
(1873) 09 CAL CK 0001

Calcutta High Court

Case No: Regular Appeal No. 262 of 1871

Tara Soondaree
Chowdhraim

APPELLANT

Vs

The Collector of
Mymensingh on behalf
of Shama Soondaree
and Another

RESPONDENT

Date of Decision: Sept. 15, 1873

Judgement

Sir Richard Couch, C.J.

This suit was brought for obtaining possession of the realties and personalities specified at the end of the plaint, and failing delivery of the latter, their value, together with mesne profits of the half share of the realties, as well as the wasilat thereof from the date of suit to the date of recovery of possession, by declaration of the right of inheritance of the second defendant, Nundo Mohun Chowdhry, to the property claimed; and it was valued at Rs. 4,20,813. The case in the plaint was that Kirti Chunder Chowdhry, the owner of a 2 annas and 15 gundas share in Pergunna Sherepore, and the great-grandson of Joynarain Chowdhry, the uterine brother of the grandfather of Nundo Mohun, died leaving two minor sons, Juggut Chunder and Bhuban Chunder Chowdhry, and a widow Anundmoye Chowdhraim, and that the eldest son, Juggut Chunder, subsequently died unmarried, and after him, the younger son, Bhuban Chunder also died without children, leaving a widow, Hurromoni, who afterwards died before her mother-in-law, Anundmoye; that upon the death of Anundmoye, the defendant, Nundo Mohun, as the nearest of kin, attempted to take possession of the properties claimed, and was opposed in doing so; that, thereupon Nundo Mohun brought a suit to obtain possession under Act XIX of 1841, but he subsequently alienated a moiety of his right, title, and interest in the property to one Kashichunder Bhattacharjee to enable him to meet the expenses which would be incurred for the recovery of the said properties; that the said Bhattacharjee took proper steps and defrayed the expenses for the recovery of the properties, but the Judge disallowed the claim, which was preferred under Act XIX, on the 2nd of July 1868, and that,

Kashichunder Bhattacharjee, on the 8th of Chait 1276 (the 20th of March 1870), transferred his entire right, title, and interest in the half share to the plaintiff under a kabala or deed of sale for Rs. 1,700 advanced by the plaintiff to meet the expenses. And the plaintiff claimed as having by purchase become the owner of the half share for which the suit was brought. The plaintiff, after stating that application had been made to the defendant Nundo Mohun, requesting him to join in the suit, alleged that he would not do so, and had therefore been made a defendant.

2. There is a decision of the Judicial Committee of the Privy Council which is in point, as to whether this suit can be maintained. It is the case of *Ranee Bhabosoondree Dasseah vs. Issurchunder Dutt and .* In that case one Ramnarain Dutt died leaving a talook, and the respondent Jogessur Ghose claimed it as his heir, and the other respondent claimed under a deed of gift from Ramnarain, which Jogessur impeached as a forgery. Whilst these disputes were going on Jogessur applied to the appellant, Ranee Bhabosoondree Dasseah, and asked her to assist him in litigating with the other respondent for the purpose of getting possession of all the property which belonged to his maternal grandfather, and it was arranged that in the event of such litigation arising, she should advance expenses to the extent of Rs. 3,000, and should protect Jogessur from a then pending execution, the consideration being a moiety of the property claimed. Accordingly an agreement in writing was executed by Jogessur in favor of the appellant, which is set out in the report of the case, by which Jogessur is stated to have received Rs. 3,000 in cash, and in consideration of that to sell the half share to the appellant and to execute that deed of sale; and it is stated that the amount was deposited with Dwarkanath Lahory, mukhtar, the agent on behalf of the appellant, and that all the expenses of the suit for dispossession and his lodging expenses were to be defrayed out of that sum. Nothing more was done under the agreement, and no money passed, and Ooma Churn Sircar having taken out execution against Jogessur, Jogessur applied to the appellant's mukhtar to deposit the money, but this was not done, and thereupon, Jogessur, instead of instituting proceedings against Issurchunder, the other respondent, agreed to an amicable partition, which was embodied in a document dated the 9th of January 1867, satisfied Ooma Churn's decree, and saved his estate. On the 20th of September 1867, the appellant commenced the suit by filing a plaint against the respondents, that is, Issurchunder Dutt and Jogessur, and against persons holding as lessees under them, seeking to have the deed of sale declared a forgery, and all the proceedings taken under it since his death declared to be fraudulent, and claiming possession of half the property under the deed executed by Jogessur, together with mesne profits.

3. The case was precisely like the one before us, the plaintiff, the alleged purchaser, bringing a suit against the person who was in possession of the property, and claiming it adversely to the person who had sold to him, and making, as is done here, that person also a defendant. The nature of the suit was the same, and on the 20th of July 1868, the Subordinate Judge dismissed the plaintiff's case on the ground that she could not sue alone. There was an appeal from that decision to this Court, and it was held that the suit

was rightly dismissed, but not on the ground which was taken by the Subordinate Judge. The two learned Judges, Loch and Mitter, JJ., considered that the plaintiff had not fulfilled her part of the contract, as the consideration had not been paid, and that, under the ruling of the Privy Council in the case of *Raja Sahib Perhlad Sein v. Baboo Budhoo Sing* 12 Moore's I.A. 301, 306, the action must fail.

4. The plaintiff appealed to Her Majesty in Council, and the Judicial Committee in their judgment said:--"This suit was based upon a deed executed by Jogessur Ghose in favor of the plaintiff in August 1866. The effect of that deed, as far as it is material, may be thus stated; it recites that Jogessur Ghose was entitled to certain properties from his maternal grandmother; that he had been dispossessed of the whole of those properties," and then stated as I have done already. Then having noticed the dismissal of the suit by the Subordinate Judge, and the decision of the High Court upon that, their Lordships proceed to say:--"The principal question is, the effect of the first deed, whether it operated as a present transfer of the property, or only as an agreement to transfer it upon certain contingencies which did not happen. In support of the latter contention, the case was referred to of *Raja Sahib Perhlad Sein v. Baboo Budhoo Sing* 12 Moore's I.A., 301, 306. Without referring at length to that case, the circumstances of which are in many respects similar to those of the present, it may be enough to quote a passage wherein their Lordships say: "The Court below 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 irrespective 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 cited in the judgment under review" (which are there referred to), "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 future 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." Having regard to this case, and to the provisions which have been referred to of the deed, their Lordships are of opinion that it did not operate as a present transfer of the property, but as an agreement to transfer so much of it as might be recovered in a suit to be instituted, to which both Jogessur Ghose and the plaintiff were to be parties."

5. In this case it is true that, as far as appears, the consideration was paid, but that makes no difference, in this part of their Lordships' decision that an instrument of this kind does not operate as a present transfer of the property, but as an agreement to transfer so much of it as might be recovered in a suit to be thereafter instituted.

6. Then they proceed: "This construction of the deed disposes of the case; for even if the plaintiff be entitled to complain of breach of contract by Jogessur, she cannot recover under it possession of the property against Jogessur, a fortiori, she cannot recover against Issurchunder Dutt, who was no party to the deed." Here also the principal defendant, the person from whom possession of the property is sought to be recovered, Shama Soondaree, or those under whom she claimed, were no parties to the deed. This case, therefore, is an express authority that the present suit cannot be maintained.

7. But I think there is another ground upon which we should hold that the suit cannot be maintained, and it is desirable that the Court should express its opinion upon that part of the case also.

8. The instruments upon which the plaintiff's right to sue for possession of the property is said to be founded are set out in the paper book. The first is an ikrar executed by Nundo Mohun Chowdhry to Kashichunder Bhattacharjee, and, after reciting the circumstances under which it was alleged that Nundo Mohun had a claim to the property, it is stated that he had appeared in the Court of the Judge and filed a petition under Act XIX of 1841, and that the moveable and immovable property, so far as he could ascertain by enquiry and investigation, were of the value of Rs. 1,71,325. That is, what he valued his claim at; and then he says that he had made an agreement with Kashichunder Bhattacharjee for taking Rs. 50 in cash, and having the expenses of the suit defrayed, and Kashichunder looking to the proper management of it; and in consideration of Rs. 50, which he says he had received in full, and the trouble and assistance and the managing and conducting the case, and defraying the expenses thereof by Kashichunder, he relinquished his right to an 8-anna share of the properties, which it is said are valued in all to the amount of Rs. 75,000; thus parting with property of this value for only Rs. 50 and such portion of the expenses of recovering the entire property as would fall upon the remaining half share which he kept.

9. This was about the time of the proceedings under Act XIX of 1841. The ikrar is dated the 1st of June 1868, and the plaint says, that the claim under that Act was disallowed on the 2nd of July 1868. What was done in the interval between that and the making of the deed of sale to the plaintiff, does not clearly appear; but on the 20th of March 1870, Kashichunder Bhattacharjee sold to the plaintiff the interest which he had acquired by the previous deed. There is a kabala of that date in which, after reciting the ikrar to him from Nundo Mohun, and that he had expended money in the proceedings to the amount of Rs. 1,700, he, Kashichunder, in consideration of the Rs. 1,700 which it is alleged he had expended, sold all his rights and interests in the moveable and immovable property, as well as the wasilat of the immovable property, to the plaintiff. And there is at the end of the kabala a very significant statement. We have seen that in 1868, when the first instrument was executed, the half share was valued at Rs. 75,000; here it is said by Kashichunder that "having estimated the value of my aforesaid properties according to the current market value at the amount of Rs. 2,18,000, I have got this conveyance engrossed on a stamp of Rs. 1,000."

10. Thus we have, according to the statement of the parties, this property, to which there was a claim, not property in the possession of the seller in any way, valued at Rs. 2,18,000, and sold to the plaintiff for Rs. 1,700. The plaintiff has to bear the costs of any litigation in endeavoring to recover the property, and Nundo Mohun, the person who is said to be entitled to it, practically parted with the half share of this estimated value for Rs. 50. No doubt, he gets a suit brought of which he would have the benefit so far as it related to the other half share which he retained.

11. That is the nature of the transaction. It appears to me to be one which this Court must hold to be void as being contrary to public policy, and as, therefore, not giving the plaintiff any right to sue for the property which was professed to be passed by these instruments.

12. In *G.F. Fischer vs. Kamala Naicker*, the Judicial Committee said that in order to make the agreement or contract void, it must have something of the qualities which are attributed to champerty or maintenance by English law; it must be something against good policy and justice, something tending to promote unnecessary litigation, something which in a legal sense is immoral, and to the constitution of which a bad motive in the same sense is necessary, and that the substance of the transaction is to be looked at, and not merely the language of the instrument. Looking at the substance of this transaction, it appears to me to come within these terms, as being against good policy and justice, and as tending to promote unnecessary litigation, and being in a legal sense immoral. Their Lordships speak of the qualities which are attributed to champerty or maintenance by the English law: and for the common law of England upon this matter, I refer to the 1st volume of *Hawkin's Pleas of the Crown*, p. 470, where it is said: "It seemeth to be a high offence at common law to buy or sell any doubtful title to lands known to be disputed, to the intent that the buyer may carry on the suit which the seller doth not think it worth his while to do, and on that consideration sells his pretensions at an under-rate, and it seemeth not material whether the title so sold be a good or a bad one, or whether the seller were in possession or not, unless his possession were lawful and uncontested. For all practices of this kind are, by all means, to be discountenanced, as manifestly tending to oppression by giving opportunities to great men to purchase the disputed titles of others, to the great grievance of the adverse parties, who may often be unable or discouraged to defend their titles against such powerful persons, which perhaps they may successfully enough maintain against their proper adversaries."

13. To what is there said as a reason in England, I think we may add what is forcibly and truly expressed by Holloway, J., in *Mulla Jaffarji Tyeb Ali Saib vs. Yacali Kadar Bi and* . There the learned Judge says,--"In this country it may be added that this is now the favorite instrument for revenging private quarrels. A suit against a man's enemy is commenced in the name of another, promoted by the money of the enemy, and sustained by the perjury which he suborns. The state of Hindu society, with joint families, dissatisfied junior members, adoptions real or fictitious, affords a fine field for the operations of these speculators in litigation. At the elbow of every man with a grievance, real or imaginary, is one of these unclean animals busily engaged in fanning into a

law-suit every trifling difference. Where a zamindari is concerned, the operations are on a large scale. The claimant is taken up either by an individual speculator or a joint stock company. Having nothing, he is prepared to promise everything, and agreements stipulating for enormous sums of money are executed in favor of these people. The suit is promoted with their money, and the victory leaves the victor and the vanquished together prostrate at the feet of these unholy speculators. The nominal plaintiff is not the poor man of Lord Abinger, but the poor neighbour of Quirk, Gammon and Snap. Let a man with the smallest knowledge of this country cast his eyes upon the wide-spread ruin and immorality created by these proceedings, he will scarcely doubt that it is contrary to public policy, if the welfare of a country is any element therein, to permit these creatures to bargain for the proceeds of the litigation which they have commenced, fomented and carried on without the smallest interest, other than the nefarious bargain, in the suit which they are conducting. On that portion of public policy which consists in the purity of the administration of justice, the effect is still more directly pernicious. The unlimited supply of evidence to support any claim, true or fictitious, renders it easy for these speculators to produce for the support of any claim, with equal ease whether it is true or false, a body of people called skilled witnesses, whom by any mode of cross-examination directed merely to inconsistencies in the story which they came to tell, it is impossible to break down."

14. I think these observations are applicable to the present case, and that the transaction upon which the plaintiff founds her right to bring the present suit is one to which effect ought not to be given by the Courts in this country.

15. But there is still another objection to the suit being maintained, which we may as well notice. Supposing that Nundo Mohun was properly adopted, it appears in the evidence that there is a person who is nearer in title as heir than Nundo Mohun, that is, Ram Dyal Sen.

16. It was admitted that if Earn Dyal bore the relationship which the defendant's witnesses said he did, he would be preferable to Nundo Mohun; and I think the evidence which was given shows that he was related as alleged by the defendant. The Subordinate Judge has not thought it necessary to give a decision upon that question. It is right to say, and I think it is what his decision would have been if he had given a formal decision upon it, that the defendant's evidence, on this part of the case, is not met by the evidence which the plaintiff gave. There is evidence which appears to be trustworthy, that Ram Dyal was treated by the members of the family as related in the way which it is said on the part of the defendants he was. It is not necessary to examine that evidence in detail. This also would be a bar to the plaintiff recovering the property which she claims. The Subordinate Judge has decided against the plaintiff on the ground that the deed of permission to Bhubani Chundra to adopt was not proved. He says it did not appear that there was any such deed of permission, and consequently the adoption of Nundo Mohun would not give him a title to recover the property, assuming that he was right in the other part of his case.

17. I think it is doubtful whether this decision is right. The deed of adoption is said to have been executed so long ago as eighty years. The copy of the deed was produced. The witnesses to it were dead, and the Subordinate Judge says of it that in the copy which was produced before him, the names only of five persons of low position in life have been put in the deed in the place of the subscribing witnesses. He then says that no attempt appears to have been made to establish the authenticity of the deed. We cannot expect it at this distance of time. And he considered that the conduct of the family in not disputing the adoption would not be evidence against Nundo Mohun. I think he was wrong there; for it appearing that the adoption had for a very long time, forty or fifty years, been acted upon and acquiesced in by the parties interested in opposing it, by the members of the family whose rights had been set aside by the adoption and who had not apparently made any opposition to it, I think it should be presumed that the deed of which a copy was produced, and which had been filed many years before, was a genuine one, and the Subordinate Judge was not justified in setting it aside upon suspicion, on account of the apparent character or position of the attesting witnesses. From the lapse of time, it was impossible to clear up any doubt of that kind. I only mention this, in order that it may not be supposed that in dismissing the appeal and confirming the decision of the lower Court, we have adopted the reasons of that Court. I think the plaintiff has no right to recover possession of the half share, and that the decree of the lower Court dismissing the suit ought to be confirmed with costs.