

(1925) 05 CAL CK 0070

Calcutta High Court

Case No: None

Srimati Jasoda Sundari
Choudhurani alias Provabati
Choudhurani

APPELLANT

Vs

Lal Mohan Basu and Others

RESPONDENT

Date of Decision: May 27, 1925

Citation: 91 Ind. Cas. 681

Hon'ble Judges: Mukerji, J; Ewart Greaves, J

Bench: Division Bench

Judgement

Mukerji, J.

These three appeals arise out of three suits for rent wherein the plaintiff claims 8 annas share of rent due for three holdings making the tenants principal defendants and the other 8 annas co-sharers pro forma defendants. The suits were decreed by the Court of first instance and after several interlocutory proceedings were dismissed by the learned Subordinate Judge on appeal.

2. One Kali Kumar Bose had two sons Kailas and Ram. The original plaintiff was the widow of Ram. The co-sharer landlords, pro forma defendants are the heirs of Kailas. The properties in suit were acquired during the lifetime of Kali Kumar in the name of Kailash. Kali Kumar died in the year 1893 and the properties are said to have been acquired between 1880 and 1886. Two of these properties were acquired in the name of third parties and they subsequently executed deeds of release in respect of them in favour of Kailas.

3. The question which arises in these appeals is as to whether the properties were those of Kali Kumar or of Kailas and that is the sole point of controversy in these appeals.

4. In deciding this point the learned Subordinate Judge held that the onus of proving that the properties were those of Kali Kumar lay upon the plaintiff, and being of that

opinion he thought that the plaintiff had failed to discharge that onus and in that view of the matter he dismissed-the plaintiff's suits.

5. The question of onus is intimately connected with one or other of the presumptions of Hindu Law which are relevant to a case of his description. It has been argued before us on behalf of the appellant that in dealing with this question of onus the learned Subordinate Judge was in error. The properties having been acquired during the lifetime of Kali Kumar when Kali Kumar and his sons Kailas and Ram were members of a joint family governed by the Dayabhag School of Hindu Law and there being nothing to show that Kailas had separate funds, it is urged, that it should have been held that Kali Kumar was the owner of the properties and it was for the defendants to prove that Kailas had any separate funds out of which the acquisitions were made.

6. On behalf of the respondents it has been argued that this presumption does not arise in a case in which the members of the family are the father and his sons and reliance has been placed on their behalf upon the decision of this Court in, the case of *Sarada Prosad Roy v. Mahananda Roy* 31 C. 448. The head note of that case runs in these words. "The presumption of law that, while a Hindu family remains joint, all property including acquisitions made in the name of individual members, is joint property does not apply to the case of a joint family governed by the Dayabhaga." As has been pointed out in the case of *Ramanath Chatterji v. Kusum Kamini Debi* 4 C.L.J. 56 the head note of the case in *Sarada Prosad Roy v. Mahananda Roy* 31 C. 448 to which I have referred is misleading. All that that case decides is that under the Dayabhag a family consisting of father and his sons cannot be regarded a joint Hindu family in the technical sense and consequently the presumption referred to in the head note quoted above does not apply to such a family. On a reference to the observations contained in page 451 Page of 31 C.--[31] of the case in *Sarada Prosad Roy v. Mahananda Roy* 31 C. 448, it is clear that in that case the family consisted of a father and his sons and the contention that was put forward in that case was that all the properties acquired by a member of a joint Hindu family are properties of the family as a whole and the learned Judges observed that that presumption put in the way in which it was formulated before them by the learned Vakil appearing for the respondent in that case could not be taken as correct in all circumstances and that it would not arise in a case in which the father and the sons form members of a joint family governed by the Dayabhag School of Law. Ordinarily in other cases of joint family governed by the Dayabhag School the presumption of Hindu Law that while a family remains joint all properties including acquisitions made in the name of individual member is joint property does apply. See the case of *Ramanath Chatterjee v. Kusum Kamini Debi* 4 C.L.J. 56 and the other cases cited in the judgment of this Court in that case.

7. In the present case the family as it stood at the time of the acquisitions consisted of Kali Kumar, his son Kailas and probably also his son Ram. Therefore, this

presumption of Hindu Law cannot apply to the present case. But there is another presumption also which is relevant and which is founded upon the principle that where the question is whether property standing in the name of a junior member of a Hindu joint family is his self-acquisition the criterion is to consider from what source the money comes with which the purchase-money is paid. Therefore, in the absence of evidence that the junior member had any separate funds or that the property in question was purchased with money belonging to him the presumption is clear and decisive that it was acquired by the head of the family in the name of the junior member and that it was not the self-acquired property of the junior member. This presumption applies to a family governed by the Dayabhag School of Hindu Law as also to such a family consisting of a father and his sons, as would appear from the decision of the Judicial Committee in the case of *Parbati Dasi v. Raja Baikuntha Nath De* 22 Ind. Cas. 51 : 19 C.L.J. 129 : 15 M.L.J. 66 : (1914) M.W.N. 42 : 12 A.L.J. 79 : 18 C.W.N. 428 : 16 Bom. L.R. 101 : 26 M.L.J. 248 (P.C.). The question, therefore, is whether in the present case it has been proved that the property in question was purchased with money belonging to Kailas, and also whether it has been proved that Kailas had any separate funds of his own. So far as this question is concerned there is no evidence to show that the property was purchased with separate funds of Kailas but our attention has been drawn by the learned Vakil for the respondent to a passage in the judgment of the learned Subordinate Judge as containing a finding" to the effect that at the time when the property was acquired Kailas had separate property of his own. Now the passage in the judgment to which reference is made runs in these words. "It may at once be accepted from the evidence even on the defendant's side that Ram and Kailas were in possession of joint funds and that they, were also in possession of separate funds." I am very doubtful whether this finding really relates to the point of time at which the acquisitions were made, that is to say; the period from 1880 to 1886 when Kali Kumar was alive. The reasons for this doubt are these: The first part of this finding is to the effect that Ram and Kailas were in possession of joint funds. That evidently refers to a period after Kali Kumar's death, for so long as Kali Kumar was alive, it cannot possibly be said that Ram and Kailas were in possession of joint funds. I see no reason to hold that the other part of the finding that Ram and Kailas were in possession of separate funds relates to a different point of time from what is referred to in the first part of this finding. It will be seen on a reference to the judgment of the learned Munsif that he found, and that finding has not been displaced by the learned Subordinate Judge, that on a certain calculation the properties were acquired when Kailas age was between 8 to 15 years and according to another calculation, when he was between 17 and 23 years. This finding as I have said has not been touched or reversed by the learned Subordinate Judge. I am unable to hold that the finding of the learned Subordinate Judge to which our attention has been drawn is really a finding to the effect that at the time when the acquisitions were made Kailas had any separate funds of his own. In the absence of such a finding it is clear that the onus would be upon the defendants and not on the

plaintiff.

8. It has been urged before us on behalf of the respondent that there is evidence on the record upon which it may be found that Kailas had separate funds of his own at the time of the acquisition.

9. We think, therefore, that the proper order to make is to set aside the judgment of the learned Subordinate Judge and to send back the case to him so that he might come to a proper finding on the question as to whether Kailas had separate funds of his own at the time of the acquisitions, that is to say, between 1880 and 1886. If he finds this question in the negative, then the onus will be on the defendants and the presumption to which I have referred will enure to the plaintiffs benefit and the plaintiff will succeed unless the defendants have succeeded in rebutting the presumption. If he finds this question in the affirmative, the presumption will not arise, and the onus will be on the plaintiff to prove that Kali Kumar Bose was the owner of the properties which were acquired in the name of Kailas and the plaintiff's suit will fail unless he succeeds in discharging that onus.

10. In the result the decrees of the learned Subordinate Judge are set aside and the cases sent back to him to be dealt with in accordance with the observations I have made. Costs will abide the result.

Greaves, J.

11. I agree.