

(1880) 05 CAL CK 0010

Calcutta High Court

Case No: None

Rajender Dutt

APPELLANT

Vs

Sham Chund Mitter
and Others

RESPONDENT

Date of Decision: May 21, 1880

Acts Referred:

- Criminal Procedure Code, 1898 (CrPC) - Section 196

Citation: (1881) ILR (Cal) 106

Hon'ble Judges: Wilson, J

Bench: Single Bench

Judgement

Wilson, J.

This case came on for settlement of issues on the 19th and 22nd April, when the several questions of law arising in the case were argued. It was admitted that there was no real contest as to the facts of the case-that is to say, of the correctness of the pedigree as alleged, and the execution of the several documents set out in or annexed to the pleadings. But as there are infants parties to the suit, it was necessary that these matters, so far as they affected them, should be proved. I directed, u/s 196 of the Procedure Code, that these facts might be proved by affidavit.

2. Affidavits have since been filed, and the whole case is now ready for decision. (His Lordship then stated the facts of the case, and proceeded as follows):

3. There is no averment or admission in the pleadings that the plaintiff purchased with notice of the agreement of 1858. I called attention to this during the argument, and Mr. Bonnerjee, the plaintiff's counsel, admitted that his client took with notice.

4. The first question is, whether the plaintiff is disentitled to partition by reason of Clause 6 of the agreement of 1858.

5. The general scheme of the arrangement is, in my judgment, clearly such as cannot be binding except upon the actual parties to it. Its object is to settle the family property upon trust for the maintenance of the members of the family born and to be born. This could not be done by gift-Tagore v. Tagore 9 B.L.R. 377; and what cannot be done by gift cannot be done by the intervention of a trust-Krishnaramani Dasee v. Ananda Krishna Bose 4 B. L.E. O.C. 231. On this ground I think Clause 2 and the clauses subsidiary to it, viz., Clauses 3, 4, 7, 9, and 10, could bind nobody but the contracting parties.

6. At first sight those clauses seem also to create an absolute perpetuity. But seeing that the subject of partition is expressly dealt with in Clause 6, it may perhaps be that the other clauses were intended to operate only so long as the property remained unpartitioned, and subject to the ordinary right of partition, except so far as Clause 6 could control that right. However this may be, I think the trusts are bad on the other ground I have stated.

7. Clause 5, which attempts to establish a new line of descent somewhat analogous to descent-in-tail male, is clearly inoperative.

7. But it was argued that" Clause 6 is valid and binding upon the present plaintiff. The substance of that Clause is, that, during the lifetime of the five brothers and the survivors and survivor of them, if any brother or the son or sons of any brother desired to separate, he should be deprived of all share in the property, and should receive Es. 20,000, or a rateable share of that sum instead. This seems to me to be a prohibition of partition under penalty of having to accept a fixed sum of money in lieu of a share of the estate.

8. The short question that has to be decided is, whether the owner of property can by mere contract during his life prevent his heirs from partitioning property after his death; and further, whether such a prohibition is binding upon an assignee of the heir.

9. An attempt was indeed made to put the matter in a somewhat different light. It was said that a .man may by gift inter vivos, or by will, give property to one person with a gift over to another, provided the latter gift is to take effect on or before the termination of a life in being at the time of gift-Soorjee-money Dossee v. Denobundoo Mullick 9 Moore"s I. A. 123; and it was argued that Clause 6 should be read as giving the property over to the other sharers in case any one sought partition during the life of any of the contracting parties. But the gift would then be void. A gift, whether primary or substitutionary, can only be to some one in existence at the time of the gift-Tagore v. Tagore 9 B.L.E. 377, and this gift, if it be one, is a gift not to the brothers, but to them or their respective heirs, born or unborn at the date of the document, as the case might be. Such a gift cannot take effect-Tagore v. Tagore 9 B. L. E. 377 Soudaminy Dasee v. Jogesh Chunder Dutt I.L.E. 2 Cal 262, Kherodemoney Dassee v. Doorgamoney Dassee ILR 4 Cal. 455.

10. The clause must be regarded as a mere restraint on partition. Now it is clear that a man cannot by gift inter vivos or by will give property absolutely to another, and yet control his mode of enjoyment in respect of partition or otherwise. It is scarcely necessary to cite authority for this.

11. I know of no authority for saying that a man can allow property to descend absolutely to his heirs, and yet by any act during his life restrain their mode of enjoyment in respect of partition or otherwise. The case of *Anath Nath Dey v. Mackintosh* (8 B.L.R. 60) was cited as an authority. In that case two joint owners executed a deed of trust by which certain properties were set apart to provide for religious worship; the worship was to be performed in the family dwelling-house, which was not included in the property set apart, and it was agreed that for twenty years the house should not be partitioned. *MACPHIBSON, J.*, held, that a mortgagee of a half share of the house, taking from the representatives of one of the contracting parties with notice of the trust, could not claim partition during the twenty years. That case decided, I think, no more than this—that there was a valid trust for the performance of certain worship in the dwelling-house, and as incidental to that trust, a restraint upon partition or alienation during the period of the trust, and that a mortgagee with notice was bound by the trust. This case is very different. If there be any trust here, it is the trust sought to be created by Clause 2, and that trust, for the reasons I have stated, is bad. There remains nothing but the restraint on partition.

12. In *Ramdhane Ghose v. Annund Chunder Ghose* (2 Hyd 93) it was held that a contract similar to the present was binding upon the parties to it. I do not know that the question has ever been expressly raised whether such an agreement is binding upon the heirs of the parties. In the absence of authority I do not see how a man can have greater power of control over the enjoyment of property which he allows to descend than over property which he gives by deed or will. The case of *Anandchandra Ghose v. Prankisto Dutt* (3 B.L.R. O.C. 14) is, I think, an authority to the effect that such an agreement does not bind a purchaser from one of the contracting parties. It cannot any more bind a purchaser from the heir of a contracting party.

13. I come to the conclusion, therefore, that Clause 6 of the agreement of 1858 affords no answer to this suit.

14. A point is also raised in the written statement, founded upon Clause 11 of the Agreement of 1858, as to the capital of the banianship and agency business. But I do not think any question arises as to that. The plaintiff does not claim any share in the business or its capital, and I read Clause 11 as only regulating the extent to which the business should be entitled to "draw upon the family funds."

15. The third question raised was as to the family dwelling-house. It was contended by the plaintiff that the gift by *Neemdhane Dassee* in 1860 was not an absolute gift

to the idol, but that subject to a trust for worship there was a gift for the benefit of the members of her family mentioned in the deed, of whom Prakash was one. And it was sought to bring the case within the authority of such cases as *Ashutosh Dutt v. Doorgachurn Chatterjee* (L.E. 6 I. A. 182). I do not think this is so. The deed in terms gives the house to the idol, and appoints the four surviving sons managers. The house is to be the perpetual habitation of the idol. The four managers and the sons of her deceased son and their sons are to dwell in it in succession, without power to partition or alienate. After paying the Government revenue, the profits are to be applied to certain poojahs and other religious objects, and the manager for the time being is to receive Es. 5 a month. The balance, if any, is to be employed in building new buildings for the accommodation of the families of the managers. If there be still any surplus, it is to be employed in the purchase of lands in the name of the idol, to be added to his estate. The deed then makes provision for future managers who are to be the members of the family in the male line in succession, excluding any who shall forsake his religion, or give a widow of his family in marriage or marry a widow.

16. This is in my opinion a good gift of the house to the idol absolutely. The only benefit given to any one else is the salary of Es. 5 to the manager, and the right given to actual and potential managers to live in the house. These provisions do not, I think, make the property anything but debutter.

17. The decree will declare that the plaintiff is entitled to the one-tenth share of Prakash in the properties claimed, exclusive of the family dwelling-house. The plaintiff is also entitled to a partition.

18. But on partition the widow of Gobind Chund will be entitled for life to a share equal to that of the plaintiff and of her son Nolit Chund.

19. There will be the usual partition decree, and costs will follow the ordinary rule in partition suits.