

(1906) 04 CAL CK 0020
In the Calcutta High Court

Dharma Das Kundu

APPELLANT

Vs

Amulyadhan Kundu

RESPONDENT

Date of Decision : 30-04-1906

Acts Referred:

Transfer of Property Act, 1882 — Section 123

Citation : (1906) ILR (Cal) 1119

Hon'ble Judges : Rampini, J;Mookerjee, J

Bench : Division Bench

Judgement

Rampini and Mookerjee, JJ.—This is an appeal on behalf of the plaintiff in an action commenced by him for the ejectment of the defendant, one of his sons, from the property described in the schedule act of trespass. The plaintiff alleged that the land mentioned in the plaint is his ancestral property, that the defendant abuses and ill-treats him and sometimes attempts to beat him, and that his conduct has been of such a description as practically to destroy the peace of his family. He contends that the defendant is not entitled to enter upon or remain on the property without his leave and license and against his wish and consequently prays for a decree for ejectment and for a perpetual injunction. The defendant resisted the suit on various grounds, amongst which it is sufficient to state that he alleged that he paid off a mortgage upon a portion of the land described in the plaint and made improvements in the other parts of the property and substantial additions to the ancestral buildings at considerable expense from his own earnings. The defendant contended that as these improvements and additions have been made with the knowledge and assent of the plaintiff, the latter was estopped from ejecting him or restraining him from a fair use of the property. He further denied the truth of the charge of misbehaviour brought against him. The Courts below have concurrently found the following facts, namely, first that the land described in the plaint is the ancestral property of the plaintiff; secondly, that there were ancestral buildings, to which improvements and substantial additions have been made by the defendant at considerable expense with the consent of the plaintiff; thirdly, that a mortgage which covered

a portion of the ancestral lands has been discharged with money supplied by the defendant; fourthly, that the defendant lived jointly with his father until within the last two or three years, since when he has separated from him in mess and that during the time they lived jointly the defendant earned considerable sums of money as an engraver, while the plaintiff carried on the ancestral business of a grocer; and fifthly, that the charge of misbehaviour is substantially true, and the defendant appears to have been exasperated because his father has made a testamentary disposition of the properties in favour of his brothers and thus practically disinherited him. Under these circumstances the Courts below have held that the plaintiff is not entitled to deprive his son of the enjoyment of the property and have accordingly dismissed the suit. The plaintiff has appealed to this Court, and on his behalf the decision of the Court below has been challenged on two grounds, namely first, that the plaintiff is under the Hindu Law the sole owner of the ancestral lands and that the additions and improvements effected by the defendant do not entitle him to possession against the will of the plaintiff, and secondly, that the conduct of the defendant entitles the plaintiff to a decree for ejectment and for a permanent injunction. The questions raised are somewhat novel and their decision is not altogether free from difficulty; but after a careful consideration of the rules of the Dayabhaga School of Hindu Law, by which the parties are admittedly governed, we must hold that the plaintiff is entitled to succeed.

2. As regards the first contention of the appellant, it is now settled beyond the possibility of all dispute that under the Hindu Law as expounded by Jimutavahana in the second chapter of the Dayabhaga, the right of a son to his father's wealth does not originate from the date of his birth, but from the date of the father's death; so long as the father lives, he is absolute owner, not only of his self-acquired property, but also of all ancestral wealth; it follows, therefore, that the father can deal with the same in any manner he likes, irrespective of the consent of his sons. This has been treated as settled ever since the decision of the Supreme Court in *Juggomohon v. Neemoo Dossee* (1831) Morton 90 : 2nd Ed. by Montriou, p. 586 in which it was ruled that "a Hindu, who has sons, can sell, give or pledge, without their consent, Immovable ancestral property situated within the province of Bengal, and that without the consent of the sons, he can, by will, prevent, alter or affect their succession to such property." If, therefore, the plaintiff is the absolute owner of the ancestral property described in the plaint, the question arises, how far, if at all, has the position of the plaintiff been affected and his absolute dominion, which is the essential characteristic of ownership, been restricted by reason of the improvements and additions made by his son? Upon this subject it is possible to take one of three views, namely, first that the additions belong to the son; secondly, that by reason of the improvements and accretions the whole has been converted into the joint property of the father and the son, and thirdly, that the additions belong to the father, because he is the owner of the land upon which the additions have been made. As regards the first of these alternatives, which was supported by the

respondent, it was contended by the learned vakil for the appellant, in the first place, that under Ch. II, paras. 65 to 71 of the Dayabhaga, the father is entitled to a share of the acquisition made by the son, the extent of the share varying according as the patrimony has or has not been used in making the acquisition, and in the second place, that whatever the rights of the son might have been to his self-acquisitions, if he had kept them separate, he could not claim any exclusive title after he had voluntarily employed them in improving his father's property. As regards the first branch of his contention, the learned vakil for the appellant also relied upon the text of Manu, Oh. VIII, verse 416, that three persons, a wife, a son and a slave, are declared by law to have in general no wealth exclusively their own; the wealth, which they may earn, is regularly acquired for the man to whom they belong. Similar views are expressed in the writings of other sages; for instance, in the Institutes of Narada, Ch. V, verse 39, and Ch. III, verse 38, and Sankha and Likhita quoted in Jagannath's Digest, Book V, Articles 7 and 17. It is not necessary, however, to consider whether the test of Manu, which might have been applicable to patriarchal families and which gave to the Hindu father the same absolute authority over his family as was possessed by the Roman father, has any application to modern times. It is sufficient for our present purposes to confine our attention to the law as expounded in the Dayabhaga and it is not essential, if at all open to us, to examine the original sources of that law as contained in the works of Manu and other sages. *Collector of Madura v. Muttu Ramalinga Sathupathy* (1868) 12 Moo. I.A. 397 : 10 W.R.P.C. 17. Under that law it was held by the Supreme Court in the cases of *Gooroo Churn Boss v. Goluckmoney Dossee* (1843) 1 Fulto 165, *Jadumoni Dasi v. Gangadhar* (1856) 1 Boulnois 600 and *Surjamoni v. Dinobondhu* (1855) 1 Boulnois 223 that, although the acquisition of a distinct property by a member of a joint Hindu family without the aid of the joint funds or of joint labour gives a separate right and creates a separate estate, the acquisition of a distinct property with the aid of joint funds and joint labour gives the acquirer a right to a double share thereof; but the union with the joint fund of that, which might otherwise have been held in severalty, gives it the character of a joint and not of a separate property. It is argued, however, by the learned vakil for the respondent that, if a father wishes to claim any share of the property acquired by his son, he must allow the son a share of the ancestral property in his hands; and he bases this contention upon the fact that para. 73 of Oh. II of the Dayabhaga finds place in a chapter on partition made by a father of ancestral property and of his own acquisitions. There would be considerable force in this argument, but for the fact that under the Dayabhaga School of law, as interpreted by our Courts, a Hindu father has quite as much power of disposition over ancestral lands as over his self acquired properties. It must be held, therefore, that, whether the acquisitions of a son are made with the help of the joint property or not, the father always takes a double share; if the acquisitions have been made by (he use of the joint funds, the father takes two shares, the acquirer takes two shares, and the rest of the brothers one share, each, but if the acquisitions have been made without the use of the joint funds,

they are divided half and half between the father and the son. This view is in accordance with that taken by this Court in the case of *Sreenarain Berah v. Gooro Pershod Berah* (1866) 6 W.R. 219. We are unable, therefore, to uphold the contention of the respondent, that simply because some of the rooms were built with money earned by the son, they belong exclusively to him. The second branch of the contention of the learned vakil for the appellant, however, shows still more clearly that the exclusive claim advanced on behalf of the respondent is manifestly untenable. It is well settled that property though originally and strictly self-acquisition ceases to be such, and acquires the character of joint property, if it is thrown into the common stock : *Sheo Dyed Tewaree v. Judocnath Tewaree* (1868) 9 W.R. 61 and *Chellayamal v. Multialamal* (1870) 15 W.R.P.C. 1, If, therefore, the land, upon which the new buildings have been erected, had been joint property of the father and the son and the son had borne the expense of their erection, prima facie, the buildings would have been joint property on the theory that the son had voluntarily thrown his earnings into the joint stock. The fact, therefore, that the land is not joint property, but belongs exclusively to the father, cannot obviously sustain the contention of the respondent that the buildings he had paid for were his exclusive property. The first of the three alternative propositions must therefore be decided in favour of the appellant.

3. As regards the second alternative proposition, it is argued on behalf of the respondent that the effect of the additions and improvements made, at the cost of the son, to the property of the father, has been to impress upon the whole the character of joint property. In support of this position a threefold argument appears to have been advanced in the Courts below. It was contended in the first place that at the request of the father, the son had got a portion of the property released from a mortgage and that the father had made an oral gift of such portion to the son. No attempt, however, seems to have been made to prove the alleged gift; and even if an attempt had been made, it was bound to be infructuous, because as pointed out in the case of *Dharmodas Das v. Nistarini Dasi* ILR (1887) Cal. 416 a valid gift of the portion in question could only have been effected by a registered instrument u/s 123 of the Transfer of Property Act. It was suggested in the second place, as appears from para, 6 of the written statement of the defendant, that the new rooms were built at the request of his father and expressly upon condition that they would be his property, that he would be allowed to reside in them and that he would have his legal share, presumably after the death of his father, in the ancestral land and house. No issue, however, was raised upon this point and there does not appear to be any evidence on the record upon which a finding as to the truth or otherwise of the alleged agreement could possibly be sustained. In the third place, it was contended that the plaintiff was debarred by the doctrine of estoppel from asserting his title to the property and from claiming exclusive possession thereof. Upon this point the learned Subordinate Judge has held that as the plaintiff has allowed and encouraged his son to spend vast sums of money on the additions and improvements, his claim is barred by estoppel. It appears to us that the view

of the Court below is based upon a loose and inadequate statement of the principle of estoppel, which was disapproved by their Lordships of the Judicial Committee in *Beni Ram v. Kundanlal* I.L.R (1899) All. 496 : L.R. 26 IndAp 58. The High Court of Allahabad in *Gopi v. Bisheshwar* (1885) A.W.N. 100 had ruled that, if a man permits another to build upon his land and with the knowledge that the building is being erected, stands by and does not prevent the other from doing so, then equity comes in and by the rules of equity, which in this respect are the same as the rules of law, he cannot eject that other person. Their Lordships of the Judicial Committee overruled this case and observed that the doctrine might be applicable, where the owner of land sees another person erecting buildings upon it and knowing that such other person is under the mistaken belief that the land is his own property purposely abstains from interference, with the view of claiming the building, when it is erected. Their Lordships referred with approval to the decision of the House of Lords in *Ramsden v. Dyson* (1866) L.R 1 H.L 129, which is an authority for the following propositions:

(i) If a stranger begins to build on land supposing it to be his own, and the real owner perceiving his mistake abstains from setting him right and leaves him to persevere in his error, a Court of Equity will not afterwards allow the real owner to assert his title to the land.

(ii) But if a stranger builds on land knowing it to be the property of another, equity will not prevent the real owner from afterwards claiming the land with the benefit of all the expenditure on it because there is nothing in his conduct, active or passive, which makes it inequitable in him to assert his legal rights.

4. These rules are based upon the principle that, where a person, with actual or constructive knowledge of the facts, induces another by his words or conduct to believe that he acquiesces in or ratifies a transaction and that other, in reliance on such belief, alters his position, such person is estopped from repudiating the transaction to the prejudice of that other : *Duke of Leeds v. Earl of Amherst* (1846) 2 Phillips 117 : 10 Jur. 956 : 78 R.R. 47, *Be Bussche v. Alt* (1878) 8 Ch. D. 286, *Willmott v. Barber* (1880) 15 Ch. D. 96. In the present case, when the defendant was fully aware that the land, upon which he expended his money, was the property of his father, it is impossible to hold that the plaintiff is estopped from asserting his legal rights, or that the defendant had been encouraged by his acquiescence in the expenditure of his money. Even if, however, the principle of estoppel had been applicable, it would be a matter for consideration whether the subsequent conduct of the defendant would not entitle the plaintiff to assert his legal right without regard to any estoppel. "We must hold, therefore, with reference to the second alternative proposition" that the defendant cannot successfully claim joint title and possession in respect of the properties described in the plaint.

5. As regards the third alternative proposition, it has been argued on behalf of the appellant that the accessions and improvements belonged to the father as

the owner of the corpus. It is not necessary for the purpose of the present litigation to determine finally whether, assuming the improvements to have been made by the son upon the land of the father without his request, the father ought to be allowed to take them without reimbursing the defendant to the extent that his expenditure has enhanced the value of the property. No doubt, if the defendant had made the improvements in good faith as a bond fide occupant of the land and in the belief that the land was his own, he might be entitled in equity to recover the value of the improvements: *Bright v. Boyd* (1843) 1 Story 478 : 2 Story 608. But unless equitable grounds are made out, the moment the improvements are made, they belong to the owner of the land by mere operation of law. Thus in *Wells v. Bannister* (1808) 4 Mass. 514 it appeared that the defendant's son had erected a house upon land belonging to the defendant under a license given him by the defendant to do so; the defendant, however, had not agreed either to convey the land to the son or to pay for the improvements so made. It was held that the father could not be charged for the improvements, because the son had made them with full knowledge that the land belonged not to himself, but to the father, and as the father had not expressed any intention to assume an obligation in reference thereto the son must be taken to have made the improvements without intention to charge the father therefor. Even if we assume, however, that in the case before us. the improvements were effected under circumstances, which entitle the son to their value and to a lien upon the land, it does not follow by any means that the defendant is entitled to remain in possession, until he has been reimbursed: *Parsons v. Moses* (1864) 16 Iowa 444 and the notes to *Jackson v. Loomis* (1825) 15 Am. Dec. 347. The owner is under no legal obligation to pay for improvements, which he did not desire as a condition precedent to a decree for recovery of possession; the improvements may be expensive and beyond the ability of the owner to pay without a disposition of the land for which, as in this case, he may have a strong attachment and which might have answered all his purposes without the improvements (*Jones on Liens*, vol. 11, Sections 1131--1139). We must hold accordingly that even assuming that the defendant is entitled to the value of the improvements, and that he has a charge upon the land to the extent of such value, he is not entitled to remain in occupation against the wishes of his father, and that the plaintiff is consequently entitled to a decree for ejectment.

6. The second ground taken on behalf of the appellant raises the question whether the plaintiff is entitled to an injunction restraining the defendant from entering upon the property. It has been argued by the learned vakils, who appear on behalf of the father, that as appears from the Institutes of Manu, Ch. II, verse 225, and Ch. III, verse 159, the Hindu Law strictly enjoins the son to be reverent to his father and that consequently this is a fit case for the grant of an injunction. He has further pointed out that not only is a son, who does not respect his father, highly censured in Hindu Law books, but that a son, who is habitually inimical to his father and beats him or otherwise ill-treats him is

excluded from inheritance (Dayabhaga, Ch. V, Article 13, Payatatwa, Ch. IV, Article 9, Dayakrama Sangraha, Ch. III, Section 1, para, 3, Vivada Chintamani, p. 214, and Vivada Ratnakara, Ch. V, para 11). The learned vakil for the respondent, on the other hand, has placed considerable reliance upon the case of *Waterkouse v. Waterhouse* (1905) 22 T L.R. 195 and has argued that the Court will not, except in very grave circumstances, grant an injunction to restrain a son from entering his father's house, the result of which would be to sever the connection, which ought to exist between parent and child. The case relied upon by the respondent is an authority against him in so far as it laid down that the father may in some cases forbid his son even to enter his house and to seek the assistance of a Court of Equity in protecting himself from molestation by his son; but we are not prepared to agree with the other observations of Mr. Justice Buckley, which appear to us to be directed entirely in favour of the son and against the rights of the father. We are unable to hold that the only remedy of a father, who is in his own house molested by his adult son, is to rely patiently upon the effect of education, example, influence and guidance from childhood and throughout life, and that he is not entitled to seek the protection of a Court of Justice. If it is the duty of the father to protect, to educate and to maintain his children, it is no less the duty of the children to be obedient and subject to the control of the father during their minority and to honor and reverence him ever after. It would be lamentable if the Courts were powerless to afford adequate protection to a father against a son, who has trespassed upon his property, habitually molested him and destroyed the peace of his family. The view we take is supported to some extent by the decision of the Allahabad High Court in *Baldeo Das v. Sham Lal* ILR (1875) All. 77, in which it was held that, although the sons in an undivided Mitakshara family have a proprietary right in the paternal and ancestral estate, they have no independent dominion and that consequently the father, who was the head of the family, was entitled to eject his son from a portion of the family house, which the son had occupied against the will of the father. It is not necessary for us to express any opinion as to whether such an order ought to be made in the case of a family governed by the Mitakshara Law, but it appears to us that the case of a Daya-bhaga family like the one before us stands on a different footing and is very much stronger (West and Buhler's Hindu Law, 3rd ed., p. 211). The plaintiff will, therefore, be entitled to an injunction restraining the defendant from entering upon any portion of the property described in the plaint without the consent of his father. It appears, however, that the question of title to the property and of the right of the defendant to the improvements made thereon has been only indirectly in issue in the present litigation; indeed, having regard to the value alleged in the evidence, both of the land and of the improvements, if the question of title thereto had been directly in issue between the parties, the suit would have been beyond the jurisdiction of the Munsif. We direct accordingly that the injunction, which is granted, shall remain in force only until the defendant succeeds in obtaining, if he can, a decree for possession of the land with the improvements, either in whole or in part by a suit instituted in a Court of competent jurisdiction.

7. The result, therefore, is that this appeal must be allowed and the decrees of the Courts below discharged. The plaintiff will have a decree for ejectment and for an injunction limited as specified above. The respondent must pay the appellant his costs in all the Courts.