# Kishori Pal, Defendant No. 1 Vs Sheikh Bhusai Bhuiya

**Court:** Calcutta High Court

**Date of Decision:** Aug. 6, 1909

**Final Decision:** Dismissed

## Judgement

Brett, J.
The present appeal arises out of a suit brought by the Plaintiffs to eject the Defendants from a certain holding on the ground that

the Defendants having purchased the rights of an occupancy raiyat which were not transferable by custom or local usage had acquired no right to

the tenure by their purchase. The Plaintiff claimed title as landlord by a purchase made by him and the Defendant No. 3 of the taluqi right from one

Annapurna Dasi. The Defendants claimed title as tenants to the land by purchase from Kausalya Bewa who had purchased from the Defendant

No. 2. The Plaintiff also alleged that there was surrender of the jote in his favour by the Defendant No. 2. The tenant Defendant No. 1 pleaded

that the suit was barred by limitation and that the Plaintiff had acquired no right as landlord by his purchase from Annapurna who had only a

widow"s estate in the taluk. The Court of first instance found that the Plaintiff had proved his title and that the Defendants had no right to remain in

pos-session of the holding as they had failed to prove that occupancy rights were transferable by custom. It, therefore, gave the Plaintiff a decree.

On appeal, the judgment and decree of the Court of first instance have been re-versed and the suit of the Plaintiff has been dismissed. The Plaintiff

has appealed to this Court. In dealing with the appeal the lower Appellate Court has directed its attention mainly to the question whether the

Plaintiff"s right to the land was established, and in dealing with that question, the learned Subordinate Judge seems to have confined himself rather

to the consideration of the question whether the title of the Plaintiff was a good title as against the reversioners than whether it was a good title as

against the Defendants, In the present appeal the main contention which has been advanced on behalf of the Appellants is that the learned

Subordinate Judge has erred in law in the view which he has taken that the Plaintiff had failed, for the purposes of this suit, to establish his title. In

this case the reversioners were not parties to the suit and it has been argued that such being the case, all that the lower Appellate Court had to

ascertain for the purpose of determining this suit was whether the Plaintiff had proved as against the tenant Defendant a title which would justify that

Court in giving the Plaintiff the decree sought for. In my opinion this contention is sound, and in a case of this description where the suit is brought

as against a tenant for rent, what the Court has to ascertain first is whether the Plaintiff has been able to establish as against the Defendant a right

which would entitle him (Plaintiff) to recover rent from the Defendant. In the present case it has been found to have been proved by the evidence

on both sides that the Plaintiff purchased the rights of Annapurna for Rs. 100 or more and that the deed of sale was attested on behalf of her

daughters, who were the next heirs to the property, by their husbands. The reason for the sale by Annapurna appears to have been that after her

husband''s death, she was left with this small property; that she had no one to look after her and that she sold the property and went to live at the

house of one of her daughters. The circum-stances were such as would certainly justify a bond fide purchaser in believing that the sale was a valid

sale and that it was made in order that the lady might raise sufficient money to support herself. The lower Appellate Court has found that the facts

were not sufficient to establish legal necessity for the sale; but I am of opinion that for the purposes of the present case it was not necessary that the

present Plaintiff should prove conclusively that the sale was for legal necessity. The circum-stance that at the time of the sale the husbands of the

two daughters were present and apparently signed the documents on behalf of their wives as evidence their consent to the sale was certainly, in

itself, a fact which would induce a bond fide purchaser to believe that the sale was a valid sale. But whether the sale was valid as against the

reversioners or not does not appear to me the question which the lower Court was called upon to determine in deciding the present suit. The

Plaintiff has distinctly proved his purchase. He has also proved that the next heirs of Annapurna consented to the sale and that since the sale, he has

been in possession. Whether or not it was with-in the rights of the widow to transfer the entire interest in the property sold, such a sale, under the

law, cannot be held to be ipso facto void but it is only voidable at the instance of the reversioners. In the present case, there is nothing whatever in

the judgments of the lower Courts to indicate that the reversioners appeared in the suit or that they, in any way, showed that they wished to avoid

the transaction. That being the case, I am of opinion that the view taken by the lower Appellate Court is not correct and that for the purposes of

the present suit, the Plain-tiff has sufficiently established his title as landlord of the Defendant. The Court of first instance held that the rent claimed

by the Plaintiff was due and that finding of the Court of first instance does not appear to have been contested before the lower Appellate Court and

I must, therefore, hold that that finding stands good. The only points that seem to have been contested in the Appellate Court were whether there

was any legal necessity for the sale by the widow and whether her daughters consented to the sale or not. As I hold that the Plaintiff has for the

purposes of this suit sufficiently established his title and as the finding of the first Court still holds good that the rent claimed by the Plaintiff is due

from the Defendant, I set aside the judgment and decree of the lower Appellate Court and restore those of the first Court with costs in all the

Courts.

2. Babu Sarat Chandra Basack for the Appellant submitted, with reference to the point upon which their Lordships decided this appeal, that on the

finding of the Subordinate Judge no necessity for sale by the widow had even proved, the Plaintiff was out of Court. At most it would operate as a

sale of the widow''s life-interest, and this came to an end at the widow''s death. Right to recover rent since then rests with the reversioner. Relies

on Bhagwat Dayal Singh v. Debi Dayal Sahu ILR 85 Cal. 420 (1908). The transfer by the widow in favour of the Plaintiff is under the

circumstances void.

3. Babu Gobinda Chandra Dey Roy for the Respondent.--The transfer was not void ipso facto. It was voidable only at the option of the

reversionary heir. The widow was not a mere life tenant but was owner of her husband''s property subject to certain restrictions on her powers of

alienation. There is nothing to show that the reversionary heirs have impeached the validity of the sale. They might elect to ratify it. The transfer is

therefore good against the whole world excepting those who are interested in the reversion. See Bejoy Gopal Mukerjee v. Krishna Mohishi 11

C.W.N. 424 : S.C. L.R. 84 I.A. 87; ILR 34 Cal. 329 (1907), Modhu Sudan v. Rooke L.R. 24 I.A. 164 (1897), Bejoy Gopal v. Nil Ratan 7

C.W.N. 864 : S.C. T. L.R. 80 Cal. 990 (1903).

Jenkins, C.J.

4. [""Was not the decision in this case set aside by the Privy Council""]

Partly. The decision of the High Court on the question of limitation was wholly overruled but their Lordships agreed with the High Court that a

lease granted by a Hindu widow is only voidable and not void at her death.

5. The Defendant No. 1 does not claim through or under the reversionary heir. He is the purchaser of the land in suit which constituted a non-

transferable occupancy holding. He has therefore acquired no title.

6. Debi Dayal Sahu''s case ILR 35 Cal. 420 (1908) is no authority for the proposition that a sale made by a Hindu widow without legal necessity,

is void ab initio. The head-note of this case is misleading. The Privy Council did not in this case dissent from the view expressed in Madhu Sudan

v. Rooke L.R. 24 I.A. 164 (1897) and re-affirmed in Bejoy Gopal Mukerjee v. Krishna Mohishi 11 C.W.N. 424 : S.C. L.R. 34 I A. 87; I. L.R.

34 Cal. 329(1907).

Jenkins, C.J.

7. The prayer in this suit is for recovery of possession of an 8 anna share of the land in suit or for rent according to the prevailing rate: and, the facts

out of which this suit arose may be briefly stated as follows : The Plaintiff claims to be the transferee of the landlord''s interest in this land by virtue

of a transfer executed in his favour in June 1897. Under that transfer he says he became entitled to an 8 anna share in the land in suit, and so claims

the relief, I have indicated, alleging that the Defendant-Respondent is a trespasser, inasmuch as he claims to be the transferee of an occupancy right

which was not transferable.

8. In the first Court the decree passed was in these terms, "" the suit is decreed with costs and interests at 6 per cent. per annum; "" and it is

unfortunate that it should be the practice of the Courts to pass their decrees and to express their conclusions in these vague and general terms--it is

almost a common form for the Judge to say that the suit is decreed. It is particularly unfortunate that this formula should be adopted when, as here,

there is an alternative prayer in the plaint. In the present case the learned pleader for the Respondent has urged, that what the learned Judge

intended was a decree for possession of the 8 anna share, and we will so treat it. From that decree an appeal was preferred to the lower Appellate

Court, and it was there held that the Plaintiff''s title was bad, because the Plaintiff claimed as purchaser from a widow and it was not shown that

there was either legal necessity or the reversioner''s consent. The result was that the lower Appellate Court dismissed the suit with costs. Then

there was an appeal to the High Court, and the case came before Mr. Justice Brett sitting alone, who reversed the decree of the lower Appellate

Court and restored the decree of the Munsif. From this judgment of Mr. Justice Brett this appeal is preferred before us.

9. Though there are many interesting points that might arise out of the circumstances of this case, as a matter of fact we are only concerned with

one point, and that is whether or not the Plaintiff acquired a good title as against the Defendant-Respondent. The determination of this question

turns upon whether or not the transfer by the widow to the Plaintiff was void. For the purpose of determining that, we must accept the findings of

the lower Appellate Court, that is to say, we must take it as established that there was no legal necessity and that there was no consent of the

reversioners. On that basis, it was urged before us that the transfer by the widow was void. Now, obviously it could not have been void ab initio; it

must have operated during the widow''s life. But the widow has since died and can it be said that it became void on her death ? In support of the

proposition that it became void, we have been referred to a decision of the Privy Council in Bhagwat Dayal Singh v. Debi Dayal Sahu ILR 35 Cal.

420(1908). No doubt, the head-note lends some colour to the argument, but its author did not do justice to the actual words of their Lordships

and there is nothing in that case that would entitle us to say that their Lordships there held that in circumstances like the present the transfer would

become void by the mere fact of the widow''s death. Now, how do the authorities stand ? It seems to me that the matter is placed beyond doubt

by what was decided and said in Bejoy Gopal Mukerji v. Krishna Mohishi 11 C.W.N. 424 : s. e. L.R. 34 I.A. 87; ILR S4 Cal. 329 (1907). It

was there pointed out that an alienation by a widow, even though there may not be legal necessity or consent was not void and could not be

regarded as void, because it is the established law that such transfer was capable of affirmation after the death of the widow, and that which is

capable of affirmation cannot possibly be void. If not void, it is clear that the transfer even after the death of the widow had a qualified operation. It

is quite true that to nullify such a transfer a suit is not necessary; disaffirmation would be sufficient. But as the transaction is capable of disaffirmation

so it is also capable of affirmation; and, while there is nothing decisive one way or the other, it seems to me that we cannot say that the transfer

even after the death of the widow is incapable of operation as against a third party in the position of the Defendant-Respondent in this appeal. I

therefore agree with the conclusion at which Mr. Justice Brett has arrived, and as this is the only point before us on this appeal we hold that he was

right in restoring the decree of the Munsif, which must be treated as a decree for joint possession of an 8 anna share and not a decree for rent. This

appeal, therefore, must be dismissed with costs.

Caspersz, J.

10. I agree.