
(1874) 06 CAL CK 0005

Calcutta High Court

Case No: None

G. Peters

APPELLANT

Vs

T.Z. Manuk and Others

RESPONDENT

Date of Decision: June 2, 1874

Judgement

Sir Richard Couch, Kt., C.J.

No objection is taken in the grounds of appeal that the suit ought not to be dismissed as against the husband. The object of it was to have the balance which is due on the notes paid out of the separate property of the wife; and the question we have to decide is whether the separate property of the wife is liable, and the trustees ought to pay the amount due. The section of the Indian Succession Act that is relied on is the 4th, which says that "no person shall, by marriage, acquire any interest in the property of the person whom he or she marries, nor become incapable of doing any act in respect of his or her own property, which he or she could have done if unmarried." It was contended that the effect of this is to prevent the operation of the clause in the marriage settlement by which the female defendant is restrained from anticipating or alienating the income of the property which was settled to her separate use. Now the inability to anticipate or alienate the income is not an incapacity which is caused by the marriage. Under the settlement she takes a limited interest. The money was given to be held by the trustees upon trust to pay the interest to her for life for her sole and separate use free from the debts of her husband and without power of anticipating or alienating the same, and her incapacity to anticipate or alienate is caused by the limitation of the interest which she takes under the settlement. It is true that, according to the authorities by which the law on this subject has been settled in England, a restraint or limitation of this kind can operate only during the marriage; but this does not make the marriage the cause of it. The restraint is created by the settlement. If there were no such words in the settlement, and the property was given to the wife for life, the marriage would make no difference, although it was said to be for her separate use. Unless the husband acquired an interest in it, she would have the same power of alienation or anticipation as if she were single. The words of the section are:--"No person shall, by marriage, acquire any interest in the property of the person

whom he or she marries, nor become incapable of doing any act in respect of his or her own property, which he or she could have done if unmarried." She does not by the marriage become incapable of anticipating or alienating. In this case she never was capable of anticipating or alienating the income arising from this money because she had no right to it until the marriage, and then she had no power to anticipate or alienate. I think therefore that upon this section the contention for the appellant cannot be supported.

2. But Mr. Kennedy, who appeared for the appellant, referred to Act III of 1874, and relied upon the preamble to it and upon s. 8. The preamble recites s. 4 of the Indian Succession Act and continues:--"And whereas, by force of the said Act, all women, to whose marriages it applies, are absolute owners of all property vested in, or acquired by, them, and their husbands do not by their marriage acquire any interest in such property, but the said Act does not protect such husbands from liabilities on account of the debts of their wives contracted before marriage, and does not expressly provide for the enforcement of claims by or against such wives." I think the words "are absolute owners of all property vested in, or acquired by, them," must be read not alone but in connexion with the words which follow "and their husbands do not by their marriage acquire any interest in such property." What is meant to be declared is with reference to the effect of the marriage on the property of the woman in giving to the husband an interest in it. I do not think that the Legislature, when using the words "absolute owners," intended to make a declaration which would have the effect of extending the provisions of s. 4 of the Indian Succession Act. It was intended to describe the legal effect of s. 4, and the word "absolute" will have a fair meaning given to it as used with reference to the husband not acquiring any interest in the property. Supposing the preamble can have the meaning which Mr. Kennedy contended for, and can be treated as a declaration by the legislative authority of the law,--a declaration that a woman is the absolute owner of property notwithstanding that, in the settlement by which she acquires it, there is a restraint against anticipation and alienation,--I think that, as a declaration by the legislative authority of what the law is, it ought not to have a retrospective effect any more than any other provision in the Act. The Legislature may declare that such is the law, but without something showing that it was intended to give to the declaration a retrospective effect it ought not to have it.

3. If s. 8 were applicable to this case, I should say it would make the separate property of the wife liable notwithstanding this clause in the settlement, because the words there are very different from the words in the Indian Succession Act. They are:--"If a married woman (whether married before or after the 1st day of January 1866) possesses separate property, and if any person enters into a contract with her with reference to such property, or on the faith that her obligation arising out of such contract will be satisfied out of her separate property, such person shall be entitled to sue her, and to the extent of her separate property, to recover Against her whatever he might have recovered in such suit had she been unmarried at the date of the contract and continued unmarried at the execution of the decree."

4. These words are substantially the same as the words in s. 12 of the 33 & 34 Vict, c. 93, upon which the late Master of the Rolls held in *Sanger v. Sanger L.R.*, 11 Eq., 470 that the separate property of a married woman was liable notwithstanding any clause against anticipation. The question, then, is whether s. 8 of Act III of 1874 applies to the present case, whether it is retrospective and applies to a contract made before the passing of the Act. I think it does not. The words "if any person enters into a contract with her with reference to such property, or on the faith that her obligation arising out of such contract will be satisfied out of her separate property" appear to me to point to contracts entered into after the Act had been passed, and not to be intended to affect contracts made before, and to alter the rights of persons or the obligations arising out of them. If it could be considered to be a law of procedure only, it might be held to have a retrospective effect. But it is not a law of procedure. It is a law by which an effect is given to a contract with a married woman which it had not before, and it declares that a contract entered into on the faith of its being paid out of the separate property shall be so satisfied. I think, therefore, that s. 8 does not apply to this case, and that the decision of Pontifex, J., should be upheld.

5. It may be (and I strongly incline to think that I should adopt the opinion of the late Master of the Rolls in the case I have referred to) that, where a contract is made after Act III of 1874 came into operation, there will be a remedy against the separate property of the wife, although there is a clause against alienation or anticipation in the marriage settlement. I have said I incline to this opinion, because what I may now say cannot be considered as a decision. Being of opinion that the Act has not a retrospective effect, it is not necessary to decide that question in the present case.

6. The appeal will be dismissed with costs. As Macpherson, J., says that trustees are generally allowed separate costs in this Court, the trustees will have a separate set of costs in this appeal.

Macpherson, J.

I also am of opinion that nothing in the Succession Act renders a provision against anticipation nugatory, and that the Act III of 1874 is not applicable to this case.

(1) Act X of 1865, s. 4.--"No person shall, by marriage, acquire any interest in the property of the person whom he or she marries, nor become incapable of doing any act in respect of his or her own property, which he or she could have done if unmarried."

(2) Act III of 1874, Preamble.--* * * "Whereas, by force of the said Act (i.e., The Indian Succession Act, 1865), all women, to whose marriages it applies, are absolute owners of all property vested in, or acquired by, them, and their husbands do not by their marriage acquire any interest in such property, but the said Act does not protect such husbands from liabilities on account of the debts of their wives contracted before marriage, and does not expressly provide for the enforcement of claims by or against such wives; it is

enacted as follows:--

S. 8.--"If a married woman (whether married before or after the 1st day of January 1866) possesses separate property, and if any person enters into a contract with her with reference to such property, or on the faith that her obligation arising out of such contract will be satisfied out of her separate property, such person shall be entitled to sue her, and to the extent of her separate property, to recover against her whatever he might have recovered in such suit had she been unmarried at the date of the contract and continued unmarried at the execution of the decree.* * * *"