
(1869) 09 CAL CK 0023
In the Calcutta High Court

Dinanath Bose

APPELLANT

Vs

Mangala Debi and Others

RESPONDENT

Date of Decision : 23-09-1869

Acts Referred:

Citation : (1869) 09 CAL CK 0023

Judgement

Sir Barnes Peacock, Kt., C.J.—This is a suit brought by Dinanath Bose against Mangala Debi and others, to recover possession of certain premises described as No. 20, Mirzapore Lane. The premises are called a lower-roomed dwelling-house, with the piece or parcel of land or ground on part whereof the same is erected and built, containing by estimation six and-a-half katas." They are all treated as No. 20, Mirzapore Lane, and I therefore take it that that part of the land on which the house is not erected is appurtenant to the house, and is part of the premises belonging to the dwelling-house; at any rate there was no proof that the defendants occupied more than the dwelling-house. The plaintiff claims, under a conveyance from Umes Chandra, dated the 10th of February 1869. Times Chandra was the adopted son of Sudharam Bhattacharjee, deceased, who was the husband of Mangala Debi; and it is in evidence that the husband lived in the plaintiff's dwelling-house with his wife up to the time of his death; and that, at the time of his death, Umes Chandra was an infant. Some question has been raised as to whether Umes Chandra had attained his majority at the time when he executed the conveyance; hut it is unnecessary to decide, for the purposes of the present suit, whether he was or was not a minor at that time. I certainly should not place any reliance on the horoscope produced by the boy's natural mother if it were necessary to decide the question, for it certainly does not come out of the possession of those with whom you would expect to find it, for it comes from the boy's own family, after he had ceased by reason of his adoption to be a member of that family. Besides, it does not, so far as I can judge, amount to a complete document of the kind. It has been attempted to be shown that the husband by a nuncupative will gave this property to his wife. But I do not think that the evidence is sufficient to show that the husband intended to

make a will. Then, again, it is said, that Mangala Debi deposited the title deeds of this dwelling-house as a security for advances which had been made to her; but that fact, I think, has not been sufficiently proved in the absence of the production of those title-deeds by some person who claims to hold them as an equitable deposit.

2. The first question which we have to determine is, whether the plaintiff is entitled to turn out the widow of the adoptive father of his vendor, either with or without notice; and if he cannot turn her out without notice, whether the notice given in the present instance was sufficient. The next question is, whether he is entitled to turn out the other defendants, some of whom have been proved to hold different parts of the house at a monthly rent under the widow, and others who have not been proved to be actually in possession. This last point may appear to be somewhat technical, but the probability is that, if those defendants had been proved to be in possession, it would also have been proved at the same time that they were holding parts of the house like the other defendants as monthly tenants.

3. I have very great doubt myself whether a son, either natural born or adopted, is entitled to turn his father's widow and the other females of the family who are entitled to maintenance out of the dwelling selected by the father for his own residence, and in which he left the females of his family at the time of his death. No one who is at all acquainted with the usages and customs of Hindus can doubt, that it would be highly injurious to the reputation of the females of a family to be turned out of the residence, at least until some other proper place has been provided for them. It is laid down by Katyayana that, except his whole estate and "his dwelling-house, what remains after the food and clothing of his family, a man may give away, whatever it be, whether fixed or moveable, otherwise it may not be given 2 Colebrooke's Digest, 133. The meaning of that passage is, that he must not give away his whole estate without providing food and clothing for his family, and that he must reserve "one house, without which he himself or his family might want a dwelling." Jagganatha, in his commentary, referring to this text, says: It is meant generally, comprehending a pond supplying water for common use or the like." The meaning being that, whatever is appurtenant to a dwelling is to be retained with the dwelling. In the Dayabhaga, Chapter 6, section 2, verse 29, it is said, that no division of a house takes place."

4. The only difficulty is in deciding whether this is a moral precept, or whether the right of the family to remain in the dwelling-house causes such a want of title on the part of the owner to sell as would preclude the operation of the maxim current in Bengal of *factum valet*.

5. In the Dayabhaga, Chapter 2, verses 16, 17 and 18, a distinction between the restriction of ownership and a mere moral precept is, I think, pointed out. In verse 16 it is said: "" So Vishnu says "when a father separates his sons from himself, his will regulates the division of his own acquired wealth. But, in the

estate inherited from the grand-father, the ownership of father and son is equal." Verse 17 says: "This is very clear. When the father separates his sons from himself, he may, by his own choice, give them greater or less allotments, if the wealth were acquired by himself; but not so, if it were property inherited from the grandfather, because they have an equal right to it. The father has not in such case an unlimited discretion.

6. Verse 18 then proceeds: "Hence (since the text becomes pertinent by taking it in the sense above stated, because there is ownership restricted by law in respect of shares, and not an unlimited discretion), both opinions, that the mention of like ownership provides for an equal division between father and son in the case of property ancestral and that it establishes the son's right to require partition, ought to be rejected."

7. That shows that, with regard to ancestral property, the father's inability to make an unequal partition of ancestral property among his sons depends on restricted ownership, and that he has not an unlimited discretion over his property. In those cases where a man has no title to convey, or where his right is restricted, the rule of *factum valet* does not apply. That rule will not give a good title to a person to whom another conveys more than he has a legal right to convey. The distinction is pointed out clearly in Macnaghten's Hindu Law from pages 4 to 10.

8. If a man's right is not restricted, *factum valet* applies; his act is valid if he has title, although he may be guilty of an immoral act in doing what he has a legal right to do; but if his right is restricted, the rule, *factum valet*, does not enable him to go beyond the restriction. The most difficult question here is, whether this passage of Katyayana, which says that a dwelling-house may not be given, is a mere moral precept or a restriction on a man's right to convey. It seems to me at present that it is a restriction and not a mere moral precept, and that the son and heir of the father has not such a right in the dwelling of the family that he can at once, of his own pleasure, turn out all the females of the family, or sell it and give the purchaser a right to turn them out.

9. One case was cited by Mr. Creagh, from Morley's Digest, page 439, reported in 4 Borradaile's Reports, which, although not an authority in the Bengal School, tends to throw some light upon this doctrine of Katyayana. It runs thus: A widow of a Hindu (who had by her two sons, both of whom died, one leaving B his widow, and C his son), was turned out of the family-house after the death of her two sons by B and C, and sued for a house and maintenance. An award of arbitration in the dispute had insured A a sufficient maintenance; and B and C maintained that A's husband had provided her with a house, mortgaged to him by a third person, and since redeemed; and that she was bound to provide herself a lodging out of the redemption-money. But as B and C were unable to show that A's husband had assigned her this house as a lodging, the Court decided, according to the opinion of the law officers, that A should be allowed a suitable set of apartments in the family-house, and a sum of money to provide

herself with household furniture."

10. In the same volume of Morley's Digest, page 440, Case 21, it is said: Where one of two united Hindu brothers, living with their mother, died, "leaving a widow and a daughter, it was held, in accordance with the opinion of the law officers, that the widow must take her daughter and live with her mother and brother-in-law in their house; the brother-in-law being entitled to provide her with maintenance and to protect her; and that should she not agree with them, the brother-in-law must give up a part of the house for her residence, and afford her a suitable maintenance."

11. Now, unless the lady had a right in a part of the house, the Court could not have decreed that she should have certain apartments allotted to her in it.

12. In the Dayabhaga, Chapter II, section 1, verses 56 and 57, it is laid down, that a widow ought to remain in her husband's dwelling house. "

13. In Sir Francis Macnaghten's Principles of Hindu Law, page 60, it is said: It is now my purpose to show how far a widow having a right to maintenance may, by the Hindu law as administered in the Supreme Court, compel a person in possession of her husband's estate to maintain her, or to make an allowance for the purpose of enabling her to maintain herself.

14. In the year 1799, Sreemuttee Mundoodaree Dabee, the eldest widow of Tilluckram Puckrasee, by my advice filed a bill against Joynarain Puckrasee, who was the son of Tilluckram Puckrasee by another wife then living,--this was the first proceeding of the sort that was had in the Supreme Court. The bill stated that Joynarain had threatened to turn the complainant, Mundoodaree Dabee, out of the family-house; that the whole tenor of his conduct towards her was unbecoming and improper; and that he had neglected and refused to maintain her in a manner suitable to the wealth of which her husband Tilluckram had died possessed." The son, in his answer, stated that he was willing to maintain her in the dwelling-house, and a decree was made for maintenance.

15. It appears to me that, in the present case, the adopted son was not entitled to return the widow of his (vendor's) father out of the dwelling-house, in which she was left by her husband at the time of his death; at any rate, that he could not do so, or authorize a purchaser to do so without providing some other suitable dwelling. It seems quite contrary to every principle of Hindu law, by which the property taken by an heir is for the spiritual benefit of the deceased, to suppose it would not have contained some provision to protect a Hindu widow from being turned out of the dwelling in which her husband left her at the time of his death, without notice or even after a week's notice.

16. The defendant, Mangala Debi, having been left by her husband with an adopted son, an infant, properly took the management of the house, and I apprehend that, according to the doctrine laid down by the Privy Council in the case of Hunooman Pershad Panday v. Mussamut Babooes Munraj Koonwuree 6

M.I.A. 393, she had a right to do that which was beneficial, and I think she had a right to let out certain portions of that house to other persons as monthly tenants for the purpose of obtaining maintenance for herself and her infant child.

17. It appears to me that those monthly tenants could not be turned out immediately on the son's coming of age without properly determining the monthly tenancies, and that those monthly tenancies were not properly determined by the notice given, even if the attorneys had proper authority to give the notice, as being tenants at a monthly rent they could not be turned out at a week's notice. Even if Mangala Debi, as the widow of her husband, had no legal right to remain in the apartments in which she was resident for the remainder of her life, it would indeed be strange if she could be turned out after a week's notice, when the tenants whom she had let in as monthly tenants could not be turned out without at least a month's notice, There is nothing to show that the son after he came of age, if indeed he is of age, ever repudiated the arrangements made by his mother during his minority in regard to the house.

18. In this case it is not proved even that the demand for possession was made, before the suit was brought, by agents of the plaintiff authorised to make that demand for possession, and upon that ground alone, if there were no others, it appears to me that the defendants are entitled to a decree. I have thought it right not to decide the case merely upon that last point, without adverting to the other points, because although I do not recollect a case myself in which an attempt has ever been made by a Hindu son, whether natural born or adopted, to turn his mother out of the house in which his father left her at the time of his death, I cannot think that it is consistent with the Hindu law that such a right should be conferred on a purchaser. I am now speaking of the dwelling house of the family. I am not speaking of dwelling-houses which belong to an ancestor as a mere matter of investment or protective property. It appears to me that the plaintiff has not established a right to turn the defendants out of possession of this house, and that the judgment of the lower Court ought to be reversed. The plaintiff in this case has attempted to do that which, as a Hindu, he must have known would cast discredit upon the widow, if she had to venture from the house in which her husband left her, without previously having some other proper place of residence provided for her. He ought, therefore, in my opinion, to pay the costs in the lower Court, and the costs of this appeal, both to be taxed according to scale No. 2.

Mitter, J.

I entirely concur in this judgment.