(1868) 12 CAL CK 0021

Calcutta High Court

Case No: Special Appeal No. 1239 of 1868

Janmajay Mazumdar		APPELLANT
	Vs	
Keshab Lal Ghose and Another		RESPONDENT

Date of Decision: Dec. 21, 1868

Judgement

Macpherson, J.

We think the judgment of the lower Appellate Court is right, and this appeal ought to be dismissed. As the case is placed before us, the real contest is as to the right of succession to one Gorachand. This Gorachand, it is found by the lower Appellate Court, disappeared about the year 1258 (1850), and has not since been heard of. A grandson, Panchanan, and Ambika, the widow of a deceased son, having both died, the respondent Keshab Lal Ghose contends that he, as the next heir of Gorachand, at the time of the expiry of 12 years, from the date of Gorachand''s disappearance, is entitled to possession of the property, which is the subject of the present suit. The lower Court has found as a fact that Panchanan died in Sraban or Bhadra 1270 (1863); that Ambika died in Aswin of the same year; and that both of them died within 12 years of the date of Gorachand''s disappearance. The plaintiff in this suit claims under a mortgage from Panchanan; but the respondent, Keshab Lal, contends, that as Panchanan, if he did mortgage the property, did so within 12 years of Gorachand''s disappearance, be did it before any right had accrued to him, and at a time when he could not deal with the property; and that, therefore, the mortgage does not affect or interfere with the rights of Keshab Lal as the next heir of Gorachand. The question is, whether, when a Hindu disappears and is not heard of for a length of time, any person can succeed to, or take any interest in, his property as his heir, until after the expiry of 12 years from the date on which he was last heard of.

2. We think that no right accrues to any person as heir to the person disappearing until the 12 years have been completed. There is not much authority on the subject: but this appears to be the opinion of such writers as have touched upon the point. In the course of the argument, we have been referred to Macnaghten''s Hindu Law,

Vol. II, page 9; case of Gunganaryan Bonnerjee v. Balram Bonnerjee (2 Mor. Dig., 152); case of Musst. Ayabati v. Rajkrishna Sahoo (3 Sel. S.D.K., 28); SHL 1 133; Vyavastha Darpana by Baboo Shama Charan Sircar, pages 10 and 11, and an unreported case.[1] Being of the opinion which we have expressed, we think the judgment of the lower Appellate Court is substantially right.

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3rd December, 1868.

Present:

Mr. Justice Loch and Mr. Justice Glover.

Saradasundari Debi versus Gobind Mani alias Brajasundari Debi[2]

Hindu Late - Presumption of Death by Absence--Bequest to Idol.

The rule of English Law, that a period of seven years'' absence without tidings is sufficient to raise a presumption of death cannot be applied in the case of a Hindu. The Hindu Law has a rule of its own, requiring the lapse of 12 years before an absent person, of whom nothing has been heard, can be presumed to be dead.

A testator by will left certain property to an idol, and appointed a sebait. The person so appointed died without taking charge of the property or filling the office, and the lands remained in the possession of testator''s family. Held, that this property would follow the course of the other properties left by testator, and be divided with them among the devisees under the will.

Baboos Srinath Das and Mohini Mohan Roy for appellant.

Baboos Annada Prasad Banerjee and Ashutosh Chatterjee for respondent.

The facts of this case sufficiently appear in the judgment of the Court, which was delivered by

Loch, J.--Krishna Nath Nyayapanchanana died on the 9th of Chaitra (21st March 1851), leaving two widows, Maheswari and Surjamani, and three daughters, Gobindamani alias Brajasundari, the plaintiff in this case, Jayasundari, and Saradasundari, the defendant in this case. Krishna Nath Nyayapanchanana executed a will, bearing date the 5th of Bhadra 1257 (20th August 1850), by which he gave maintenance to his elder wife, Surjamani, and left the rest of his property to Maheswari, to be in her sole management and control during her life, and on her death to be divided in equal shares by his three daughters. He further dedicated the lands of Basantpur to the service of the family idol, and appointed his son-in-law,

Biswanath, the husband of Saradasundari, to be sebait. Maheswari died on the 9th of Chaitra 1271 (21st March 1865), and plaintiff brings the present suit for possession of the whole of the property left by her father, moveable and immoveable, on the ground that Jayasundari is dead, Saradasundari is a childless widow, and that she is the only married daughter likely to have a family, and is entitled under the Hindu law to succeed. The Judge stated, in his judgment with regard to the intention of the testator and the purport of the will[2]: I am of opinion that the testator did not intend that, at the death of his widow Maheswari, only those of his daughters who had sons or who were not past child-bearing should succeed to his property. On the contrary, the terms used clearly show that all his three daughters were to succeed; that he never contemplated their becoming childless widows, or intended their exclusion, because on this ground they would not, as such, under the Hindu law, be entitled to succeed. The concluding sentence, moreover, in providing for the disposition of the property on the death of any daughter, shows that the testator never intended to exclude childless daughters from succeeding at the death of his widow Maheswari. I am, therefore, of opinion that on the third issue the plaintiff is entitled, at the death of Maheswari, to succeed to only one-third share with her other two sisters, and that she is not entitled to succeed under the Hindu law in opposition to the terms of the will as interpreted in the foregoing." No appeal from this finding has been put in by the plaintiff; and, therefore, we cannot allow the plaintiff''s vakeel in answer to raise the question as to the correctness or otherwise of the Judge''s finding upon this point; but before we proceed to enquire as to the right of the plaintiff, we must first determine whether Jayasundari is dead as asserted by the plaintiff, or still alive, as asserted by the defendant. The Judge has declared that Plaintiff is entitled to one-third share of the landed properties on her own right, and one-third on the right of Jayasundari; and the defendant being a childless widow incapable of succeeding Jayasundari, is entitled to one-third; and, therefore, the appeal rests chiefly with regard to one-third of the immoveable property. We concur with the Judge in thinking that the direct evidence as to the death of Jayasundari is altogether untrustworthy; but we think that the Judge is in error when, disposing of this point, he applied the rule of the English law, which provides that a period of seven years'' absence is sufficient to raise the presumption of death, when the Hindu law has a rule of its own which requires the lapse of 12 years before the expiry of which an absent person, of whom nothing has been heard, during that period, cannot be considered as dead (Loch, J., then stated and discussed the evidence on this point). Therefore, so much of the Judge''s order, decreeing to the plaintiff one-third of the landed properties belonging to Jayasundari, must be set aside.

With regard to the moveable property, we find that the plaintiff has put in a list, distinctly specifying many articles of household furniture, &c. She did not ask the Court to attach these articles; as articles which belonged to her father to be divided among the daughters under the terms of the will; and she has valued these articles

at about Rs. 925. We think that plaintiff has entirely failed to prove the existence of these articles, and that their value was what she has stated in the plaint. We think the onus was upon her to do so; and, therefore, with regard to the moveable property, plaintiff is entitled only to recover her share of the moveable properties which the defendant has admitted.

The plaintiff has claimed certain plots of lakheraj land situated in various places which she says were the properties of her father. The defendant alleges that she was only in possession of one-half, the other half being the property of Baikantnath Newgi; and she urges that plaintiff cannot get a decree of the one-third of the whole, unless she can prove that defendant was in possession of the whole. We think this contention is correct, and plaintiff has failed to prove defendant''s possession to the whole of the land. Her decree must be limited to one-third of the half share. Certain other lands, which are claimed by the plaintiff, are alleged by the defendant to be not in her possession. We think that the plaintiff, if she wished to recover these lands from the defendant, and to make her liable for them, was bound to prove that they were in her possession.

With regard to the sebait property Basantpur, we find that though, under the will, a sebait was appointed, yet he never took charge of the property, nor did he fill the office, and the lands remained in the possession of the widow of Krishnanath Nyayapanchanana. The sebait has been dead for several years, and no one had been appointed in that office. Under these circumstances, we think that this property must follow the course of the other properties, and plaintiff be declared entitled to one-third of the same.

We amend the Judge''s decree accordingly.

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The wording of the will as regards the daughters was "my three daughters shall inherit equally whatever is left at Maheswari''s death, but the sons of the other (surviving) daughters shall inherit the property of any that may die childless."