
(1874) 12 CAL CK 0005

Calcutta High Court

Case No: Special Appeal No. 962 of 1874

Raghubram Nundee

APPELLANT

Vs

Gungahurry Nundee
and Another

RESPONDENT

Date of Decision: Dec. 21, 1874

Final Decision: Dismissed

Judgement

Markby, J.

In this case three persons beings in possession of property as a joint Hindu family, two out of that number ejected the third. Whilst the third member was out of possession, he sold his share in a specified portion of the property to the plaintiff, who brought his suit for possession against the other co-sharers. Both the lower Courts gave the plaintiff a decree. The only objection taken in special appeal, which appeared to us necessary to reserve for consideration, was this:--That as by the plaintiff's own admission his vendor was out of possession when the conveyance was executed, the plaintiff could not make a valid title to the property in dispute under a document which had not been followed or accompanied by possession.

2. This in substance raises the very broad and general question whether upon a contract of sale and purchase delivery of the possession of the thing sold is necessary to complete the title of the vendee.

3. There seems never to have been any suggestion that, under Mahomedan law, delivery is necessary to the transfer of ownership of either moveable or immoveable property except in the case of gifts. So by the common law of England it is not necessary in the case of moveables: and though it was at one time necessary in the case of immovables, under the Statute of Uses it is no longer so. The only question can be whether under Hindu law there is any difference in this respect.

4. It would no doubt lead to considerable inconvenience if the law upon such a subject varied with the religion of the parties to the transaction; and upon the whole I think the

general rule has been adopted in India that in the case of purchase and sale the ownership is acquired by the purchaser, though the transaction has not been followed by delivery.

5. That this is the accepted law of India is, I think, shown by the Registration Acts. In the first place the existence of a system of registration *prima facie* suggests that ownership is acquired without delivery. The reasons for the rule, which has so widely prevailed, requiring delivery for the transfer of ownership are not of one simple character. Whether, however, this ceremony was required because, taking place in public, it carried with it the consent of the community to which the parties belonged or because, taking place before an officer of justice, it carried the consent of the State, or simply because the transaction is one which ought to be notorious and open, so that all persons may know when it takes place (all of which influences have at one time or other affected and can still be traced on it), it has almost everywhere been supplanted by registration; and scarcely anywhere retained concurrently with registration.

6. Moreover, if we look at the special provisions of the Indian Registration Act, I think it will be seen that the framers of it contemplated, not a condition of the law in which delivery was rigorously required, but a condition of the law in which ownership both of moveables and immovables was frequently transferred without delivery. The view taken in the Act seems to be the ordinary English view that a document executed by the parties may operate not only as a contract but as a conveyance; and the general object of the Act seems to be to require that such documents should be registered in order to have that operation. It may not be impossible to look upon the Act as providing for a registration of contracts only, and not of titles. But if so, a great deal of the language of the Act would be superfluous and unmeaning. Throughout Part X of the last Registration Act, the Act seems to contemplate that the document, if registered, will "take effect" (which must I think mean "will operate as a conveyance") as soon as executed, if the requirements as to registration have been fulfilled. It is true that a certain advantage is given to a purchaser who has obtained delivery, but that does not show that such a purchaser had this advantage independently of the Act. It rather points the other way.

7. The conclusion, therefore, at which I should arrive is, that by the law of this country delivery is not generally necessary for a transfer of ownership: but it was contended that there are certain recent cases in which a contrary proposition has been laid down.

8. The first of these is the case of *Raja Sahib Prahlad Sen v. Baboo Budhu Singh* 2 B.L.R., P.C., 111; S.C., 12 Moore's I.A., 275. The Privy Council in that case, commenting on a judgment of the Sudder Court, use these words, which have since been so often referred to: "They" (the Judges of the Sadder Court) "seem to have ruled that the effect of the execution of a bill of sale by a Hindu vendor is, to use the phraseology of English law, to pass an estate irrespectively of actual delivery of possession, giving to the instrument the effect of a conveyance operating by the Statute of Uses. Whether such a conclusion would be warranted in any case, is, in their Lordships' opinion, very questionable. It is

certainly not supported by the two cases--Gopeechurn Kur v. Koroona Dabee S.D.A., 1857, 225 and Surbonaraj Singh v. Maharaj Singh S.D.A., 1858, 601 cited in the judgment under review, in both of which actual possession seems to have passed from the vendor to the purchaser. To support it, the execution of the bill of sale must be treated as a constructive transfer of possession. But how can there be any such transfer, actual or constructive, upon a contract under which the vendor sells that of which he has not possession, and to which he may never establish a title? The bill of sale in such a case can only be evidence of a contract to be performed in futuro, and upon the happening of a contingency; of which, the purchaser may claim a specific performance if he comes into Court, showing that he has himself done all that he was bound to do."

9. If this passage be taken alone, it cannot be denied that the doubt here expressed goes to the full extent of raising the question whether "in any case" the ownership could be acquired without delivery. Nor can it be for a moment contested that these observations are unimpeachable in theory. They represent the views which have prevailed amongst lawyers generally in some shape until displaced by legislation or recognized practice. But nevertheless it must be borne in mind that they have been in fact so displaced to a very large extent. And I feel confident that the Privy Council did not intend to exclude the consideration of the question whether under the actual Hindu law delivery was still necessary, because they do not either directly or indirectly decide the question thus raised: the decision of the case did not in any way involve as a proposition of law that delivery was in all cases necessary to A transfer of ownership.

10. The next case is Rani Bhabosoondree Dasseah v. Issurichunder Dutt 11 B.L.R., 36, and is also a decision of the Privy Council. The passage above quoted is quoted by the Privy Council from their former decision, and it must, therefore, be taken that, the same doubt is reiterated: but the decision was given with reference to the particular provisions of the document then in question, upon the construction of which it appears to have been held that it did not operate as a conveyance.

11. The remaining case is a decision of this Court, in Tara Soondaree Chowdhrair v. Collector of Mymensingh 13 B.L.R., 495. But the main ground of that decision was that the transaction then under consideration was contrary to public policy: it does not decide the question which the Privy Council had left in doubt.

12. As far as I am aware this is the first time the Court has been called upon directly to decide this question; and upon the whole, not feeling myself prohibited by the doubt expressed by the Privy Council, I feel bound still to say that in my opinion delivery has not been considered generally necessary to the transfer of ownership by Hindus in this country.

13. Of course there may be cases in which, from the nature of the transaction, it is plain that the ownership was not intended to be transferred immediately, but only at some future time or under some condition: it may also, when a question arises as to which out

of two honest purchasers has the better title, be important to consider who has got the possession. Upon this I say nothing. But, as a general rule of law, I consider that when the vendee has got not a mere contract to convey, but (as is admitted to be the case here) a conveyance, that is to say, a document which in terms professes to make over the property, and the document is registered (in case registration be necessary,) he becomes at once the owner without further ceremony.

14. I may add that the decision in *Prankrishna Dey v. Biswambhar Sen* 2 B.L.R., A.C., 207 seems to me to be in accordance with this view.

15. The special appeal is dismissed with costs.

Mitter, J.

I concur in this conclusion. It was pressed upon us that, according to Hindu law, delivery of possession is essentially necessary to render the title by sale complete; and it was contended that without it a purchaser does not become the owner of the property sold. As far as I am aware there is no provision in the shasters which can be quoted in support of this contention. On the other hand, the following passage from the *Mitakshara*, to be found in 1 *Macnaghten's Hindu Law*, 218 and 219, goes a great way against it. It runs thus:--"The acceptance of gold, cloths, &c., being completed by the ceremony of bestowing water, and falling, therefore, under either of the means, may be designated as three-fold acceptance; but in the case of land, as there can be no corporeal acceptance without enjoyment of the produce, it must be accompanied by some little possession, otherwise, the gift, sale, or other transfer is not complete. A title, therefore, without corporeal acceptance, consisting of the enjoyment of the produce, is weaker than a title accompanied by it, or with such corporeal acceptance. But such is the case only when of these two the priority is undistinguishable; but when it is ascertained which is first in point of date, and which posterior, then the simple prior title affords the stronger evidence; or the interpretation may be as follows:--"Evidence is said to consist of documents possession, and witnesses *Catyayana*, cited in the *Smriti Chandrika*." This having been premised as the general rule, the texts, "A title is more powerful than possession unaccompanied by hereditary succession" and "where there is not the least possession, there a title is not sufficient," *Viramitrodaya* have been propounded to point out to which the superiority belongs, where the three descriptions of evidence meet: as for instance in the case of the first acquirer, if a title be proved by witnesses, it is of greater weight than possession unaccompanied by hereditary succession. Again possession accompanied by hereditary succession vested in the fourth descendant, is more weighty than a title proved by documents; but in the case of an intermediate (claimant), a title accompanied with even a small degree of possession it better than a title destitute of possession See *Blackstone* on this subject, vol. ii, p. 197. This has been expressly declared by *Narada*: "for the first, gift is a cause; for an intermediate (claimant) possession with a title; but long and hereditary possession alone is also a good cause." "*Smriti Chandrika*, *Vivasdatandava* From the above quotation it is evident that the title of a purchaser without

delivery of possession is complete, although the holder of it labors under certain disadvantages as against a person who acquires title accompanied by possession. There are also numerous texts in the Hindu law, laying down that a well-defined usage acquires the force of law. And as far as my experience goes I may state that the conclusion at which we have arrived is entirely in accordance with the usage that now obtains amongst the people of the country. I desire also to add that our view in this matter is not only supported by the provisions of the Registration Act, as shown by my learned colleague, but also by s. 259 of Civil Procedure Code, which lays down that "after a sale of immoveable property shall have become absolute in manner aforesaid, the Court shall grant a certificate to the person who may have been declared the purchaser at such sale to the effect that he has purchased the right, title, and interest of the defendant in the property sold, and such certificate shall be taken and deemed to be a valid transfer of such right, title, and interest."