the trust property in trust for the plaintiff and the defendant's wife Bacheoni in equal shares absolutely?

30 (H) If the answer to (F) is in the affirmative, whether the defendant takes only a life interest with remainder over to the plaintiff and the defendant's wife Bacheoni in equal shares absolutely; and if so, whether the said interest in remainder is vested from the moment of Nanhu's death, or contingent on both or either of the plaintiff and the defendant's wife Bacheoni surviving the defendant after his death and the survivors or the survivor of them taking the whole property absolutely?

40 (I) Whether the defendant, whatever the nature of the trust, has any power to dispose of the trust property contrary to the terms of such a trust?"

12. The cause was heard on the 18th and 19th September 1946 and a reserved judgment was delivered by His Honour Mr. Justice Thomson on the 11th October 1946.

p.16

13. By his said judgment the learned Judge answered

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the questions raised by the Originating Summons as follows:-

p.20

"(A) On the true construction of the Will of Nanhu deceased, executed on 21st August, 1937, and in the events which have happened, a trust is created.

(B) The said trust cannot be revoked save either under the sanction of the Court or with the consent of all parties interested under the said trust and being sui juris. 10

(C) The said trust attaches only to the estate of the said Nanhu deceased.

(D) Subject to the life interest of Plaintiff the Defendant takes a life interest in the property to which the trust attaches together with an interest in the whole estate absolutely contingent on his surviving Plaintiff and his wife Bacheoni.

(E) As the Defendant does not take a life interest only, this question does not arise. 20

(F) The trust confers interest on the Defendant as set out previously.

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

(H) The interest taken by Defendant is as set out in (D) above. Subject in the case of each of them to their surviving Defendant, Plaintiff and Defendant's wife Bacheoni take an interest absolutely to the trust property as it exists at the death of Defendant, each of them as to one-half of the said property, or, if only one of them survive Defendant, then such one as to the whole of the property. 30

(I) The Defendant has no power to dispose of the property which is affected by the said trust save under the sanction of the court or with the consent of all parties interested under the said trust and being sui juris."

And further ordered that the costs of the Plaintiff and of the Defendant should be taxed as between solicitor and client and paid out of the Testator's estate. 40

14. By Orders both dated the 30th October 1946 leave pp.23, 24.
was given to both Jagannath and Ramdassi to appeal to
His Majesty in Council upon giving security in the sums
of £500 and £250 respectively.

15. Ramdassi does not appeal from the said judgment p.25
but by order of His Majesty in Council dated the 21st
May 1947 special leave was granted to Ramdassi to
defend in forma pauperis the appeal of Jagannath.

10 16. Jagannath died on the 25th July 1947 while the
appeal was pending and Jaduram as executor of the
last Will of Jagannath dated the 7th June 1944 being
the proper person to be substituted on the Record in the p.26
place of Jagannath an order of Revivor was accordingly
made by His Majesty in Council on the 26th January
1948.

20 17. Until after the death of Jagannath it was not
known that he had in any way revoked his said Will of
the 21st August 1937 and the hearing before His Honour
Mr. Justice Thomson proceeded on that basis. The said
Will of 7th June 1944 (not included in the Record)
differs materially from the said Will of the 21st
August 1937. The legal representative of Jagannath was
subsequently suspended from practice as barrister
or solicitor for one year under Section 29 of the
Supreme Court Ordinance (Fiji) for concealing from
the Court on the hearing of the said Originating
Summons the existence of Jagannath's said Will dated
7th June 1944.

30 18. The learned Judge in the course of his Judgment
dealt first with the question whether the Testator's
Will created any enforceable trust or condition in
respect of the Testator's own estate. He held that it
was intended to and did so and that in respect
of the Testator's own estate the trusts or conditions
(accepted by Jagannath and enforceable against him)
resulted in the following beneficial interests in the
Testator's estate:

p.17 l.1 to
p.18 l.20

- 40 (a) A right in Ramdassi during the joint lives
of herself and Jagannath to occupy the
dwellinghouse at Nasea.
- (b) A right in Ramdassi during the joint lives
of herself and Jagannath to be maintained
out of the estate of the Testator.
- (c) A right in each of them Ramdassi and Bacheoni
should they both survive Jagannath after his

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death to one half each of the Testator's estate absolutely.

- (d) A right in Ramdassi or Bacheoni, should only one of them survive Jagannath, after his death to the whole of the Testator's estate absolutely.
- (e) Subject to the above vested or contingent interests Jagannath was beneficially entitled, having survived the Testator, to the whole of the Testator's estate.

19. In the events which have happened the result is that Jagannath until his death was entitled to a life interest (subject to Ramdassi's right of occupation and maintenance) in the Testator's estate and on his death on the 25th July 1947 Ramdassi and Bacheoni (both of whom survived Jagannath) became entitled to the estate of the Testator in equal shares absolutely. 10

p.18 1.37
to
p.20 1.11

20. On the second part of the Case the learned Judge held (Jagannath being then still alive) that Jagannath's own property as distinct from that devolving upon him from the Testator was not subject to any trust and that he was free to dispose thereof inter vivos as he thought fit. From that part of the Judgment there is no appeal by Ramdassi. The learned Judge however indicated that, if Jagannath died in the lifetime of Ramdassi or Bacheoni (as he did) leaving a Will disposing of his own property otherwise than in accordance with the conditions set out in the Testator's Will (e.g. by revoking as he in fact did his own Will of 21st August 1937), it might well be that those conditions would be then enforceable against his estate. It is however apprehended that such questions cannot be dealt with or arise on the hearing of this appeal. 20 30

p.18
11.23-36

21. Ramdassi submits that so far as it declared that the Testator's Will created the enforceable trusts or conditions specified in the said Judgment the Order of His Honour Mr. Justice Thomson was right and ought to be affirmed and that this appeal should be dismissed with costs for the following amongst other.

R E A S O N S

- (1) BECAUSE it correctly states the interpretation and effect of the Testator's Will. 40
- (2) BECAUSE on the construction of the Testator's Will it was intended thereby to create an enforceable trust or condition affecting the Testator's estate in the hands of Jagannath.

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- (3) BECAUSE Jagannath having proved the Testator's Will and dealt with his estate and accepted benefits thereunder he became bound by such trust or condition
- (4) BECAUSE the effect of such trust or condition was (in the events which have happened) to confer upon Jagannath no greater beneficial interest than a life interest in the Testator's estate subject to the right of Ramdassi to occupy the said dwellinghouse and to be maintained out of the Testator's estate and to confer upon Ramdassi and Bacheoni an equitable interest in the capital of the Testator's estate after the death of Jagannath in equal shares absolutely.
- (5) GENERALLY for the reasons given in the judgment of the learned Judge on this aspect of the case.

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CHARLES RUSSELL

JOHN BESWICK

IN THE PRIVY COUNCIL

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.

B E T W E E N

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

C A S E

-of-

THE RESPONDENT RAMDASSI

CHARLES RUSSELL & CO.
37, Norfolk Street,
Strand, W.C.2.

Solicitors for the Respondent.