(1910) 09 CAL CK 0002

Calcutta High Court

Case No: Appeal from Appellate Decree No. 1405 of 1908

Nepen Bala Debi		APPELLANT
	Vs	
Siti Kanta Banerjee		RESPONDENT

Date of Decision: Sept. 5, 1910

Citation: (1910) 09 CAL CK 0002

Final Decision: Allowed

Judgement

1. This is an appeal on behalf of the Plaintiff in a suit for partition of joint family properties which has now lasted for nearly ten (10) years. The

Court of first instance made a decree in favour of the Plaintiff for a half share of the properties. Upon appeal the District Judge has given her a

decree for 1/4th share only. It is the common case of both parties that the property in dispute belonged to two brothers, Haripada Banerjee and

Sasipada Banerjee. The Plaintiff is the widow of Haripada Banerjee and claims to be jointly interested in one-half share which belonged to her

husband. The first Defendant is the purchaser of the right, title and interest of Sasi Bhusan at a sale held in execution of a mortgage decree on the

6th June 1896. The second Defendant is Sasi Bhusan himself. The third Defendant is a transferee from the purchaser at the mortgage-sale. The

fourth Defendant has apparently no interest at present in the disputed property. The fifth Defendant is the sister of Haripada and Sasi Bhusan. The

Plaintiff sated in her plaint that her husband had embraced Christianity and that at the time of his death he was a follower of the Christian faith. The

substantial question in controversy between the parties therefore is whether the Plaintiff has taken by inheritance under the Hindu Law the whole of

the share of her husband or whether under the Indian Succession Act she has taken only one-half of that share and the other has been taken

equally by the brother and sister of Haripada, that is Sasi Bhusan and Mondakini. The Courts below have concurrently held that the Indian

Succession Act is applicable to the case and that under secs. 27 and 36 the Plaintiff is entitled to one-half of the half share of her husband and that

the remaining half share has vested in equal halves in the brother and sister of the deceased. But the Courts below have differed in the view they

have taken upon the question of possession. The original Court has held that the Plaintiff has acquired a good title by adverse possession for the

statutory period in the half share which had passed by succession to the brother and the sister. The District Judge on appeal has held on the other

hand that as title by adverse possession was not specifically set up in the plaint, the Plaintiff is not entitled to succeed on any such basis. The

Plaintiff has now appealed to this Court and on her behalf the decision of the District Judge has been assailed on two grounds, namely, first, that

the Indian Succession Act has no application to the case, and, secondly, that if it does govern the matter, she has acquired a good title by adverse

possession in the one-half share which vested in the brother and sister of her husband. In so far as the first of these contentions is concerned it is

necessary to observe that sec. 2 of the Indian Succession Act provides that except as provided by this Act or by any other law for the time being

in force, the rule therein contained shall be the Law of British India applicable to all cases of intestate or testamentary succession. The provisions of

this section show that the Act is of universal application in this country unless a person claiming to be excepted can show that he is specifically

excepted from the operation of its provisions. Dagree v. Pacotti I. L.R. 19 Bom. 783 (1895). In other words as observed in De Souza v.

Secretary 0f State 2 B. L. R. 423 (1874). the words "" applicable to all cases "" operate as a repeal of the previously existing law and that subject to

the exception in the section the Courts must look to this Act and this alone for the Law of British India applicable to all cases of testamentary and

intestate succession. The burden therefore is upon the Plaintiff to prove the exception within which her case falls, and she relies upon sec. 331 of

the Indian Succession Act for this purpose. That section-we quote only so much of it as applies to the case before us-lays down the following rule

:-"" The provisions of this Act shall not apply to intestate or testamentary succession to the property of any Hindu, Mahomedan or Buddhist."" The

question therefore narrows down to this : Is a Hindu who has embraced the Christian faith and continues to be a Christian up to the time of his

death, a Hindu within the meaning of sec. 331 ? The Appellant has invited us to answer this question in the affirmative while the Respondents have

strenuously maintained the contrary view. After a careful consideration of the arguments which have been addressed to us we have arrived at the

conclusion that the question ought to be answered in the negative. Dr. Whitley Stokes has pointed out that the collocation of the words Hindu,

Mahomedan or Buddhist makes it reasonably plain that the term Hindu is used as a theological term and denotes only persons who profess any

faith of the Brahminical religion or the religion of the Puranas. (Anglo-Indian Codes, Vol. 7, 483), Dagree v. Pacotti I. L. R. 19 Bom. 783 (1895)

In our opinion by no stretch of language can we reasonably hold that the term Hindu includes a convert to Christianity. It is further obvious that as

ruled in the case of Jogendra Chandra Bose v. Bhagwan Coomar (1900) 1 Punjab Law Report 251 at p. 268. subsequently affirmed by the

Judicial Committee in Bhagwan Keor v. J. C. Bose ILR 31 Cal. 11 (1903), it is not sufficient to bring a man within the definition of Hindu to prove

his Hindu birth and origin. It is also essential that he should be a Hindu at the time when the question in issue arises, for example, if there is a

dispute as to the succession to the estate of the deceased person, it must be proved that he was a Hindu at the time of his death. No doubt under

the law as it stood before the Indian Succession Act, a Hindu after his conversion to Christianity might by his conduct show by what law he

intended to be governed in matters of succession and inheritance, Abraham v. Abraham 9 M. I. A. 199 (1863)., because, as observed by their

Lordships of the Judicial Committee "" Upon the conversion of a Hindu to Christianity, the Hindu Law ceases to have any continuing obligatory

force upon the convert; he might renounce the old law by which he was bound as he had renounced his old religion or if he thought fit, he might

abide by the old law notwithstanding he had renounced the old religion."" In view, however, of the provisions of secs. 2 and 331 of the Indian

Succession Act, this position can no longer be maintained. We must consequently hold that when a Hindu as embraced Christianity and continues

to be a Christian up to the time of his death, all questions of succession to his estate upon intestacy must be determined by the Indian Succession

Act. The view we take is supported by decisions of the Madras High Court in In re Vathiar 7 Mad. H. C. Rep. 121 (1872). Ponnusami v.

Dorasami I. L. R. 2 Mad. 209 (1880), Administrator-General v. Anandachari I. L. R. 9 Mad. 466 (1886), Tellis v. Saldanha I. L R. 10 Mad. 69

(1886). and of the Bombay High Court in Dagree v. Pacotti I. L. R. 19 Bom. 783 (1895), Bai Baiji v. Bai Santok I. L. R. 20 Bom. 53(1894) and

Hastings v. Gonsalves I. L. R. 23 Bom. 539 (1899). The decision of the Bombay High Court in Francis Ghosal v. Gabri Ghosal I. L. R. 31 Bom.

25 (1906). and of the Punjab Chief Court in Edith Mukerji v. George Alfred 52 P. W. R. 1907. are not really opposed to this view. They are

distinguishable on the ground that the question raised there was whether the Indian Succession Act purported to enlarge the category of heritable

property or affected the right of co-partnership as between those to whom it applied. We must consequently hold that the Courts below have

correctly applied the provisions of the Indian Succession Act to determine the distribution of the estate left by Haripada Banerjee who at the time

of his death was a Christian. The first ground urged on behalf of the Appellant must consequently fail.

2. In support of the second ground urged on behalf of the Appellant, it has been contended that the plaint though it did not expressly set out a title

by adverse possession, yet contained a sufficient recital of the facts that the Plaintiff was in possession of the entire half share of her husband and

that consequently the Plaintiff ought to have been allowed to succeed on the ground of title by adverse possession. Now it is perfectly true that, as

laid down by this Court in the cases of Joytara v. Mobaruck I. L. R. 8 Cal. 975 (1882). Sundari v. Mudhoo Chandra I.L. R. 14 Cal. 592 (1887)

and Ananda Hari v. Secretary of State 3 C. L. J. 316 (1906), where no case of acquisition of title by adverse possession is made in the plaint nor

is the question raised directly or indirectly in any of the issues the Plaintiff ought not to be allowed to succeed upon such a case. On the other hand

as pointed out by this Court in the case of Lilabati v. Bishun Chobey 6 C. L. J. 621 (1907). when the question reduces itself to one of law upon

facts admitted or proved beyond controversy, it is not only competent to the Court but expedient in the interest of justice to entertain the plea of

adverse possession, if such a case arises on the facts stated in the plaint and the Defendant is not taken by surprise. The true test, therefore, to be

applied to determine whether the plea of title by adverse possession should be allowed to be urged though not explicitly raised in the plaint is, how

far is the Defendant likely to be prejudiced if the point is permitted to be taken. Now the case before us is obviously of a somewhat peculiar

description. The parties themselves were possibly ignorant of their true rights under the Indian Succession Act till their legal advisers made the

discovery in the course of this litigation. In this view it does seem probable that upon the death of the husband the Plaintiff did enjoy possession of

his entire half share as if the rights of the properties were governed by the Hindu Law and she may have done so to the exclusion of her sister-in-

law Mandakini if not also of her brother-in-law Sasi Bhusan. It has been asserted on the other hand that the Plaintiff was in possession as a co-

sharer and the burden is upon her to prove that her possession was adverse. A question of some nicety may also arise as to the true position if it

should be found that the possession was adverse to one of the two persons and not to the other. We are satisfied that the true bearing of these

questions was not considered, possibly not appreciated at all in the Court below and in the interest of justice it is obviously necessary that the

question should be examined. The second ground urged on behalf of the Appellant must consequently prevail. The result therefore is that this

appeal must be allowed and the decree of the District Judge discharged in so far as modifies the decree of the Subordinate Judge. The case will be

remanded to the District Judge in order that he may determine whether in addition to the half share inherited by the Plaintiff from her husband she

has acquired a good title by adverse possession for the statutory period to the other half share which would otherwise belong to the brother and

sister of Haripada. The District Judge will frame an issue on this point and allow an opportunity to the parties to adduce evidence in support of their

respective allegations. Such evidence may be taken by the District Judge himself or by the Subordinate Judge under his directions. The District

Judge will decide the question of title by adverse possession as also any other question that may incidentally arise. The Defendant No. 1 will get

half the costs allowed to him only by the Court of Appeal below in respect of both the lower Courts. The costs of this appeal will abide the result.