

## Biswanath Kabash Vs Panchulal Das Modak

**Court:** Calcutta High Court

**Date of Decision:** Sept. 3, 2013

**Citation:** (2014) 1 CHN 202

**Hon'ble Judges:** Asim Kumar Ray, J

**Bench:** Single Bench

### Judgement

Asim Kumar Ray, J.

The judgment and decree dated 28-11-1989 passed in Title Appeal No. 85 of 1986 by learned Additional District

Judge, 12th Court, Alipore, 24-Parganas (South) affirming the judgment and decree dated 11-9-1986 and 4-11-1986 respectively passed in Title

Suit No. 145 of 1975 by learned Assistant District Judge, Alipore, 24-Parganas (South) for partition declaring that the plaintiffs have 4/9th share in

the property is under challenge in this appeal at the instance of the defendants/appellants. Filtering out unnecessary details the fact of the case is that

the suit property, Bastu measuring 20 decimal appertaining to Plot No. 25 in Khatian No. 824, Nangi, P.O. Batanagar, P.S. Maheshtala, District-

South 24-Parganas admittedly belonged to one Haradhan Kabash and on his death passed to his three sons Purna Chanda, Trailokyanath and

Parimohan, Purna, Trailokyanath and Parimohan died leaving their sons Kalipada, Hiralal and Upendra respectively. Each of them succeeded

1/3rd share to the suit property and they used to possess the same by mutual partition. Hiralal sold his share to one Chintamoni Das Modak on

18-8-1927 by a registered kobala. Chintamoni adopted his nephew Bechuram Das Modak who inherited 1/3rd share of Chintamoni on his death.

On the death of Bechuram Das Modak, the plaintiffs i.e. Panchulal and others inherited his share. On the death of Upendra sometime in 1937 his

widow Durgabala inherited her husband's share as Upendra and Durgabala had no issue. Durgabala sold her interest to her brother Jibon by a

kobala dated 2-4-1952, thereafter, Jibon sold his interest to the plaintiff Panchulal Das Modak by a registered kobala dated 14.3.1969. Thus the

plaintiff by purchase and inheritance acquired 2/3rd share in the suit property and were in joint possession with the defendant Nos. 1 to 8, the heirs

of Kalipada who had 1/3rd share. The plaintiffs demanded partition of the joint property which was refused by the defendants. So the suit.

2. The defendant Nos. 1 to 5 contested the suit by filing written statement and contended, inter alia, that Hiralal never sold his share to Chintamani

and Durgabala had no authority to sale her husband's share to Jibon by kobala dated 2.4.1952. They have asserted that they have 2/3rd share in

the suit property which was originally belonged to Kalipada and Upendra and that Chintamani died leaving behind Phoni, Gobinda and Jagannath

as his brothers besides his nephew Bechuram. Bechuram had no authority in the property and as such the plaintiffs could not succeed to the said

1/3rd share of Chintamani. The record of rights in respect of share of Upendra is erroneous. The possession of the plaintiff in the suit property is

denied.

3. Undisputed Background-Learned Assistant District Judge arrived at a finding that Durgabala had really felt actual necessity for essential and

obligatory purposes and had authority to transfer her limited interest of the suit property to Jibon. She transferred it and the said transfer was valid.

The subsequent transfer of the suit property by Jibon to the plaintiff is also a valid transfer. The plaintiff would be entitled to the aggregate share of

4/9th and the balance 5/9th share would go to the defendants. The judgment and decree passed by the learned Assistant District Judge was

challenged before the learned Additional District Judge and the learned Additional District Judge affirmed the judgment and decree passed by the

learned Assistant District Judge. In the aforesaid background this is the second appeal before this Court.

4. This Court has formulated substantial question of law to hear out the appeal and the same is:

1) Whether learned Courts below substantially erred in law by holding that Kobala dated 2nd April, 1952 executed by Durgabala in favour of

Jibon [ Ext. 1(a)] was valid and legal document conferring title upon Jibon without applying correct legal test.

5. Mr. Sudhis Dasgupta, learned Senior advocate appearing for the appellant has contended that on the death of Upendra his widow Durgabala

left her husband's place in the year 1932 and started living at Howrah at her father's place. So the possession of the suit property was with the

plaintiffs. Durgabala was illiterate and issue less. She sold the suit property to her brother Jibon in the year 1952. She had limited interest in the suit

property as a Hindu widow. Hindu Succession Act came into force on 17.6.1956. The suit property was fettered with the principles of reversion

to the heir of Upendra, Durgabala's husband. Durgabala died on 9.12.1965 and on her death the life interest which she had became non-est. The

sale of suit property by Jibon to Panchulal Das Modak was nothing but a paper transaction as on the death of Durgabala no title passed to the

plaintiffs. Defendants being the reversionary got the property after the death of Durgabala.

6. Mr. Dasgupta has further contended that there was no pleading of legal necessity of Durgabala to transfer the suit property to Jibon. The

evidence of legal necessity of P.W. 1 is a hearsay evidence. P.W. 1 was minor at the material point of time. No issue on "legal necessity" was also

framed. Durgabala being an illiterate woman was dependent on his brother Jibon and Jibon had ample scope to influence her sister Durgabala for

executing kobala in his favour. There is no evidence to the effect that the content of the kobala/deed was read over and explained to Durgabala

before she put her L.T.I. on the deed.

Mr. Dasgupta has relied on:

- 1) Banku Behari Mukherjee and Others Vs. Amulya Chandra Ghosh, ;
- 2) 25 Indian Appeal 183;
- 3) 42 Indian Appeal 64;
- 4) 46 Indian Appeal 72;
- 5) 30 CLJ 56 and
- 6) Bhagat Ram (D) by Lrs. Vs. Teja Singh (D) by Lrs., .

7. Mr. S.K. Mallick, learned advocate appearing for the respondent has contended that it is not admitted that Upendra Nath Kabash, husband of

Durgabala died in 1932. He had died after 1937. It is an admitted fact that Durgabala had (right to maintenance) limited interest in the property

which she had transferred to his brother Jibon Krishna Das. Right to Maintenance is a right to property in lieu of maintenance is not alienable unless

there is necessity. There is clear evidence that Durgabala visited Gaya in 1952 and if it is deducted by 15 years (vide page 25 of paper book) then

1937 the year of death of Upendra is coming. There is nothing in the pleading except so called corrected pleading that Upendra died in 1932.

There is no evidence to show that Upendra died in 1932. Therefore, it is a fact that Upendra died in 1937 and Durgabala had the right to property

under the Hindu Women's Rights to Property Act, 1937. It has come in evidence that Durgabala had legal necessity. So there was no bar on her

part to transfer it.

8. Mr. Mallick has contended further that there is concurrent finding that Durgabala had been to Gaya for offering Pindo for her husband's Shradh.

The said concurrent finding of the learned Courts below is a finding of fact. Ordinarily unless there exist sufficient and cogent reasons, the finding of

fact arrived at by the Courts below are binding on the Hon'ble High Court. The deed [Ext. 1(a) ] speaks that Durgabala had legal necessity for

transfer of the property. It will appear from the judgment of the Trial Court (vide page No. 7 of the paper book).

9. Mr. Mallick has argued also that the word "possession" has wide meaning. If a person has right to possess then it is sufficient regarding the

factum of possession. If it is considered, for the argument sake that Durgabala was not in possession of the property in question even then the

possession is to be interpreted liberally. The R.S. Ror has been exhibited. It shows that Jibon was in possession along with others as the property

was not partitioned. He has referred to Articles 176,178,180 and 181A of Mulla's Hindu Law (15th Edn.) at page 222 and page 230 and has

contended that alienation for religious purpose is valid. He has also referred to Articles 373 and 374 of Hindu Law (14th Edn.) at page 900 and

has contended that Durgabala's property was her property as widow.

Mr. Mallick has referred to:

1) S.S. Munna Lal Vs. S.S. Rajkumar and Others, ;

2) Ram Dulare and Another Vs. Smt. Batul Bibi, ;

3) Smt. Naresh Kumari (Dead) By Lrs. and Another Vs. Sh. Shakshi Lal (Dead) By Lrs. and Another, and

4) Chandrika Singh (Dead) by LRs. and Another Vs. Sarjug Singh and Another, .

10. He has supported the judgment of the learned Courts below and has submitted that the appeal may be dismissed.

11. Undisputed Background-Title Suit 145 of 1975 was dismissed on contest on 16.4.1984. Plaintiffs preferred appeal being Title Appeal No.

425 of 1985 challenging the said judgment and decree of dismissal. The appeal was allowed. The judgment and decree dated 16.4.1984 was set

aside. The suit was sent back on remand for fresh adjudication with the observation that it was incumbent on the plaintiffs to prove that Durgabala

had legal necessity for transfer and also had authority to transfer her limited interest to Jibon Krishna Das.

12. On receipt back the record on remand the learned Assistant District Judge allowed the parties to examine witnesses. Plaintiffs examined P.W.

5 Bochan Chandra Rej and the defendants recalled D.W. 1 Kashi Nath Kabash. Both the witnesses were cross-examined. Learned Assistant

District Judge had to confine itself on the point of legal necessity for transfer by Durgabala and her authority to make such transfer. The rest part of

the dispute regarding adoption of Bechuram by Chintamoni and dispute regarding 1/3rd share in the suit property of Bechuram was made

conclusive and that is why the learned Assistant District Judge had no scope to touch the said part of the case. Trial Court passed the judgment

and decree. The suit was decreed in preliminary form declaring plaintiffs 479th share in the property.

13. The judgment and decree dated 11.9.1986 passed by the learned Trial Court was appealed against. The learned lower Appellate Court

dismissed the appeal on 28.11.1989. It was found by the learned lower Appellate Court that Durgabala had legal necessity for going to pilgrimage

for performing the Shradh ceremony of her husband. Point for consideration before the Court below was whether Durgabala had legal necessity to

transfer the disputed property to her brother Jibon.

14. Durgabala was an issue less widow. She was in necessity to go to Gaya on pilgrimage and the said fact has been specifically averred in para 3

of the plaint which is however not denied in para 10 of the written statement. Therefore, the said non-challenge of specific assertion of Durgabala's

visit for pilgrimage tantamount to evidence in favour of Durgabala. The act of Durgabala to offer Pindo at Gaya is for spiritual welfare of the dead

soul of her husband.

15. In the case of Ram Dulare and Another Vs. Smt. Batul Bibi, , it is held:

Hindu widow can alienate the property for legal necessity or for the benefit of the estate Gaya Shradh being an obligatory religious act for the

salvation of the husband's soul, his widow can alienate the property for raising funds for the purpose.

16. In the case of Smt. Naresh Kumari (Dead) By Lrs. and Another Vs. Sh. Shakshi Lal (Dead) By Lrs. and Another, , the Hon"ble Apex Court

has held:

A Hindu widow has got only qualified proprietorship in her estate which she can alienate only when there is justifying necessity and the restrictions

on her powers of alienation are inseparable from her estate. For legal necessity she can convey to another an absolute title to the property vested in

her. If there is no legal necessity the transferee gets only the widow's estate which is not even an indefeasible life estate for it can come to an end

not merely on her death but on the happening of other contingencies like remarriage adoption, etc. If an alliance from a Hindu widow succeeds in

establishing that there was legal necessity for transfer, she is completely protected and it is immaterial that the necessity was brought about by the

mismanagement of the limited owner herself.

17. There is concurrent finding that Durgabala had been to Gaya for offering Pindo for upliftment of the departed soul of her husband. The Kobala

dated 2.4.1952 executed by Durgabala in favour of Jibon is an old document of more than 30 years. Regarding its genuineness section 90 of the

Indian Evidence Act comes into play and it may be presumed that the document being 30 years old and the execution of the same by Durgabala is

nothing but genuine. The deed was exhibited as Ext. 1(a). It was produced by the plaintiffs as Jibon sold his interest to the said property to the

plaintiffs by registered kobala dated 14.3.1969 [Ext. 1(b)].

18. There is concurrent finding too regarding the legal necessity of Durgabala for transfer of the property to Jibon Krishna Das. Durgabala

transferred the property to Jibon in the year 1952. The property was recorded in the name of Jibon along with others as it was not partitioned in

the revisional settlement record of right. Jibon thereafter transferred the property (1/3rd share) to the plaintiffs by Kobala dated 14.3.1969.

19. In the case of Chandrika Singh (Dead) by LRs. and Another Vs. Sarjug Singh and Another, , the Hon"ble Court has held:

We may before adverting to the question raised before us must observe that the High Court dealt with the matter in a very slipshod manner. It

interfered with the finding of fact arrived at by the First Appellate Court without assigning any reason therefor. While exercising its jurisdiction u/s

100 of the Code of Civil Procedure, the High Court is required to formulate a substantial question of law in relation to a finding of fact. The High

Court exercises a limited jurisdiction in that behalf. Ordinarily unless there exists a sufficient and cogent reasons, the findings of fact arrived at by

the Courts below are binding on the High Court.

20. In the case of Narayanan Rajendran and Another Vs. Lekshmy Sarojini and Others, , the Hon"ble Apex Court has held:

20. Once again we are making serious endeavour to re-capitulate the legal position with the fond hope that the High Courts would keep in mind

the legal position before interfering in a case of concurrent findings of facts arrived at by the Trial Court and upheld by the First Appellate Court.

21. "33. Section 100 of the Code of Civil Procedure, 1908 (for short "CPC") corresponds to section 584 of the old CPC of 1882. Section 100

(prior to the 1976 Amendment) reads as under:

22. "100. Second Appeal.--(1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force,

an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to a High Court, on any of the following

grounds, namely:

(a) the decision being contrary to law or to some usage having the force of law;

(b) the decision having failed to determine some material issue of law or usage having the force of law;

(c) a substantial error or defect in the procedure provided by this Code or by any other law for the time being in force, which may possibly have

produced error or defect in the decision of the case upon the merits.

(2) An appeal may lie under this section from an appellate decree passed ex-parte."

34. A reference of series of cases decided by the Privy Council and this Court would reveal true import, scope and ambit of section 100 CPC.

23. "35. The Privy Council in Luchman Singh v. Puna observed that a second appeal can lie only on one or the other grounds specified in the

present section.

36. The Privy Council in Pertap Chunder Ghose v. Mohendranath Purkait observed that the limitation as to the power of the Court imposed by

sections 100 and 101 in a second appeal ought to be attended to, and an appellant ought not to be allowed to question the finding of the first

Appellate Court upon a matter of fact.

36. In Durga Chowdhry v. Jewahir Singh Chowdhry the Privy Council held that "the High Court had no jurisdiction to entertain a second appeal

on the ground of erroneous finding of fact, however gross or inexcusable the error may seem to be.

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42. It may be pertinent to mention that as early as in 1890 the Judicial Committee of the Privy Council stated that there is no jurisdiction to

entertain a second appeal on the ground of an erroneous finding of fact, however gross or inexcusable the error may seem to be, and they added a

note of warning that no Court in India has power to add, or enlarge, the grounds specified in section 100 of the Code of Civil Procedure.

45. The amendment Act of 1976 has introduced drastic changes in the scope and ambit of section 100 CPC. A second appeal u/s 100 CPC is not

confined to cases where a question of law is involved and such question must be a substantial one. Section 100, as amended reads as under:

100. Second appeal.--(1) Save as otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal

shall lie to the High Court from every decree passed in appeal by any Court subordinate to the High Court, if the High Court is satisfied that the

case involves a substantial question of law.

(2) An appeal may be under this section from an appellate decree passed ex parte.

(3) In an appeal under this section, the memorandum of appeal shall precisely state the substantial question of law involved in the appeal.

(4) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.

(5) The appeal shall be heard on the question so formulated and the respondent shall, at the hearing of the appeal, be allowed to argue that the

case does not involve such question:

Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the

appeal on any other substantial question of law, not formulated by it, if it is satisfied that the case involves such question:

Cases decided after the 1976 Amendment

25.46. In *Bholaram v. Ameerchand* a three Judge Bench of this Court reiterated the statement of law. The High Court, however seems to have

justified its interference in second appeal mainly on the ground that the judgments of the Courts below were perverse and were given in utter

disregard of the important materials on the record particularly misconstruction of the rent rate. Even if we accept the main reason given by the High

Court the utmost that could be said was that the findings of fact by the Courts below were wrong or grossly inexcusable but that by itself would not

entitle the High Court to interfere in the absence of a clear error of law.

21. In the case in hand substantial question of law is formulated. The correct legal test here-"" the legal necessity to alienate the property in issue.

To assess it the Courts below looked back to the pleadings of the parties. The need for *Durgabala* was taken for consideration. *Durgabala*, a

Hindu widow had a pious obligation to observe *Shradh* ceremony of her husband at Gaya. It was her mission to offer ""*Pindo*"" to the soul of her

dead husband, *Upendra Nath Kabash* for its spiritual upliftment. The remand order of the first Appellate Court virtually specified the point to be

considered by the learned Trial Court. The point of legal necessity and the authority of *Durgabala* were the subject matter of decision before the

learned Courts below. The order of remand was not challenged by either of the parties. It may be presumed safely that the parties were aware as

to what are the points on which the learned Courts below was directed to adjudge. Therefore, non-framing of issues on the point of legal necessity

of *Durgabala* by the learned Trial Court before taking up the matter after remand is of no importance. It cannot be said that the appellants have

been prejudiced for non-framing of such issue by the learned Trial Court before proceeding with the hearing of the Title Suit once again after

remand.

22. Taking the aforesaid background in mind and regard being had to the decision of the Hon"ble Apex Court, this Court find that the *Kobala*

dated 2nd April, 1952 executed by *Durgabala* in favour of *Jibon* [Ext. 1(a)] was valid and legal document conferring title upon *Jibon* as it was for

her legal necessity and *Durgabala* had the authority to execute such document.

23. The judgment and decree passed by the learned lower Appellate Court is affirmed.

24. In the result, the appeal stand dismissed.

25. There is no order as to costs.

26. Send down the lower Court record at once. Urgent Photostat certified copy of this judgment be supplied to learned counsel of the parties, if



applied for.