(1870) 01 CAL CK 0016

Calcutta High Court

Case No: Review. No. 245 of 1869 in Special Appeal No. 32 of 1869

Mussamat Indirjit Kunwar and Another		APPELLANT
	Vs	
Mussamat Raj Kunwar alias Sheomurat Kunwar		RESPONDENT

Date of Decision: Jan. 12, 1870

Final Decision: Dismissed

Judgement

Kemp, J.

This is an application to review our judgment, dated the 28th of July 1869. The case, when it was before us in special appeal, was argued at great length on both sides; by Mr. Allan for the special appellant, and by Mr. Gregory for the special respondent. I (speaking for myself) have had considerable difficulty in following the argument of the learned counsel, Mr. Montriou; I therefore prefer taking the grounds of this review as stated in the application for review, and as far as my memory serves me, I shall briefly notice the arguments of the learned counsel on the points taken in review. The first question which arises in the application for review is the construction and operation, in law and in fact, of the ikrarnama 2ndly, the conduct of the plaintiff in the case originally brought by the life-tenant, Mahes Kunwar, against the donee under the ikrar; and 3rd, the question whether this Court should have, as contended in the application for review, listened to the objection contained in the 4th ground of special appeal, namely, the question of whether the special law of limitation applies or not, and whether, in the absence of any arguments in the Court below on this point, this Court was bound to notice the point in question. On the construction and operation of the ikrarnama, we have already in our former decision pronounced an opinion. We have held most distinctly that under that ikrarnama nothing but the life-interest of the donor passed. The learned counsel, Mr. Montriou, has contended that the ikrarnama is a complete alienation of the title of Mahes Kunwar, the donor, and that the possession of Nund Kunwar under that ikrarnama was adverse to the donor; this question had already been argued by Mr. Allan, when the case was heard in

special appeal, and we have, right or wrong, pronounced an opinion upon the question. The plaintiff in this suit is a reversionary heir; it is true that during the life-time of Mahes Kunwar he might have brought a suit for the purpose of having it declared that the ikrarnama was not binding upon him when the succession opened out to him, but that suit, if brought, could only have been in the nature of a declaratory suit; moreover, the plaintiff''s right to recover at all depended solely upon the fact of his being the heir, not of Mahes Kunwar, but of Bakhuri Sing, at the time of the death of the life-tenant. The mere fact, therefore, of the reversioner not having brought a declaratory suit in the life-time of the life-tenant to have it declared that the ikrarnama was an alienation not binding upon the reversioner when the succession opened out to him, does not in any way preclude him from bringing a suit when the cause of action accrued to him as heir of the last proprietor, namely, Bakhuri Sing. Now the donee, under the ikrarnama, was not under the Hindu law either the heiress of Bakhuri Sing or of Mahes Kunwar; Mahes Kunwar thought proper for purposes best known to herself to make over the property, which she held as life-tenant, to Nand Kunwar on these terms, that Nand Kunwar was to pay the debts of the donor, and that, with the exception of certain estates which the donor reserved for her maintenance, the donee was to take possession of the rest of the estate and to procure the registration of her name on the rent-roll of the Collectorate. It is contended by the learned counsel, Mr. Montriou, that this was a complete alienation, and that looking to the conduct of the plaintiff, the reversionary heir, in allowing mutation of names to take place, and in taking no steps to question this ikrarnama at an earlier stage, he has accepted it as a complete alienation, and is now barred by the adverse possession of the donee under that deed. The learned counsel has also contended, most strenuously, that unless under no circumstances can an alienation by a Hindu widow, and the possession under that alienation be considered adverse to the reversionary heir, it must be held in this case that, looking to the terms of the deed itself and to the conduct of the reversionary heir, the possession of the donee was adverse.

2. I am of opinion that the possession of the donee was not adverse to the reversionary heir. There are, of course, cases in which, where a cause of action accrued to the widow during her lifetime, and where she neglected to assert her right, and permitted a third party to hold possession adversely to her, and that adverse possession enured during the life-time of the widow for a period beyond that prescribed by the law of limitation, the possession of the third party which was adverse to the widow, would also be adverse to the reversioner; and it is to a case of this description that the Full Bench ruling to be found in Nabin Chandra Chuckerbutty v. Issar Chandra Chuckerbutty Case No. 460 of 1867, April 29th 1868 applies. In that case the point is referred by a Judge of this Court well versed in Hindu law; Mr. Justice Mitter was of opinion that limitation would not run against a reversionary heir under the Hindu law until after the death of the female heir who succeeded to the estate of the deceased proprietor. Now here was an opinion which was entitled to considerable weight and respect. The learned Judges sitting on the Full Bench pronounced separate judgments, that is to say, three Judges out of five pronounced separate judgments; in the judgment of His Lordship, the Chief Justice, he observed, "that

in that case the cause of action did accrue to the female heir, and the question was whether the reversionary heir upon her death acquired a new and independent cause of action, or merely succeeded to the same cause of action which was vested in the female heir in her life-time." In that case the learned Chief Justice found that there was a cause of action which accrued to the female heir, and that therefore the reversionary heir did not acquire a new and independent cause of action, and therefore the limitation which ran against the widow ran equally against the reversioner. Mr. Justice Phear observes, "that if the proprietary right was invaded whilst in the hands of the widow, the cause of action accruing from that act of invasion would be none other when it came to be pursued by the reversionary heir, than it was when the female heir herself was the person who could sue." It therefore followed in the opinion of the learned Judge, "that if the reversionary heir brought a suit founded upon that act of invasion of the proprietary right, the time prescribed in the Statute of Limitation would run against him from the date of the act; but then," continues the learned Judge "it may be that the possession of a third party which would be no trespass of the proprietary rights when in the hands of the female heir, may, if persisted in, become so when that proprietary right passes to the reversionary heir."

3. Mr. Justice Macpherson in his judgment is very clear upon the point, and that judgment, in my opinion, is entirely applicable to the facts of the case now before us. He observes, "that there is a great difference between the case which was before the Full Bench, and a case in which a Hindu female has alienated property belonging to the estate which she takes as heiress without sufficient reason for making such alienation; in the latter case," the learned Judge observes, "the alienation would be good as against her, so far as her own life-interest is concerned. Therefore in fact no cause of action necessarily would arise to the reversioner in respect of the alienation of a widow so long as the widow lives; the cause of action to the reversioner would not arise until the death of the widow, when the reversioner''s cause of action for the first time accrues." In the case before the Full Bench the property never reached the hands of the widow but had all along been held adversely to her, and therefore as properly observed by the learned Judge, a suit to recover possession by whomsoever it may be brought would be barred unless instituted within twelve years from the commencement of the adverse possession. In another case--Srinath Gangopadhya v. Mahes Chandra Roy 4 B.L.R., F.B., 3, reference was made by Kemp and Jackson, JJ., the point referred being whether in a suit by a reversioner to set aside an adoption, and to recover possession in right of inheritance the cause of action arose from the death of the widow when the right of entry first accrued to the reversioner, or from the date of the possession taken by the adopted son, though such possession be taken with the consent of the widow, the life tenant. In that case the judgment of the majority of the Court was delivered by his Lordship the Chief Justice. In one passage of the judgment his Lordship remarks, that he was of opinion "that the possession of an adopted son or his heir, with the acquiescence of the adopting mother, is not an adverse possession as against her in the sense in which that term is used with reference to the statute of limitation." Mr. Justice Macpherson, who delivered a separate judgment, observed that "an improper giving away or other

alienation of her husband''s estate by a Hindu childless widow is of no operation as against the reversioner, and therefore until it be ascertained whether in giving possession to the alleged adopted son the widow acted in a manner warranted by the Hindu law, it cannot be ascertained whether that possession was adverse to the reversioner." Now applying these two judgments to the facts of the case before us, it appears to me very clear, that whatever construction may be put upon the ikrarnama, whether, as stated in our judgment, it simply passes the life-interest of Mahes Kunwar, or whether she intended, as contended by the learned counsel, Mr. Montriou, to make an out and out alienation of the estate which she inherited from the deceased proprietor, it is clear to me that, to use the words of Mr. Justice Macpherson in the judgment just quoted, "this is an improper giving away of the estate of the deceased proprietor" by the life-tenant, Mahes Kunwar. The donee, under the ikrarnama, took possession of the estate with the permission and acquiescence of the life-tenant Mahes Kunwar; the donee, as already observed, was not the heiress of the deceased proprietor or of the donor Mahes Kunwar her possession was a permissive possession, and was not in any sense adverse or hostile to the reversioner. With reference to the conduct of the plaintiff in the suit subsequently brought by Mahes Kunwar, upon which great stress has been laid by the learned counsel, Mr. Montriou, I would observe that that suit was brought during the life-time of Mahes Kunwar. She sued to set aside that ikrarnama because, and solely because, the donee under the ikrarnama had not fulfilled the conditions under which the gift was made, namely, she had not paid the debts of the donor. Mahes Kunwar did not dispute the execution of the ikrarnama, and the donee Nand Kunwar did not claim as heiress of Mahes Kunwar, but claimed solely under the ikrar, and the issue was whether the terms of the ikrar had been complied with or not. It is to be remembered that Mahes Kunwar won the suit in the first Court, namely, she succeeded in establishing that Nand Kunwar had not acted up to the terms of the ikrarnama. Nand Kunwar appealed, and it was in this stage of the case, and after the death of Mahes Kunwar, the respondent in that appeal, that the present plaintiff appeared in Court. It has been said, as was contended by Mr. Allan, when the case was heard in special appeal, that the plaintiff, when he appeared, as representing Mahes Kunwar in the appeal, ought, to use the words of Mr. Allan, "to have shown his whole hand," that is to say, he ought not to have contented himself with taking up the case as Mahes Kunwar left it, but that he ought then and there to have declared that he was the reversioner, that he was not bound by the ikrarnama, and that he was entitled to possession. Now, in our former decision this point was fully discussed, and our judgment was given upon it; and in my opinion it is not right, when a case comes up on review to re-argue it entirely upon the same points: it is not because learned counsel think that the judgment of this Court is wrong (and it may be wrong,) that they are entitled to re-open and to re-argue for two days a point which has already been argued at great length by one of the leading pleaders of this Court; however, be that as it may, I proceed to add to the reasons already given in the former judgment of this Court, such further reasons as in my opinion meet the argument of the learned counsel on this point. I have already remarked that Mahes Kunwar had won the case in the first Court. The plaintiff, on the death of Mahes Kunwar, applied to the

Appellate Court to be admitted to carry on the case in the room of Mahes Kunwar, and the order of the Court was that he be admitted "waste jawab-dehi appeal," that is to say, to carry on the appeal. At that stage of the case, the plaintiff, to whom the succession to the estate of Bakhuri Sing had but just opened out, was not in a position to raise an entirely new case which had not been tried in the Court of first instance, and which was not in issue between the original parties to the suit, and therefore the mere fact that he did not at that stage of the case disclose his title, does not, in my opinion, lead to the inference that he in any way admitted the ikrar, or that because the ikrar was found by the Appellate Court to be binding as against Mahes Kunwar the life-tenant, it was equally binding upon the plaintiff the reversioner.

4. With reference to the last ground of review, which was that this Court ought to have listened to the plea raised in special appeal, with reference to the objection taken in the grounds of appeal to the Judge that the special law of limitation barred the plaintiff"s suit, I am of opinion that it does not appear either on the pleadings or in the judgments either of the first Court or of the Judge (which is wholly silent upon the point), that this plea was put in issue[4] in the first Court, or was argued before or pressed upon the Judge in appeal. In the first Court, I can find no argument or plea with reference to the special law of limitation. The judgment of the first Court proceeds to try the issue in bar with reference to the twelve years" limitation, and not with reference to the special term of limitation mentioned for the first time in the grounds of appeal to the Judge. The defendant below, the special appellant before us, did not mention under which section of the Law of Limitation she considered the case of the plaintiff to fall; moreover, it is not patent on the plaint that the claim of the plaintiff is barred under any of the sections of the Act which prescribe special terms of limitation. The suit was not to set aside any settlement or proceeding of the Collector, but it was a suit for possession, as heir of the late proprietor Bakhuri Sing, of the whole of the properties included in the ikrarnama, and amongst these properties of the diaras for which the special appellant in review seeks to apply the law of special limitation. It is not for this Court to presume that if this plea, that the special law of limitation barred this part of the case, had been addressed to the Judge and pressed upon him, he would so far have forgotten his duty as to have taken no notice of it at all. Some months after the special appeal is decided, nearly six months after, we are asked to send for the pleader who argued the case in the Judge"s Court, and to examine him, but we think it wholly unnecessary to do so, because if this plea was taken before the Judge, and pressed upon his notice, and the Judge neglected to pass any decision upon it, it was the duty of the applicant for review to apply to the Judge to re-consider his judgment on that point; not having done so, we can but hold that the Judge not noticing the point in his decision is simply owing to its not having been pressed upon him.

5. The case of Payne v. Constable 1 B.L.R., O.C., 49, which was pressed upon our attention, is not at all similar to the case before us; in that case in the plaint itself it was patent that the claim was one which was barred under the Statute of Limitation. It is true that the defendant did not plead the statute, but the learned Judges to whom the

reference was made, held that this was not a question of jurisdiction, but as it was patent on the plaint that the claim was barred, the Judge of the Court of Small Causes was bound to adjudicate on it, although the defendant did not plead the statute as a bar to the claim of the plaintiffs. In this case there is nothing in the plaint to show that the claim of the plaintiff is barred under the special law of limitation, and as already observed, it was not argued or put on issue in the first Court, and although taken without any specification in the grounds of appeal to the Judge and in the most vague and general terms, it was not pressed upon the attention of the Judge. In my opinion, therefore, we acted rightly in not permitting this point to be taken on argument in special appeal.

6. This disposes of all the main grounds taken in review. I adhere to the former judgment of the Court, which entered fully into all the points of the case, and I would reject this application for review with costs payable by the applicant.

Glover, J.

7. I am of the same opinion. With reference to one part of the argument adduced by Mr. Mackenzie, I wish to add, that as all the three Judges in the case of Payne v. Constable 1 B.L.R., O.C., 49 agreed that limitation was not a question of jurisdiction, the defendant had the power, if he chose, to waive that objection, and for the reasons given by Mr. Justice Kemp, I consider that the defendant in this case did waive that objection. I concur in rejecting this application with costs.

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[1] This was the fourth ground of special appeal.

[2] Before the argument commenced, the Court objected to counsel being heard at all, inasmuch as the review sought was either a repetition of the previous argument, merely re-discussion of former grounds, or it was upon grounds that had not been before argued or offered. Ultimately, the argument was allowed to proceed. The preliminary argument and discussion (as to whether the argument for review should be heard) was similar to that already fully reported in Bhawabal Sing v. Rajendra Pratap Sahoy, ante, 321; see ante, p. 332.

[3] In Maha Raja Dheeraj Raja Mahatab Chund Bahadoor , an objection that the right of Government to sue was barred by limitation, was taken up for the first time in appeal before the Privy Council and allowed.

[4] The issue was general--"Whether or no the hearing of this action is barred by the Law of Limitation."