

(1928) 01 CAL CK 0006
In the Calcutta High Court

Adhar Chandra Bhattacharya and Others	APPELLANT
Vs	
Srimati Sushila Sundaripal	RESPONDENT

Date of Decision : 25-01-1928

Acts Referred:

Citation : 109 Ind. Cas. 35

Hon'ble Judges : Mallik, J

Bench : Single Bench

Judgement

Mallik, J.—The suit out of which this appeal arises was one brought by the plaintiff as a reversioner on the death of her mother to recover the estate of her father Brojo Kishore. The allegations on which the suit was brought were briefly these. The property formerly belonged to one Naba Kishore who died leaving behind him two sons, Gour Kishore and Ram Kishore. Gour Kishore on his death was succeeded by his widow Anund Kumari to the extent of an 8 annas share in the property and Ram Kishore was succeeded by his son Brojo Kishore to the extent of the other half. On the death of Brojo Kishore his widow Swarnamoyee the mother of the plaintiff succeeded to the 8 annas of the estate and on her death the plaintiff was entitled to the property as her reversioner. According to the plaintiff her mother Swarnamoyee and Anund Kumari sold their properties to one Nabin Chandra Chaudhuri in 1288 B.S. on the allegation of a number of legal necessities in the deed of sale though, as a matter of fact, there was no legal necessity at all. In 1290 B.S. the interest of Nabin in the property was purchased by defendants Nos. 1 to 8 in execution of a decree against him and so the plaintiff brought the present suit for recovery of possession of the 8-annas share in the properties belonging to her father Brojo Kishore. The principal defence in the case was that the properties had been sold for legal necessity and the substantial issue for determination in the case, therefore, was whether there was legal necessity for this sale as alleged in the sale-deed.

2. The case has a little history behind it. The first Court found in favour of the defendants and dismissed the suit. On appeal the learned Subordinate Judge who

tried the appeal came to the conclusion that no legal necessity had been established and he allowed the appeal and decreed the suit. The defendants there upon came up to this Court in second appeal and a Division Bench of this Court heard this second appeal, set aside the order of the Subordinate Judge and sent the case back on remand for a re-trial of the appeal with certain observations and directions. The appeal was then heard by another Subordinate Judge and this learned Judge also came to the conclusion that legal necessity had not been established and that the plaintiff was, therefore, entitled to a decree. Defendants Nos. 1 to 8 have appealed to this Court against this decision of the learned Subordinate Judge.

3. I was taken through the judgment and the order of remand passed by the Division Bench and my attention was drawn to the fact that the learned Judges in their judgment observed that the principles as laid down in the case of *Nanda Lal Dhur Biswas v. Jagat Kishore Acharjya Chowdhuri* 36 Ind. Cas. 420 : 44 C. 186 : 20 M.L.T. 335 : 31 M.L.J. 563 : (1916) 2 M.W.N. 336 : 4 L.W. 458 : 18 Bom. L.R. 868 : 14 A.L.J. 1103 : 24 C.L.J. 487 : 1 P.L.W. 1 : 81 C.W.N. 225 : 10 Bur. L.T. 177 : 43 L.A. 240 should apply to the present case. It was contended before me that the learned Subordinate Judge against whose decision the present appeal has been preferred committed an error of law in holding that the principles in *Nanda Lal Dhur's* case 36 Ind. Cas. 420 : 44 C. 186 : 20 M.L.T. 335 : 31 M.L.J. 563 : (1916) 2 M.W.N. 336 : 4 L.W. 458 : 18 Bom. L.R. 868 : 14 A.L.J. 1103 : 24 C.L.J. 487 : 1 P.L.W. 1 : 81 C.W.N. 225 : 10 Bur. L.T. 177 : 43 L.A. 240 could not apply to the present case. As I read the judgment of the learned Subordinate Judge I do not think that he means to say that the principles in *Nanda Lal Dhur's* case 36 Ind. Cas. 420 : 44 C. 186 : 20 M.L.T. 335 : 31 M.L.J. 563 : (1916) 2 M.W.N. 336 : 4 L.W. 458 : 18 Bom. L.R. 868 : 14 A.L.J. 1103 : 24 C.L.J. 487 : 1 P.L.W. 1 : 81 C.W.N. 225 : 10 Bur. L.T. 177 : 43 L.A. 240 could not apply to the case before him. As a matter of fact the learned Subordinate Judge began his judgment by saying that the principles as enunciated in the case of *Nanda Lal Dhur Biswas v. Jagat Kishore Acharjya Chowdhuri* 36 Ind. Cas. 420 : 44 C. 186 : 20 M.L.T. 335 : 31 M.L.J. 563 : (1916) 2 M.W.N. 336 : 4 L.W. 458 : 18 Bom. L.R. 868 : 14 A.L.J. 1103 : 24 C.L.J. 487 : 1 P.L.W. 1 : 81 C.W.N. 225 : 10 Bur. L.T. 177 : 43 L.A. 240 were to be borne in mind and nowhere did the Subordinate Judge say that the principles as laid down in that case were not to be considered in the determination of the case before him. One of the principles laid down in that case is that a recital that is to be found in an old document assumes a great importance after a long period of time when all those who could have given evidence on the relevant points have grown old or have passed away and a recital of this nature cannot lightly be set aside. But their Lordships qualified this observation by saying that the recital in order to be entitled to such importance must be consistent with the probabilities and circumstances of the case. In the present case the learned Subordinate Judge has fully dealt with the circumstances of the case and also with the evidence that he had before him on the question of the existence or otherwise of legal necessity and on a

consideration of them he thought that in view of the probabilities, circumstances and the established facts of the case the principles laid down in Nanda Lal Dhur's case 36 Ind. Cas. 420 : 44 C. 186 : 20 M.L.T. 335 : 31 M.L.J. 563 : (1916) 2 M.W.N. 336 : 4 L.W. 458 : 18 Bom. L.R. 868 : 14 A.L.J. 1103 : 24 C.L.J. 487 : 1 P.L.W. 1 : 81 C.W.N. 225 : 10 Bur. L.T. 177 : 43 L.A. 240 would not be of much help. As laid down in that case recitals in deeds cannot by themselves be relied upon for the purpose of proving assertion of facts that they contain. They are certainly some kinds of evidence and if the recitals happen to be in a document sufficiently old they become more and more weighty as time goes on. But such recitals can never be conclusive evidence. In the case of recitals found in old documents they can be used as presumptive evidence but the presumption that can arise from them cannot be said to be one which is un rebuttable. In the present case if there was any presumption from the recitals in the deed of sale the findings of fact arrived at by the learned Subordinate Judge were sufficient in law to rebut that presumption, I am, therefore, of opinion that the learned Subordinate Judge gave a full consideration to the principles as laid down in Kanda Lal Dhur Biswas v. Jagat Kishore Acharjya Chaudhuri 36 Ind. Cas. 420 : 44 C. 186 : 20 M.L.T. 335 : 31 M.L.J. 563 : (1916) 2 M.W.N. 336 : 4 L.W. 458 : 18 Bom. L.R. 868 : 14 A.L.J. 1103 : 24 C.L.J. 487 : 1 P.L.W. 1 : 81 C.W.N. 225 : 10 Bur. L.T. 177 : 43 L.A. 240 and I do not think that he can be said to have committed any error of law when after considering those principles he came to the conclusion that those principles would not be of any help in view of the circumstances and findings of fact arrived at in the case.

4. Another small point taken before me was in connection with the admissibility of a certain document Ex. (D). It was said that the learned Subordinate Judge was wrong in holding the document as inadmissible. This document has been shown to me. It is an unregistered mortgage-bond. One of its executants purported to be a lady and there was no signature on the document of any attesting witness. In these circumstances the lower Appellate Court, in my opinion, was not wrong in holding the document to be inadmissible.

5. In the properties in dispute there was a holding of about 2 kanis of land. There has been a certain amount of controversy over this holding. The learned Subordinate Judge has found as a fact that this property was a part of the estate of the plaintiff's father Brojo Kishore and was not the personal property of Swarnamoyee. It was contended before me that the learned Subordinate Judge approached the question whether the property belonged to Swarnamoyee or was a part of the estate of her husband from a wrong point of view in view of the observation of their Lordships in the order of remand. In the order of remand there is a passage which runs thus: " Prima facie, when the widow Swarnamoyee dealt with that property as her own property and did not treat it as part of her husband's estate the property would be hers." It was said that the learned Subordinate Judge in view of this observation was wrong in holding that the property belonged to Swarnamoyee's husband's estate as there was no evidence to show that Swarnamoyee had any fund of her own besides the fund of

her husband's estate. But the learned Subordinate Judge's finding on this point was not based on this fact alone that there was no evidence to show that Swarnamoyee had any fund of her own. There were other facts before him to indicate that the property was not her own, but was a part of her husband's estate. As observed by him she dealt with it in the kobala in the same way as she dealt with the other properties of her husband and although there are some statements in this kobala to show that this property belonged to and was possessed by Swarnamoyee there were other statements also to indicate that the property had been purchased as a part of the family property. These being the circumstances of the case the finding of the learned Subordinate Judge on this point, namely, that the two kanis of land were not the personal property of Swarnamoyee but was a part of her husband's estate a finding that cannot be said to be based on no evidence whatsoever should not, in my opinion, be disturbed.

6. Another point that was taken before me was that the judgment and decree of the learned Subordinate Judge cannot be allowed to stand inasmuch as he has not displaced the finding of the trial Judge on the question of representation to Nabin of the existence of the debts and of Nabin's enquiries about their existence. The consideration of this question can, in my opinion, hardly arise in view of the findings of fact arrived at by the learned Subordinate Judge when he held that there was no legal necessity at all.

7. In view of the aforesaid observation I am unable to hold that there has been any error of law that would justify an interference with the order passed by the learned Subordinate Judge. The appeal fails and is dismissed with costs.

8. On an application on behalf of the appellant I declare that the case is a fit one for appeal.