
(1871) 07 CAL CK 0006

Calcutta High Court

Case No: None

Anath Nath Day

APPELLANT

Vs

A.B. Mackintosh and
Others

RESPONDENT

Date of Decision: July 17, 1871

Judgement

Macpherson, J.

In this case the question at issue is as to the validity and effect of a mortgage of a moiety of the family dwelling-house belonging to the representatives of Ashutosh Day and Promothonath Day, which mortgage was given to the defendant Mackintosh by the executors and executrix of Ashutosh Day. Ashutosh Day and Promothonath Day in November 1849 were joint in estate, but had about that time arranged for a partition of their property, had appointed commissioners to make it, and had agreed to the mode of division proposed by the commissioners. On the 26th November 1849, an agreement or "niamputtro" was entered into between Ashutosh and Promothonath on which the decision of the present case chiefly depends. In that agreement, the two brothers after reciting that their property was still joint, and that they had been ever since the death of their father, jointly performing and keeping up the family religious ceremonies, &c., declare that it is their intention that the annual pujas and so forth at the family dwelling-house, and the entertainment of strangers, shall be kept up as theretofore, and that disbursements shall be made for their pujas and ceremonies according to a list or scale annexed to the agreement. Then they specify certain properties (amongst which the family dwelling-house is not included) the income of which they estimate at Rs. 14,000 a year, and say they have "set apart" these properties. Having set these estates apart they proceed:--(reads part of deed set out Ante p. 62). The agreement in fact is an agreement by which they set apart properties producing a large income, and agree that that income shall be expended on religious ceremonies and acts to be performed jointly for twenty years, and part of which are to be performed in the family dwelling-house which is not to be divided during that period.

2. Promothonath Day died in December 1849, and left a will whereby he appointed Ashutosh Day, and his two widows, Nimai Mani Dasi and Santu Mani Dasi, executor and executrices; and in his will he directs that the purport of the agreement he had executed for the performance of pujas, &c., should never be violated.

3. In 1854 two suits were instituted in the Supreme Court, which were in fact cross-causes. In one, Manmathanath Day and the present plaintiff, the sons of Promothonath Day, were plaintiffs, and the executor and the executrices of Promothonath Day were defendants. In the other, Ashutosh Day was the plaintiff, and the widows and sons of Promothonath Day were the defendants. In these causes a decree was made on the 21st May 1855, which declared that the will of Promothonath Day, and the agreement of the 26th November 1849, executed by him and Ashutosh Day, were well proved and established and binding on Ashutosh Day and his heirs and representatives, and on the representatives of Promothonath Day. The decree ordered an account of the rents and profits of the estate to be taken as on the footing of the partition and agreement of November 1849; and Ashutosh Day was appointed receiver of the estate of Promothonath Day.

4. Ashutosh Day died in January 1856, leaving a will of which he appointed Charu Chandra Ghose and Sarat Chandra Ghose and Srimati Nabinmani Dasi his executors and executrix: and this will was at once proved by Charu Chandra Ghose and Srimati Nabinmani Dasi, and subsequently by Sarat Chandra Ghose on his attaining full age. The 14th clause of Ashutosh Day's will confirms the agreement of the 26th November 1849, and directs his representatives to carry out the terms of it. After the death of Ashutosh Day various other proceedings were had in the suits: and amongst others there was a report of the master, of the 6th May 1857, as to the manner in which the terms of the agreement could be best carried out with reference to the management of the property, the income of which was set apart for religious ceremonies and acts, and with reference to the actual performance of the religious ceremonies, &c. On the 29th June 1857, the Court made an order appointing a receiver in the place of Ashutosh Day, and giving special directions as to the keeping of a separate account by the receiver of the income of the property set apart, and as to the manner in which the payments of that income were to be made to the persons whom the Court declared to be entitled from time to time to perform the ceremonies.

5. On the 14th July 1863, the executor and executrices of Ashutosh Day executed a mortgage of a moiety of the dwelling-house to Mr. Mackintosh, and this mortgage it is which the defendant is now seeking to enforce.

6. I find generally on the evidence, and without any hesitation that the agreement of November 1849 was not in its inception fraudulent or bad, and that so far as it provides an income from which to defray the expenses of the religious ceremonies, &c., it dealt with a very small part only of the property of Promothonath and Ashutosh Day. I find further that when Ashutosh Day died, the estate belonging to the representatives of

Promothonath Day, independent of the property set apart, was very large and far more than sufficient to meet any claims against Promothonath Day's estate. I find that the agreement of November 1849 has from the first, and up to the present hour, been steadily acted on by the representatives of Promothonath Day, and that it has also in like manner been acted on by the representatives of Ashutosh Day until quite recently. There is, in truth no evidence of its not being acted on by the representatives of Ashutosh Day, except in so far as the granting of this mortgage is evidence of it, for I do not consider the evidence given of seizures having been made by the Sheriff is any evidence of voluntary departure by the representatives of Ashutosh Day from the agreement. I also find that under the circumstances, Mackintosh took the mortgage with notice of the agreement, and of the fact that the agreement was recognized and was being acted upon and carried out under the decrees of the Supreme Court.

7. The question remains whether this mortgage which Mackintosh took with notice, but for which he paid valuable consideration is wholly bad, because the property had been dedicated absolutely to the service of the deities, and therefore was inalienable, or whether it is only bad as against the representatives of Promothonath Day, as being in breach of the agreement of November 1849, of the direction contained in the will of Ashutosh Day, and of the declarations contained in the decrees of the Supreme Court.

8. As regards the first branch of the question, whether the family dwelling house can be said to have been dedicated to the deities, and therefore not to be capable of being alienated, I am of opinion that it was not so dedicated, and that it had not become the property, so to speak, of the deities. The position of the family dwelling-house under the agreement is different from the position of the properties the income of which is devoted to religious purposes. As to these other properties, the agreement says, they are set apart; while as to the dwelling-house, the only direction is that the ceremonies shall be performed in it for twenty years, during which time it shall not be divided. There is a great difference between setting apart property to provide an income for religious purposes, and merely saying that the ceremonies which are to be paid for out of that income shall be performed in the family dwelling-house. It is unnecessary to say whether the other properties are dedicated so as to be absolutely inalienable, as the only matter in issue in this suit is the family dwelling-house. But I am clear that, whether they are dedicated in the strictest sense, or not, as regards the family dwelling-house there was no such dedication. There was merely a direction that the religious ceremonies should be performed in that house for a certain number of years during which the house should not be divided.

9. Then is this mortgage bad as against the plaintiff, as being an alienation which by reason of the agreement, the will of Ashutosh Day, and the various proceedings to which I have already referred, the representatives of Ashutosh Day had no power to make? The agreement of November 1849, it appears to me, is not merely an agreement that the property should not be partitioned for twenty years; it is also an agreement that it should not be alienated for that period. The agreement is not only that there shall be no partition

for twenty years, but that the ceremonies shall be carried on jointly in this house during these years. This implies necessarily, as it seems to me, that there shall be no alienation for twenty years, and that while there should be no partition there should also be no alienation. Mr. Marindin has referred to two cases as being in his favor, -- viz., *Ramdhone Ghose v. Anund Chunder Ghose* 2 Hyde, 9 and *Anand Chandra Ghose v. Prankisto Dutt* 3 B.L.R., O.C., 14, But neither of these cases really apply in the present instance. The first case decided merely that an agreement not to divide was binding between the actual individuals who made it. The other case merely decided that the alienation, the subject of the suit was not bad, inasmuch as the agreement not to divide did not contain any agreement or indication of an intention that the parties were not to sell, &c. In the present case there is no prohibition of partition or sale for an indefinite period. The prohibition is limited to twenty years from the death of the survivor of the contracting parties, Ashutosh Day and Promothonath Day. Whereas in the case of *Anand Chandra Ghose v. Prankisto Dutt* 3 B.L.R., O.C., 14, it was held that there was no intention to prevent alienation, though there was to prevent partition. I hold that in the present case there was no such contract not to sell or alienate for twenty years as not to divide for that period.

10. On the whole, the case seems to me to stand thus. These people in 1849 agreed, that for twenty years after the death of the survivor, this house should not be partitioned or alienated, and that the ceremonies should be performed there; the Supreme Court decreed that that agreement was binding on the heirs and representatives of Promothonath Day. Ashutosh Day died, and by his will charged his executors not to fail to carry out the agreement: after his death, as before it, the agreement was acted on and recognized by the Court, and steadily carried out by his representatives and those of Promothonath Day. With notice of all this, Mackintosh takes this mortgage; and his position is not even that of an ordinary creditor of Ashutosh Day's estate or of Charu Chandra Ghose, but the position of a person who knowing this property is charged with a trust chooses to come forward and lend his money on the security of a moiety of it. The defendant has no ground for contending that he is entitled to stand any higher than the executors of Ashutosh Day, and as they by the decree of Court and by the will of Ashutosh Day are bound to carry out the agreement, so in my opinion Mackintosh is bound. So far as the plaintiff and Manmathanath Day are concerned, the mortgage to Mackintosh is inoperative and of no effect for the twenty years. During that period the defendant is not entitled to possession in any shape, and therefore the injunction which had been granted will be declared good till the end of the twenty years,--i.e., till the 30th January 1876. At the end of that time, probably, the defendant will be entitled to possession on a partition being made, though not necessarily to possession except on a partition. I find, as a fact, that the land in front of the family dwelling-house is a part of and included in it. It was proved by one of the witnesses to be so, and I believe him.