

(1870) 07 CAL CK 0005

Calcutta High Court

Case No: None

Kamikhaprasad Roy
and Others

APPELLANT

Vs

Srimati Jagadamba
Dasi and Others

RESPONDENT

Date of Decision: July 28, 1870

Judgement

Markby, J.

This is a suit brought by Kamikhaprasad Roy, Haraprasad Roy, and Bhawanicharan Roy, an infant, by his guardian. The plaintiffs are the sons of one Srimati Mani Dasi, daughter of Shamchand Roy, who died in 1841, leaving a widow and his daughter him surviving. Shamchand had four brothers, and they were all the sons of Giridhar Roy. In the life-time of all the sons, the four youngest separated from their elder brother, and re-formed themselves into a joint family; the only one who left issue was Shamchand. Subsequently the widows had some disagreement between themselves and Ram Chandra, which led to a suit for partition between them; that suit was referred to arbitration, and an award made partitioning the property of the family. This suit is brought against Jagadamba, widow of Srikant, and Rasiklal Pal, together with the other defendants; the prayer is to declare that Jagadamba has no power to alienate the land in question, and against the other defendants, that the alienation may be declared to be void as against the reversionary heirs. In the course of evidence, it was proved that Haraprasad was of the age of seventeen years; and as it has been held that a Hindu does not come of age till eighteen, I ordered Ram Chandra to be appointed his guardian, and the plaint to be amended accordingly. It appears there were two alienations by Jagadamba, both of which were made jointly with Chandramani, but by each in respect of their own shares. One bears date the 13th August 1858, and the other the 16th December 1859, and it is the deed which bears the first date that is now sought to be set aside. There were several preliminary questions raised by the issues: firstly, whether the plaintiffs were next takers--that point was abandoned on the part of the defendants;--secondly, whether Chandramani was a necessary party, but I think she was not, because, although she

professes to convey jointly, she had no joint interest with Jagadamba. On the other hand, it was contended there was a misjoinder in suing the other defendants jointly with Jagadamba. I am by no means prepared to say that Jagadamba was a necessary party; but I am not prepared to dismiss the suit on that ground, as it involves no complication. Another question much discussed was whether the suit can be brought in the life-time of Jagadamba. But I ought, I think, to follow what appears to me is the preponderance of the decisions, and hold that the suit can be maintained. *Shewak Ram Roy v. Syad Mohammed Shamsul Hoda* 3 B.L.R., A.C., 196 is a distinct decision on the point, and I also think there is, although not a decision, an expression of opinion almost amounting to a decision in *Gobindmani Dasi v. Shamlall Bysakh* B.L.R., Supplemental Vol., 48. It was there held that a conveyance by a Hindu widow, for other than allowable causes, is not an act of waste destroying the widow's right, and vesting the property in the reversioners; and the argument pressed on the Court against that view was that the heir had no power or opportunity to come in, and the Court say:--"But our decision will not preclude the reversionary heirs, even during the life-time of the widow, from commencing a suit to declare that the conveyance was executed for causes not allowable, and is therefore not binding beyond the widow's life. Nor will it deprive the reversionary heirs, during the life of the widow, of their remedy against the grantee to prevent waste or destruction of the property, whether moveable or immoveable, in the event of their making out a sufficient cause to justify the interference of the Court." This seems to me an expression of the opinion of the Court on a point discussed before it in answer to an argument pressed upon it; and, therefore, it would not have been delivered without careful consideration. The decision the other way is *Brinda Dabee Chowdhrair v. Pearee Lall Chowdhry* 9 W.R., 460, where Macpherson, J., in delivering judgment, says:--"The mere fact of making alienations that are not binding after the widow's death on the reversioner will not entitle the reversioner to come into Court and get such a remedy as he asks for in the present suit;" that is the view of the law the Court then took; but it seems to me the learned Judges had not the decision of *Mussamut Pranputty Koer v. Lalla Futteh Bahadoor Singh* 2 Hay, 608, to which they refer, fully before them; that was a suit by persons asking to have it declared that they were entitled to take on the death of the widow, and the learned Judges used expressions which appear to me to leave the question now before us an open one. It seems to me they expressly guard themselves from saying that a suit of this description will not lie. Apart from these decisions, there are strong reasons for allowing such a suit to be brought; it would be extremely dangerous to allow a widow to alienate, and to shut out the reversionary heirs, without some check being put upon her. I think, therefore, it is best to follow the law, as it appears to me at present settled. That disposes of the law points, and it remains for me to decide as to the merits. I have to see whether the purchaser acted as a careful man would act in making this purchase. A purchase does not fail because the money is not appropriated in the way it ought to be, nor if the necessity does not exist to the extent or in the exact manner it is said to exist. I also understand there is no absolute rule as to the person on whom the burthen of proof lies, and all the circumstances ought to be taken into consideration, in considering whether the defendant can make out a case, and lapse of time is one of

those circumstances. This alienation took place twelve years ago. It was not to the persons now defendants, but to Brajahari Das, in the name of his wife, and sold by him to the defendants in this suit. It is a peculiar circumstance too connected with this case that all the facts now known to Ram Chandra must have been known to him when the sale took place, and if he had had any grievance he would have brought the suit before. The position of Jagadamba is not, I think, quite that of an ordinary Hindu widow. It is slightly modified by the award. I think it is clear also that Brajahari purchased with notice of the award. Roy Chandra states he informed him of the existence of the award, and that Jagadamba was selling to pay the costs of the suit. The plaintiffs therefore must stand or fall by the fact as to whether or not she was empowered by the award to sell this property. She was empowered by it to do so. Each partner has given her power to sell for costs. It is also expressed in the award that, under certain circumstances, the parties to it might sell on giving notice. But no notice having been given, I think that reduces the defendants to the position of proving that she sold for costs. I think Roy Chandra's evidence was reliable; he was well acquainted with business, and able to manage a transaction of this sort. He has, no doubt, made a slight error as to the date of the transaction. But he proves to my full satisfaction that he advanced money to Mr. Bedell, the attorney for Jagadamba, for expenses out of pocket. The receipts were produced, and such payments amounted to rupees 785. Besides these, there was a payment of rupees 247 to Mr. Shircore, an attorney, in respect of a bill of costs due to him from Jagadamba, and rupees 64 to persona who measured the property. All these sums carried interest. I am satisfied with his evidence, and that the transaction with Brajahari was in accordance with the award. The only difficulty is whether the fact of the property having been sold for rupees 2,100 was in excess of the power granted by the award; but, upon consideration, I have come to the conclusion it is not. Jagadamba could not have measured off a certain amount of the property so as exactly to meet the debts. Moreover, it is impossible to say exactly what the property would fetch. This amount of rupees 1,096 was not all the costs of the litigation and it is clear rupees 2,100 would not have covered the whole costs, because there was a subsequent sale, the money of which was also applied in payment of costs. It was, to my mind, the more prudent course for the widow to sell once for all; it is true she did not apply the balance wholly in payment of costs, but Brajahari cannot be affected by this. Roy Chandra says the balance was applied in payment of attorney's costs, and also for religious purposes and maintenance, but for these a notice was necessary. As the matter stands, however, that appears to me, in no way to affect Brajahari's purchase. It seems to me, considering the circumstance of lapse of time, and that defendants did not purchase direct from Jagadamba, that they have fairly proved that the sale to Brajahari was a good one. This disposes of the first two prayers in the plaint. The third prayer depends on certain evidence, which, notwithstanding Jagadamba's denial, I believe to be true. I do not say that the prayer might not have been a good one, if it had been proved that Jagadamba was guilty of waste, but without any such act, I have great doubts whether under the circumstances it can be granted. The suit will, therefore, be dismissed with costs on scale No. 2.

(1) Act IX of 1850, sec. 55.--"The Judges of the Court of Small Causes may, in their discretion, reserve any question of law or equity on which they entertain doubts, or which they shall be requested, by either party to the suit, to reserve for the opinion of the Judges of the Supreme Court, and shall give judgment, contingent upon the opinion of the said Supreme Court, on a case which they shall thereupon be entitled to state to the said Court.

only two Judges together, and shall differ in opinion, the question on which they differ shall be so referred."

(2) Act XXVI of 1864, sec. 8.--"When judgment is given, contingent upon the opinion of the High Court, * * * the High Court may either order a new trial on such terms as it thinks fit, or may order judgment to be entered for either party as the case may be, and may make such order, with respect to the costs of reserving the question, and stating the same for their opinion, and otherwise arising there out or connected therewith, as such High Court may think proper, and all orders made by the High Court under this section shall be final."

(5) Before Mr. Justice Kemp and Mr. Justice Markby.

Bajinath Chatterjee v. Lakhi Mani Debi.

The 29th July 1869.

Markby, J. (Kemp, J., concurring).--I think it is quite clear that the finding of the lower Appellate Court is wrong. The plaintiff's case was that one biga of land, within stated boundaries, belonged to one Raghutan, as rent-free lakhiraj land; that Raghutan had an immediate tenant of the name of Baksu Sing, who had an under-tenant of the name Uma Shurini; and that she, the plaintiff, purchased from Raghutan, not in the year 1263 (1856) as the Judge in the lower Appellate Court says, but on the 8th Paush 1272 (December 20th, 1865). Then she goes on to say that her husband, who, she says, is in this matter separate from herself, purchased the rights of Baksu Sing; and that she has been in possession and receiving rent through her husband; but that the defendant, Bajinath, had sued Uma Shurini for rent, in which suit her husband intervened unsuccessfully; that her husband also brought a suit for ejectment against Uma Shurini, in which suit he was again unsuccessful; and then the husband brought a suit in the Civil Court against Baksu Sing, Uma Shurini, and the plaintiff herself; and in that also he was unsuccessful; and then she ends by an allegation which we are quite unable to understand,--namely, that this last unsuccessful attempt on the part of her husband to establish his right against Baksu and Uma Shurini and herself constitutes her cause of action in the present suit.

The first objection taken in special appeal was not clearly taken below; but it certainly seems clear that the plaintiff has not disclosed any cause of action in the plaint. She does not say that there have been any of those summary proceedings in which she herself having failed is referred for redress to a regular suit, nor can I see that she alleges any

sort of injury as having accrued, or even as likely to accrue, from what has taken place. It follows, therefore, that no suit will lie under the provisions of section, 15 of Act VIII of 1859, because, generally speaking, no declaration of right can be made, unless the plaintiff can show that there was some relief which the Court could have given.

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The plaintiff's suit will be dismissed, and this appeal decreed with all costs in the Court below and in this Court.