(1874) 04 CAL CK 0003

Calcutta High Court

Case No: Regular Appeal No. 52 of 1873

Madho Lall Shir Gyawal		APPELLANT
	Vs	
Behary Lall Mohurwar and Luckho Dayee		RESPONDENT

Date of Decision: April 18, 1874

Judgement

Phear, J.
Beharee Lall is evidently the real defendant in this suit. And he sets up more than one matter of defence; amongst other things he says that the suit is barred by limitation; also that the plaintiff has no title to bring the suit; and, thirdly, that even if he has, neither the plaint nor the evidence given at the trial discloses any cause of action. The question of limitation is not very simple. And in the view which we have taken of the case, it is not necessary that we should in terms decide it.

2. We are of opinion that the plaintiff has no cause of action upon the facts which he adduces in support of his suit. Without for the moment determining any issue as to his right to sue for a decree protective of the inheritance, and assuming that notwithstanding the existence of an intermediate heir, so to speak, in the person of Ranee Dayee, one of the daughters of Damoodur Mahton (a person who, unless she dies before her mother, must succeed to the property before the plaintiff can do so), we think that the execution of the ikrarnama does not constitute such a dealing with the property as to afford a cause upon which a person in the situation of a so-called ultimate reversioner is entitled to bring a suit pending the life of the person who is rightfully enjoying the inheritance.

3. It is remarkable that the plaintiff does not in his plaint set out the terms of the ikrarnama; he has, however, filed a copy of it taken from the Registry Office. The defendant at first filed an alleged original ikrarnama, purporting to bear on the face of it the Registrar''s stamp; and in addition to this he afterwards filed another copy taken from the Registry Office. It is admitted that the copy filed by the plaintiff, which is not now upon the record, corresponds in terms with the copy which is filed by the defendant from the Registry Office. There is at the same time, no doubt, a very material difference between

the terms of the alleged original document, first put in by the defendant, bearing the seal of the Registrar, and the copy-document which came from the Registry Office. But, for the purposes of this suit, having regard to the fact that the plaintiff did not, as I have already remarked, set out the terms of the document in his plaint, and that he filed, as his evidence of what the document was, a copy from the Registry Office, we think we must take that copy to represent the document which the plaintiff complains of, and which he asks this Court to set aside or declare inoperative against his ultimate interests.

4. (The learned Judge read the ikrarnama and continued):--This is the whole of the document, and it seems to us plain that it does not deal immediately with the property at all. Nearly the whole of it consists of certain statements of facts, which we understand were the actual facts of the case at the time when the ikrarnama was executed. There is no doubt that, at that time, Beharee Lall was the heir in reversion expectant on the deaths of the ladies to Damoodur Mahton, if one can lightly describe a person as heir who has such a contingent interest as Beharee Lall then had. The document only stated that which was at the time quite beyond contest, namely, that Beharee Lall was then the so-called ultimate reversionary heir of Damoodur Mahton. The last statement that, "after my death, Beharee Lall Mohurwar will get possession of the whole mauzas of this Zilla and Zilla Tirhoot, and of all the moveable and immoveable properties, and dues and demands appertaining to the estate of my late husband," is perhaps capable of being considered as an attempt to make a disposition of the property on the part of the lady. If it is a mere statement that he will as heir at that time get possession, of course it is entirely unimportant. But if the passage means that because he is the ultimate reversionary heir to my husband, therefore I give him this property at my death which, without my giving it, would go to my surviving daughter, then no doubt the document would become an instrument professing to deal with the property. But even if we take it in this light, and if we suppose that the plaintiff has his contingent interest, namely, the expectant right to succeed to the property at the death of Luckho Dayee, provided Ranee Dayee should die before Luckho Dayee, then it is clear that the mischief, if there be any, which this document is calculated to do to the right of the plaintiff, is of such a character as will not be affected either for better or worse by lapse of time.

5. The learned Advocate-General placed the right of the plaintiff to succeed on the general ground furnished by the principle of equity, that any person having rights in property, whether present or contingent, is entitled to come into a Court of Equity to complain of any attempt, which may be made by persons having no authority to do so, to deal with the property in a mode which may ultimately harm him in the matter of his title. But the learned Advocate-General omitted to state that this principle of equity is only acted upon when the mere lapse of time is of itself likely to render the plaintiff when his rights become vested, less able to meet the difficulty, and to clear away the cloud which this dealing with the property may throw over his title, than he is at the present time. For instance, in the ordinary case with which we are familiar here, suppose an alienation is made by a widow which professes to be made for a purpose such as would authorize her

to alienate the property. The evidence bearing on the question, whether that purpose is or is not the true purpose at the time of the alienation, is likely to die away, or become less accessible by mere lapse of time. Therefore a Court of Equity permits a person who has an interest in the inheritance, and is entitled to defend and protect it, to come forward, merely upon the prospect of the future mischief, to ask that the legality or illegality of the threatening act be decided at a time when all the necessary materials are at hand and can be availed of by both parties. But here in the case which is now before us, if this document will bear the construction which I have just now stated, namely, that the lady professes thereby to devise or to give away this property on her death to Beharee Lall, then it will be just as easy--when the time comes on her death, for Beharee Lall to make use of this document--it will be just as easy for the plaintiff, or any one interested, as he is now interested, in the inheritance, to establish the invalidity of that disposition, as it is at the present time. It does not depend upon evidence or materials of any sort, the force of which is likely to be weakened or deteriorated by lapse of time.

6. No doubt the learned Advocate-General did say that the essence of the complaint was that Luckho Dayee herself denied this instrument; that is, she said that, although she had executed it, she had been deceived into doing so, and she never had intended it to be what it now turns out to be. If that be so, of course she would have a right to come forward herself at any time to complain of it. But this is not her suit. This is a suit brought by the plaintiff in the character of an ultimate reversioner to have this issue, which this lady herself might raise, tried. Now it seems to us that it is not a material fact, so far as concerns the plaintiff''s future interest, that Luckho Dayee executed this instrument involuntarily, because the instrument itself does not profess to pass an immediate interest. At the most it pretends to give a remainder to Behareee Lall, or rather to give the property to Beharee Lall on the occurrence of Luckho Dayee''s death. If it had in terms pretended to pass the immediate interest to Beharee Lall, the case might have been different; for, according to the apparent facts, the persons who were interested in the matter of this ikrarnama were all the persona who were at that time entitled to the property in possession and in reversion. Luckho Dayee executed the document, we will say, in favor of Beharee Lall, who was at that time the nearest person entitled to accept the ultimate reversion upon the death of the disqualified holders. And both of Luckho Dayee''s daughters, Ranee Dayee and Phoola Dayee, assented to the transaction. According to some cases in this Court on such a state of facts, i.e., if the person entitled to the immediate possession of Luckho Dayee had, with the consent of her daughters, released the property and given it over to the hands of Beharee Lall, the person then entitled to accept the ultimate reversion, the gift or release would be held good ultimately against any other person who might eventually, at the time of the surviving lady''s death, prove to be existing heir of Damoodur Mahton, and in such a case the present plaintiff would probably be entitled to complain that the document was fraudulently got up, or was not the real conveyance of Mussamut Luckho Dayee. But this is not the character of the document, as I have more than once stated; it passes nothing at the present time: the widow twice over in the course of it asserts that she has the entire enjoyment of the right

of the property without co-parcenership whatever during her lifetime. And it therefore at the most amounts to a future disposition of the property, which cannot depend for its validity upon the question whether Luckho Dayee affected it voluntarily and intentionally or not.

7. On the whole we are of opinion that this document does not constitute a cause of action upon which the person entitled to protect the inheritance can have any right to bring a suit. And for that reason alone, if for no other, we think that the suit ought to fail. We therefore reverse the decision of the Subordinate Judge, and dismiss the suit with costs in both Courts.

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(1) Before Mr. Justice Markby and Mr. Justice Birch.

The 17th April 1873.

Rani Brohmomoyee (Defendant) V. Raja Anund Lall Roy (Plaintiff).*

Declaratory Decree--Suit to set aside Adoption--Reversioner.

Mr. Woodroffe (with him Baboos Bhowany Churn Dutt, Mohiny Mohun Roy, and Kader Nath Sircar) for the appellant.

The Advocate-General, offg. (Mr. Paul) (with him Baboos Hem Chunder Banerjee and Bama Churn Banerjee) for the respondent.

The following judgments were delivered:--

Markby, J.--In this case it appears that one Raja Nund Lall, having no sons of his own, at one time intended to adopt, and took some steps towards adopting his brother"s grandson Operdeo Lall, but afterwards quarrelling with his brother, adopted another child, the son of his dewan, Gujendro Lall. Raja Nund Lall died, leaving him surviving his wife, the defendant Brohmomoyee, and his adopted son, Gujendro. Gujendro has since also died, and the defendant Brohmomoyee has thereupon adopted another son Opendro Chunder, who is a defendant in this suit, by the name of Opendro Lall Roy. Opendro Chunder is still a minor, and his mother has assumed to act as his guardian in this suit, but whether she has obtained the certificate necessary for that purpose under Act XL of 1858 does not appear.

The present suit was brought by Anund Lall, the brother of Nund Lall, originally against Brohmomoyee alone, but afterwards the minor was added. Anund Lall alleges himself to be the reversionary heir of his brother Nirad Lall; that the adoption of Opendro Chunder was made without authority, and he asks to have this adoption declared invalid, and to have his reversionary right established in the property described in the schedule. Subsequently he put in a petition stating that he only desired to have the adoption set aside and his reversionary right declared, but did not wish any inquiry as to what the

property was to which that right attached.

It is admitted that, in the present state of this family, if the adoption be got rid of, the present right of possession is in Brohmomoyee as heiress of her son Gujendro Lall, in whom the property had vested absolutely; and that, after her death, the plaintiff Anund Lall, if then alive, would take the property. But the estate is now wholly vested, either in Brohmomoyee or in Opendro Chunder, according as the adoption is or is not invalid: and if the adoption be invalid, the plaintiff"s right of succession is still contingent upon his surviving Brohmomoyee.

That the plaintiff cannot maintain this suit, so far as it seeks to have what he calls his reversionary right declared, is clear. If he means by that to have it declared that he is the person who would take at this moment, if both Opendro Chunder and the widow were out of the way, nobody disputes it. If what he means is to have it declared that he is the person who will ultimately take the property after the death of the widow, no such declaration can be made; for that cannot yet be known; and should the plaintiff die before Brohmomoyee, the person who will then take, if the present adoption be void, will be, not the heir of the plaintiff, but the heir of Gujendro, whoever that may be.

The first question, therefore, is, whether the presumptive next taker after a Hindu widow can sue to set aside her invalid adoption.

That the presumptive next taker may sue to restrain the widow from committing waste may be considered to have been recognized by this Court. It may also be that should the widow exceed her powers of alienation, a suit may be brought to declare the alienation void, except as against the widow herself. I think the expression attributed to me in the case of Kamikhaprasad Roy and Others Vs. Srimati Jagadamba Dasi and Others is rather too strong that the law is so "settled." For, as I there point out, there are opinions directly the other way; and I find that in another case, to which I do not there refer whilst there are some expressions which favor the maintenance of the suit, there are certainly other expressions which lead to the opposite conclusion; see the case of Nobin Chunder Chuckerbutty v. Guru Persad Doss B.L.R., Sup. 1008.

But even supposing it to be the law that a presumptive next taker after a Hindu widow may sue in the widow"s lifetime, not only to prevent waste by her, but also to declare her alienations void except as against herself, still it does not follow as a necessary inference that he may sue to declare her adoption invalid. By alienation the possession and control of the property pass at once out of the hands of the widow to a stranger. The result of adoption may be in some cases to take the possession and control of the property out of the hands of the widow, and put it into the hands of another person. At present, however, this has not happened in the case before as. The widow, as guardian of her infant adopted son, remains in possession as before. The case which we have been referred to as that in which this question was settled is that of Brojo Kishoree Dassee v. Sreenath Bose 9 W.R., 463. But I do not think that the observations of Sir Barnes Peacock and Sir

Charles Hob-house in that case amount to more than an expression of inclination of an opinion. I do not think it is likely that the question, whether this suit can be maintained, can be settled without determining another question referred to in that same case, namely, whether a decision in it would be binding on the next taker after the death of the widow, whoever that next taker might be; or as Sir Barnes Peacock puts it, "whether the decree would be binding upon the persons who might eventually succeed upon the death of the widow in the same manner as a decree against the widow respecting the rights of her husband in an estate is binding upon the reversionary heirs." But that question has never yet been finally determined. On the other hand, I think, it is impossible to read the observations of the Privy Council in the case of Sreenarain Mitter v. Sreemutty Kishen Soondery Dassee, 11 BLR, 171 , without seeing that that Court had not then formed any decided opinion as to the right of the presumptive next taker to a decree simply declaring the adoption invalid.

Even, therefore, if upon the evidence the case were clear for declaring the adoption invalid, I should desire further consideration before holding that the suit would lie. The point, however, was not fully argued, and being one of very considerable difficulty and importance, I do not wish to be considered as having now expressed any opinion upon it. I merely refer to the state of the law as one of the grounds for the conclusion at which I ultimately arrive.

One thing seems quite clear that it is wholly discretionary to make, or to decline to make, the desired declaration. The Privy Council say in the case of Sreenarain Mitter v. Sreemutty Kishen Soondery Dassee:--"It is not a matter of absolute right to obtain a declaratory decree. It is discretionary with the Court to grant it or not; and in every case the Court must exercise a sound judgment as to whether it is reasonable or not, under all the circumstances of the case, to grant the relief prayed for." I think there is a misprint here. The context requires that the last words of the sentence should be the "declaration" not the "relief" prayed for. The judgment then proceeds:--"There is so much more danger in India than here of harassing and vexatious litigation; that the Courts in India ought to be most careful that mere declaratory suits be not converted into a new and mischievous source of litigation" 11 B.L.R., 190.

Now having regard to the only ground upon which the right to maintain a suit of this kind has ever been placed--I mean the danger that evidence might be lost--it seems to me that we ought not to make a declaration unless we see at least some clear ground to go upon. If the rights of the parties must ultimately be settled upon evidence which is unsatisfactory, that may be as well done after Brohmomoyee"s death as now, when a decision can be given which will be undoubtedly final; whereas it is doubtful whether a decision given by us would effectually determine any question whatever.

Now let us see the grounds upon which we are asked to declare this adoption invalid. The parol evidence in support of the deed is direct upon the point, being that of the witnesses who say they were present at the execution. That against the deed is also direct, as

regards the evidence of the witness Brojoy Mirto. As to the others, it is only indirect. Probably the witnesses on both sides are strong partizans.

No doubt we ought to attach great value to the opinion of the District Judge upon the evidence which was given in his presence: and no doubt his opinion is in favor of the plaintiff. But he does not say anything very decisive upon this, and I think he bases his opinion rather upon some external considerations which I will review.

In the first place he says that the witnesses are not of the class one would expect the Raja to have summoned on such an occasion, and that he would rather have called in his principal relations. But we know that he had quarreled with his nearest relations, and I think the evidence shows that neither the plaintiff, nor Sooroopnarain, visited the Raja during his last illness. Moreover, the act which the Raja was about to perform was in direct opposition to the wishes and interests of his own relations, and none of his relations appear to have witnessed a deed of gift executed in the same year, and which is admitted to be genuine.

The District Judge thinks this deed of gift, which the defendants relied on, rather tells against their case. The deed of gift says (according to our translation):--"I have adopted (not "you have adopted" as in my copy of the Judge''s decision) a son with your consent. Should it be necessary in future to adopt a son, I will execute an anumati patra to that effect hereafter." The District Judge thinks that indicates an intention only to execute an anumati patra in case Gujendro Lall died in the Raja''s lifetime. But I should have thought that in that case the Raja would adopt another son himself, and that the power to adopt would be given to the widow to meet any contingency that might arise after the Raja''s death.

The District Judge points out that there is a clause in the deed which directs that it should be registered, and that notice should be given to the Courts, but that non-registration is not to affect its validity. It does not appear to me that this very strongly indicates that the document is a forgery. This at least is certain, that there was never any attempt or intention to conceal the document, for it was produced within a few days after the Raja''s death.

The District Judge also makes a comparison between the signatures to this deed and those to the deed of gift, which he found to be genuine. It is a comparison which I should hardly venture to make, but I agree with the District Judge in thinking that it is an unsafe guide; and especially so, when only two signatures bare been compared. It is not at all likely that such persons as are interested in this case would, in committing a forgery, produce signatures which at a glance could be detected as false.

Moreover, the District Judge hardly gives sufficient weight to the delay which has taken place. He says that this deed is principally a deed of guardianship for the boy. I am inclined to think it is a great deal more. I am inclined to think that it is a will in Gujendro

Lall"s favor. The Raja says (according to the Hindu form addressing his wife):--"Deducting what I formerly made a gift of to you, I appoint you executrix and manager under this deed in respect of the remaining zemindaris, talooks and all the rights appertaining thereto, the malikana, &c., leaving as heir my own adopted son Jogendro Lall Roy, alias Gujendro Lall Roy, whom I have been maintaining." This would seem to amount to a devise; see the judgment of Sir Barnes Peacock and Pundit, J., in the case of Monemothonauth Dey v. Ononthnauth Dey 2 I.J., N.S., 24. It also gives to his widow an absolute power to dispose of some portion of the property which he had previously given to her; and upon the question of guardianship, the deed under s. 7 of Act XL of 1858 would be conclusive.

Now, ever since the death of the Raja, there has been a desperate litigation going on between the widow and the present plaintiff, at every stage of which this document has been produced. The main subjects of dispute in this litigation have been the validity of the adoption of Gujendro Lall, against whom were set up the rival claims of Upendro Lall, and the right to the intermediate custody of the property. Upon both these questions, this document would have an important bearing. It is certainly to my mind a circumstance which requires explanation, that although this document has been produced and filed on three several occasions, and on one occasion at any rate, if not in all, formally proved, its genuineness has not been hitherto challenged.

I do not think it necessary to say more to show how very little external circumstances at present seem to strengthen the case of the plaintiff.

Under all these circumstances, I think the safest course to pursue is to refuse to make the declaration which the plaintiff asks for, namely, that the adoption is invalid. Upon the construction of the deed I express no opinion.

Of course, however useful this inquiry may be on any future occasion (and I think even in the result which we have come to, it may be of use), the decision itself is not in any way conclusive.

I think that the decree of the Court below should be set aside, and that the suit should be dismissed with costs in both Courts.

Birch, J.--I concur with my learned colleague in thinking that, under the circumstances of this case, we should refuse to grant the declaratory decree prayed for.

* Regular Appeal No. 154 of 1872, against a decree of the Judge of Zilla Midnapore, dated the 4th April 1872.