(1909) 06 CAL CK 0005

Calcutta High Court

Case No: None

Kunja Behary Roy	APPELLANT
Vs	
Namai Chand Pal and Others and Srimatya Brojeshwan Dasi and Others	RESPONDENT

Date of Decision: June 11, 1909

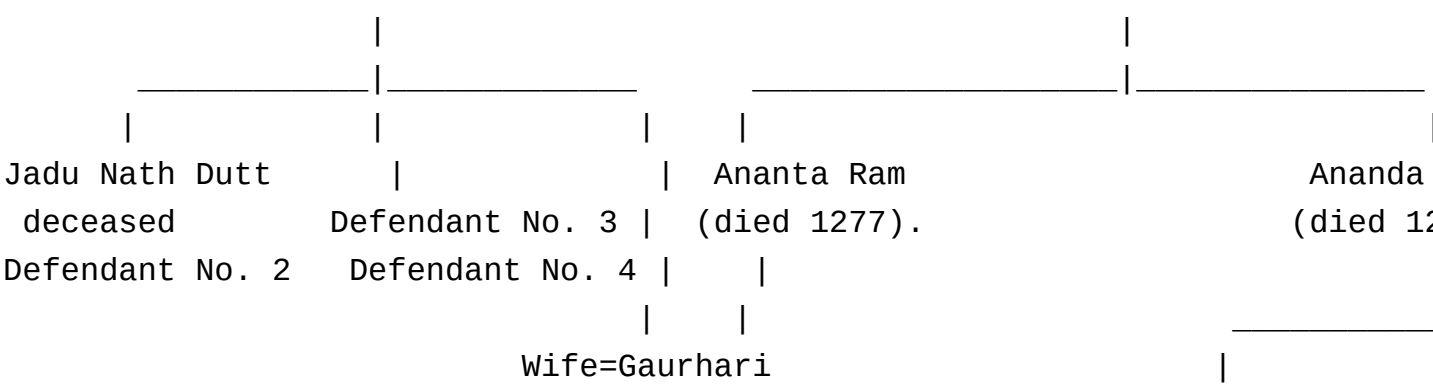
Judgement

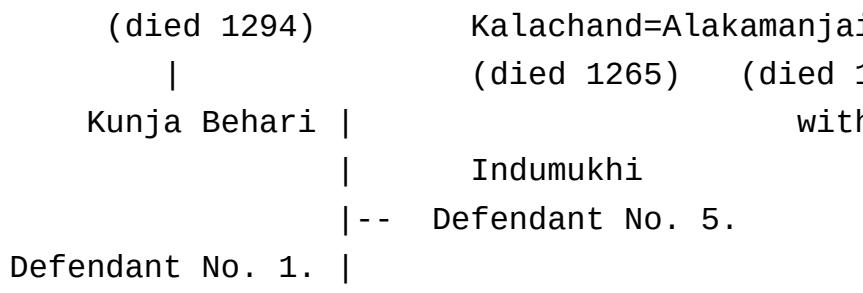
1. This appeal arises out of a suit brought by the plaintiff Nemai Chand against his second cousin Kunja Behari (defendant No. 1) the latter''s wife (defendant No. 5) and three other defendants who are Kunja Behari''s maternal relatives or connections.

2. The plaintiff claims a-half share in certain properties on the ground that they are properties to which he and the defendant No. 1 are jointly entitled as the surviving members of a joint Hindu family.

3. The plaintiff succeeded in the Court below and this appeal is preferred by the defendants Nos. 1 and 5.

4. The following genealogical table shows how the principal parties are descended from their common ancestor, Madhu Sudhan Roy. It will be seen that the latter left two sons Anantaram, the elder, from whom defendant No. 1 is descended and Anandaram, the younger, from whom the plaintiff is descended.





5. All the subordinate questions in the suit (which including a claim for mesne profits, is valued at close on Rs. 6,000), have now been set at rest, and the only issue to be decided is whether the properties of which the plaintiff claims a share are joint properties or not. It is not disputed that if the properties are joint the plaintiff is entitled as heir of his mother Titamoni and her sister-in-law Alakamanjari. Nor is it disputed that Anantaram and Ananda-ram lived jointly until the death of the latter in 1261. Nor again is it disputed that with the exception of certain properties acquired by Madhu Sudan (the common ancestor) all the properties were acquired by the defendant No. l''s grandfather and father and none by the plaintiff''s ancestors. It is also common ground that the plaintiff''s grand-mother (Grolak-niani) and his aunt (Alakmanjari) were maintained by Gaurhari. The learned Subordinate Judge adverts to the fact that Alakmanjari used sometimes to do the cooking for the family. The plaintiff and his mother joined the household, the plaintiff says they were sent for by Graurhari, some two or three years before the plaintiff''s mother died and apparently during his father''s lifetime, for it is admitted that both his parents died in the family house. His mother''s death occurred in 1299 or 1292 (1883 or 1885) and as the plaintiff is at the present time nearly "40 years of age, he could not have been more than 14 when he and his mother took up their abode with Gaurliari- Gaurhari died in 1294 and the plaintiff continued to live with defendant No. 1 and was maintained by him. If he ever left the family house, he returned to it in 1306, and the learned Subordinate Judge from whose opinion we see no reason to differ, has disbelieved the statement of the defendant No. 1 that the plaintiff returned in the capacity of a servant. Apparently he remained until the quarrel arose which has led to the present suit.

6. There being admittedly some joint property the learned Subordinate Judge very naturally supposed that the burden of proof would lie upon defendant No. 1 to show that the family had ceased to be a joint Hindu family or if not that the properties in question were not joint family properties and on the evidence adduced'' it is clear that if the burden is so placed defendant No. 1 must fail.

7. But it is ingeniously argued on his behalf-that as the learned Subordinate Judge has found that the estate left by Madhu Sudan was insufficient to meet the household expenses, the burden was on the plaintiff to show that the earnings of Anantaram who is said to have practised as an un-certificated muhhtar and to have

made some money in that way were added to the common estate. The learned Subordinate Judge relied on the judgment of the Privy Council in Anandrao Gunputrao v. Vasantrao Madhavrao 11 C.W.N. 478 : 9 Bom. L.R. 595 : 5 C.L.J. 338 : 2 M.L.T. 151 : 17 M.L.J. 184 in the course of which their Lordships say " This being so, a nucleus exists and the family is joint. The onus is, therefore, on the party setting up a case of separate estate." It is contended, however, that, that case is distinguishable on the ground that it had been found there that the nucleus of joint property was of substantial value and that the parties who set up a separate estate, had failed to show any "independent or separate source of affluence."

8. Beyond observing that the nucleus of joint property in the present case is not appreciable, we postpone our remarks on that subject and deal with the authorities. For the earlier authorities we think it is unnecessary to go further than Mayne''s Hindu Law (17th edition, paragraphs 277-278 and 255-291). Without too much refining the general rule appears to be that where at any rate it is admitted that there was a joint family and a nucleus of joint property, the presumption is not only that-the family remains joint but also that the property in possession of any member of the family is joint family property until the contrary is proved. And as regards any particular property, the presumption is not rebutted merely by showing '' that it was purchased in the name of one member of the family, and that there are-receipts in his name respecting it; for all that is perfectly consistent with the notion of its having been joint property." Dhurni Das Pandey v. Muxammat Shama Soondri Debiah 3 M.I.A. 229 : 6 W.R. 43 (P.C.) cited by Mayne. paragraph 2S9. That this rule applies to'' families governed by the Dayabhaga School is shown by the case of llama Nath Chatterjee v. Kusum Kamini Debi 4 C.L.T. 563 M.I.A. 229 : 6 W.R. 43 (P.C.). Is there anything sufficient, therefore, in the present case to take it out of the general rule? The earnings of Anantaram as an uncertificated mukhtar are not necessarily to be considered his self-acquisitions. It is clear that the greater part of the properties which are not ancestral were acquired by Graurhari, who was employed as a clerk in the Midnapore Collectorate and rose to be sharistadar on Rs. 150 a month with opportunities for supplementing his pay. His earnings like those of Anantaram are not necessarily to be regarded as self-acquired property and we can see no reason, therefore, why the general rule should not apply. The view we take receives support from the case of Lal Bahadur v. Kanhaiya Lal 11 C.W.N. 417 : 29 A. 244 5 C.L.J. 340 : 4 A.L.J. 227 : 2 M.L.T. 147 : 17 M.L.J. 228 : 9 Bom. L.R. 597 recently decided by the Privy Council and cited by Mr. Chuckerbutty for the plaintiff. That no doubt was the case of a Mitakshara father who attempted to discriminate between his three sons by a will which preferred the eldest son to the two younger sons. But it is difficult to see why the principle should not be applied to the present case. There, as her, there was a nucleus of joint property. The father had boon (like Graurhari here) in the service of Government and had risen to be an Inspector of Schools on a salary of Rs. 750 a month, earning eventually a pension of Rs. 4,000 a year. The facts lent colour to the defence of the eldest son that his father had the right to dispose of the properly

acquired by himself as self-acquired property. But their Lordships held that the burden of proving this was on the eldest son, and that though the father had purchased properties of considerable value, he had made no distinction between his income from one source and his income from another, that there was but one common stock of the whole family, into which, each voluntarily threw what he might otherwise have claimed as self-acquired, and that the property purchased by or with the assistance of the joint funds, was joint property of the family and not of any particular member of it. It is true that all the sons had given their earnings to their father, while in the present case the plaintiff''s branch of the family has contributed little or nothing. But we have it here that the defendant No. 1 utilised the plaintiff''s services and it has been found that the plaintiff gave his services, not as a servant but as a member of the family. We are unable, therefore, to say that the Subordinate Judge did wrong in placing the burden of proof on the plaintiff.

9. It must be borne in mind, as Mr. Mayne points out, that such questions as the effect of the presumption against separate estate on the burden of proof, and the quantum of proof necessary to rebut the presumption depend largely on the facts of each particular case. The presumption in the present case is supported by the history and conduct of the family, by the fact that family funds admittedly joint have all along been held by the elder branch and disbursements have been made for those funds and from subsequently acquired sources of income without distinction as from one common stock and that it is impossible, therefore, to predicate of any particular acquisition that it was made without assistance from family funds and did not become part of the joint stock.

10. A word as ''to the nucleus. It is said that there was no sufficient nucleus. The two schedules to the plaint contain 125 items of landed property, of these 56 items are admittedly joint ancestral property, and they include the first item in the first schedule (a property said in the plaint to produce an income of Rs. 267 though there is no evidence on the point). They also include about 100 bighas of land said to produce paddy. We cannot say that in the circumstances of this family there was not an applicable nucleus or that the nucleus is so small as to be negligible.

11. In the result the appeal is dismissed with costs on the usual scale.

12. This judgment governs Appeal No. 159 of 1908 which is also dismissed with costs (assessed at two gold mohurs).