

(1879) 12 CAL CK 0010

Calcutta High Court

Case No: None

Kally Churn Shaw and
Another

APPELLANT

Vs

Dukhee Bibee and
Another

RESPONDENT

Date of Decision: Dec. 1, 1879

Citation: (1880) ILR (Cal) 692

Hon'ble Judges: Wilson, J

Bench: Single Bench

Judgement

Wilson, J.

This is a suit brought by the plaintiffs, claiming to be heirs of one Doorga Shaw, and asking to recover, as against the defendant (Dukhee Bibee), the property which they allege formed part of the estate of Doorga Shaw, and for accounts. They claim as sons of Doorga Shaw, by what they call a sagai marriage.

2. The first question to consider is, whether, among the caste to which the plaintiffs' mother belongs, a marriage such as that which has taken place is a valid marriage so as to make the children legitimate.

3. The sagai marriage is not unknown. It has been before the Court on a former occasion. A sagai marriage, very similar to the one in this case, came before a Division Bench of this Court in the case of Bissuram Koiree v. The Empress (), and the marriage was held to be a good marriage so far as to render a person who had intercourse with a woman so married liable for adultery.

4. The evidence shows that the sagai marriage is common among the Hulwae caste whose home is in Benares, and who have a large settlement in Calcutta. It has been proved that a man of this caste may take a widow in marriage. I think it is further proved that if a marriage is entered into without payment of the fine, the subsequent payment of the fine by the husband is sufficient, and further by taking

the woman home as his sagai wife.

5. It is further proved that the custom allows a man who has a wife living to contract a sagai marriage if he is a childless man. It is further alleged that such a marriage may be contracted with a woman who has a husband living. Some stated it broadly, other witnesses limited it strictly; and the latter are, I think, right. They said a married woman may contract a sagai marriage notwithstanding her husband is living, provided the punchayet has examined and reported that her husband is unable to support her.

6. It is not necessary to determine whether, in the case of a married woman, the custom is good in law; but in the case of a widow I see nothing objectionable to it on principle. (His Lordship then considered the evidence as to the marriage, and continued).

7. The remaining question is, what account are they entitled to. That depends on the Statute of Limitation.

8. I don't think the case falls under Article 123 for this reason. The ground of the plaintiffs' claim is not a legacy or a share of a residue or a distributive share. This suit is in no way founded on that. The suit is to recover property which they say is theirs.

9. So far as the Immovable property is concerned, I think it falls under Article 144. If not under that, I think it must fall under Article 120.

10. As to the moveable property, the case falls perhaps under Article 89 or 90, which deals with suits by principals against agents for moveable property received by the latter and not accounted for, and suits against agents for neglect or misconduct.

11. If the case, so far as the moveables are concerned, is not governed by either of those articles, it then falls under Article 120. It is necessary to look at the facts to see whether they are such as to bar the suit. The material facts seem to be these. The deceased died in 1857. He left one infant son, the other son was born afterwards. The widows would be entitled to maintenance, the sons would take the property as heirs. It seems to me most natural that the actual control of the property should be in the hands of the elder widow, and so it continued. Then whatever interval there may have been from the death of Doorga to the latest period, the younger widow remained with the elder widow. Then, from the time when they went to reside in the house to the quarrel in 1865, all the parties lived and messed together. The quarrel was in 1865. A suit was brought by the younger widow.

12. The younger widow set up a will, and the elder widow set up title as heiress.

13. Probably neither party was confident in her case, and it ended in a compromise.

14. The substance of the compromise is this. It is stated that the following arrangement had been come to through the intervention of certain persons, and

the substance of that agreement was shortly this: an arrangement was made with respect to the mode in which the family property was to be divided, but then it was to continue so long as the management remained in the hands of the elder widow. The property was managed by the elder widow Dukhee on behalf of the family generally. The plaintiffs have had all their wants supplied out of the proceeds of the family property. I am satisfied this was the case till Aughran last year. The fact remains that, for some time, past, when the sons came of age, when they could manage the business, the shop has been in their hands. A quarrel took place between the plaintiffs and the defendant. From that time, if either Article 144 or 120 applies, and the possession became adverse from that time, the cause of action accrued and limitation began to run. If Article 120 be applicable, the limitation began from Aughran last year.

15. If Articles 89 and 90 apply, then from the time when the defendant set up title in herself the limitation began. The agency terminated, and then also limitation would run from Aughran. It seems to me the suit is not barred by limitation. Mr. Apcar has not contended that the account should go beyond that period.

16. The plaintiffs are entitled to a decree to this effect.

17. They are entitled as heirs of Doorga Shaw to such part of the estate of Doorga Shaw, or the proceeds of it, as was in the hands of the defendant Dukhee on the last day of Aughran last year, and to an account of such property so in her hands, and of the rents received therefrom and dealings therewith.

18. I will make no decree as to the costs at present; the accounts will have to be taken, and after that is done, I Will make my order as to the costs.

19. Plaintiffs are entitled, as above, subject to the defendant's right of residence in the house.