

(1888) 03 CAL CK 0002

In the Calcutta High Court

Case No : Appeals from Original Decrees Nos. 274 and 322 of 1886 and No. 130 of 1887

Girish Chandra Roy

APPELLANT

Vs

Mahomed Shajed Chowdhry and Others

RESPONDENT

Date of Decision : 14-03-1888

Acts Referred:

Citation : (1888) 03 CAL CK 0002

Final Decision : Dismissed

Judgement

1. This was a suit brought by the Plaintiff claiming to be the reversionary heir of a person called sometimes Krishna Pershad and sometimes Debi Persad who died a great many years ago leaving as his heir his widow, Kamala Dasi. Kamala Dasi died comparatively recently in 1879 and accordingly the Plaintiff contends that the succession to him as reversionary heir opened upon her death. He claims to be the reversionary heir as being the adopted son of the husband of the daughter of Debi Pershad's elder brother Murari. As such it may be taken that in the state of pedigree he is the heir if he has established the fact of his being the adopted son. In answer to the case made by him it has been said first, that he is not the adopted son, and that has been said on two grounds, first, it has been denied that his alleged adoptive father really gave any authority to his widow to adopt, and it has been denied that any adoption took place in fact. Secondly it is contended that if there was an authority to adopt, and if the adoption took place in fact it was invalid in law, for reasons I shall have to refer to again. With regard to the matters of fact, it is not desirable to go at any length through the evidence : it has been examined very carefully in the Court below and our attention has also been called to it in this Court. It is enough to say that both upon the question of authority to adopt, and on the fact of the adoption the direct evidence is undoubtedly very scanty, and if the matter rested there we might have much hesitation in supporting the adoption but it does not so rest because there is ample evidence that the adopted son performed the adoptive father's Sradh, that he also performed the Sradh of other members of the

family, that he enjoyed the position of an adopted son in the family, that he has held the property which he could only hold as an adopted son for a long time, and that both by the family and by the caste or class to which he and they belong he has undeniably, for a period of 40 years, been acknowledged as the adopted son of his adoptive father. Under these circumstances, we should not be justified in dissenting from the finding of the Court below on the matters of fact. Then it is said that if the adoption took place in fact it is invalid in law and for this reason that although the alleged adoptive father and the alleged adopted son were both Sudras they did not belong to the same branch of the caste or class of Sudras and that by some rule of law the adoption by a person belonging to a particular class of the general caste of Sudras, of a person belonging to the Sudra caste but to a different subdivision of it, is invalid. It has always been accepted that the question of intermarriage, between two classes and the question of adoption from one of these classes into the other is practically the same question. An opinion has no doubt been expressed by one of the learned Judges of this Court, Mr. Justice Mitter, in the case of *Narain Dhara v. Rakhal Gain* I. L. R. 1 Cal. 1 : s. c. 23 W. R. 334 (1875) that a marriage between parties in different sub-divisions of the Sudra caste is prohibited unless sanctioned by any special custom. That, I think, did not amount to a decision but it does amount to a distinct expression of opinion and by one whose opinion carries very great weight. On the other hand, it was dissented from by Mr. Justice Markby who heard the Case with Mr. Justice Mitter. If it were necessary for us to decide that question we should, as at present advised, not be prepared to follow that rule. That there is no such rule of Hindu law generally is now authoritatively settled by two decisions of the Privy Council, one in the case of *Inderun Valungypooly Taver v. Ramaswami Pandia Talaver* 13 M. I. A. 141 ; 3 B. L. R. 1 (P. C.) (1869) where their Lordships deal with the matter decisively. They express their view on this question thus at page 159. "On the whole, seeing that these parties are both of the Sudra caste and that the utmost that has been alleged really is that the zemindar was of one part of the Sudra caste, and the lady to whom he was married was of another part, or of a sub-caste, their Lordships hold the marriage to have been valid ; to hold the contrary would in fact be introducing a new rule and a rule which ought not to be countenanced." The same question was before the same tribunal in another case from Madras, the case of *Ramamani Ammal v. Kulanthai Natchiar* 14 M. I. A. 346 ; 17 W. R. (P. C.) 1 (1871) and again the same law was distinctly laid down. That is conclusive against the existence of the rule contended for as a rule of Hindu law generally. And we know of no principle accepted as belonging to the Bengal School of Hindu Law which could distinguish it from the other schools, nor is such a rule laid down in the books upon whose authority we are accustomed to rely. On the contrary we know that any approach to such a doctrine is distinctly negatived by the highest authority of Bengal School of Hindu Law, the *Dayabhaga*. In the case before Mr. Justice Mitter, the Privy Council decisions are not referred to, and only two authorities are cited. One is "Ward's account of the Hindus." That is a Madras book and if the writer rather intended to lay down a rule of law, not merely to describe the habits of

the people, the Privy Council has declared that he was wrong. The second authority is also a passage in Shyama Charan's Vyavastha Darpana but that writer has cited no authority in support of his position. If, therefore, it had been necessary to decide this question of law we should have been inclined to dissent from the opinion of Mr. Justice Mitter. But it is not necessary to do so because the utmost that has been said is that the rule is a rule which prevails in the absence of special custom. In this case there is abundant evidence of custom back as the memory of an old man of eighty can extend. His evidence and that of a multitude of others is to the effect that inter-marriages (sic) as between these two groups, and adoptions from one of these groups into the other are of very common occurrence. Instance after instance had been proved in which these things have taken place. It is not necessary for us to dwell upon a decision by Mitter and Grant, JJ., which has been put in as proving the existence of this custom (although we think it was admissible in evidence) because the custom is abundantly proved apart from it. This disposes of the objections as to the Plaintiff's adoption both on the ground of fact and on the ground of invalidity in law. But the Defendants have further set up an affirmative case in answer to the title of the Plaintiff. They have produced what purports to be a deed in the nature of a settlement said to have been executed in the year 1248. At that time the Plaintiff's grandfather by adoption Murari was living and his brother, whose inheritance is now in question, was dead. The widow of the latter, Kamala, was in possession of her husband's estate and the document purports to be one to which Kamala and Murari are both parties. It purports therefore to be a document executed by the widow as heiress of Debi Persad and by Murari the then reversionary heirs and it purports to settle the whole of this property in certain shares, viz., 4 annas upon a man who had married as a son-in-law into Debi Pershad's branch of the family, 3 annas on his wife, and 9 annas on the Plaintiff's adoptive father.

2. The lower Court has held that that deed is not genuine. Of direct evidence in support of that deed there is so little, and that of so little value that it may almost be discarded at once, and practically the Advocate-General has asked us to accept it on the presumption arising from its being more than 30 years old and that the fact that it comes from proper custody. It is clear that there is no trace of that deed having come to light or having been relied upon between 1848 and the date of the present suit. Then again a few months after that deed is said to have been executed an undoubtedly genuine deed was executed in 1849. It is a deed which purports to settle the properties comprised in two Perganahs, properties of very considerable value in accordance with a previous agreement recited in the deed by which provision was to have been made for the same two men. I have spoken of before, one being a son-in-law in Debi Pershad's branch of the family and the other Plaintiff's fattier by adoption. It purports to convey the properties included in it absolutely to these two men in the proportion of seven annas and nine annas.

3. It is very difficult to reconcile the existence of that deed with the previous

execution of the alleged deed of 1248 which purports to include amongst others the same properties settled in the deed of 1249. The answer of the Advocate-General was this, that there is no inconsistency between the two documents for this reason that in the deed of 1248 only the reversionary estate was given to the younger members of the family subject to a life interest in Kamala and Murari, whereas in the deed of 1249 the property is given out and out. If there were no more than this it is enough to say that the deed of 1249 purports to convey an absolute estate not to Kamala a life interest in favour of one already entitled to the property generally. But there is another difficulty which the Advocate-General did not deal with and that is that the donees in the deed of 1249 are not the same as the donees in the deed of 1248, for in the deed of 1248 the seven annas are divided into four annas and three annas while in the deed of 1249 the whole seven annas are given absolutely to the husband alone. Moreover the Defendants have themselves become purchasers of the property now in dispute in this suit and they have purchased it from the two ladies, Kamala and the Plaintiff's mother. There were two persons who, at the time of this purchase were in enjoyment of the property, one as the widow and heiress of Debi and the other as daughter and heiress of Murari. The Defendant's conduct in accepting, and the ladies' in making a conveyance in their own names alone is utterly inconsistent with the deed of 1248. There is one matter which the Advocate-General has very properly pressed upon us as in favour of the existence of this deed. I shall deal very shortly with it now on this part of the case because I shall have to deal more fully with the master in disposing of the cross-appeal. There is a trace and a well-marked trace of the enjoyment of several portions of the family property held by the two branches of the family in shares of seven annas and nine annas ; and the Advocate-General says : How is it possible to explain this unless you assume the genuineness of the deed of 1248. The answer to that is we think this that although apparently the existence of that document would explain such a state of facts still if the preponderance of evidence and of probabilities is against the existence of that document, that circumstance alone cannot be sufficient to support the deed of 1248 unless it is impossible to suggest any other explanation of the facts. But there are many explanations that can be suggested as to this. It may very well be, for instance, that the suggestion of the Subordinate Judge is correct ; and that it was an instance which is not infrequent amongst Hindus as a mark of respect to an elder brother by a younger brother giving to the former a somewhat larger share in the family property. At any rate this circumstance is not sufficient to outweigh the great mass of improbability against the existence of that document. We agree with the lower Court in holding that that document is not a genuine document.

4. The Defendants further set up a title to themselves under their purchase. All that is in question in this suit is so much of the property as Kamala conveyed to them. But Kamala could only make a good title if a case of necessity were established. No such necessity was alleged or proved and although it is true that

the Defendants have been a long time in possession the period of limitation has not run against the present Plaintiff and he is therefore entitled to recover what has been given to him by the decree of the Court below and the Appellant's Appeal Nos. 274 and 322 must be dismissed with costs.

5. Then there are the cross-objections in these two cases and Appeal No. 130 by the Plaintiff. The counter objection and the grounds of Appeal No. 130 raise the same point. I have already adverted to that point briefly. The decree has been given to the Plaintiff for a seven annas share of the property ; the learned Subordinate Judge having held that, from whatever cause the arrangement might have been made, it was a settled thing in the family that Debi Pershad's branch of the family enjoyed a seven annas share and Murari's branch a nine annas share of the property and the Plaintiff can only recover a seven annas share of the property in this suit his rights to the nine annas share not being now in question. The contention is that prima facie Debi Pershad and Murari were entitled to enjoy each an eight annas share of the property ; that their descendants must likewise be entitled to an eight annas share and as the Plaintiff is now entitled to recover on the death of Kamala whatever she might have been entitled to enjoy he ought to have a decree not for seven annas but for eight annas.

6. We are not prepared to dissent from the lower Court's finding on this point. What appears is this that under the deed of 1249 the deed which provided for the maintenance and support of the two sons-in-law, one in one branch of the family and the other in the other branch, the property was given in the proportions of seven annas and nine annas. Then there was a subsequent settlement providing these people with a dwelling-house and we find that although no particular shares are mentioned they were treated as having the shares as seven annas and nine annas. There are other properties which we find from time to time held jointly between members of this family and specially a number of properties dealt with in the kobala, dated 18th Poush 1270, printed at page 124 of the Paper-book. That kobala deals mainly with the properties covered by the deed of 1249 but it also deals with other properties probably of much smaller value, and all of them appear to have been held by the two branches of the family in the proportion of seven annas and nine annas. There the witness Peary Mohan Dutt speaks about this matter and he says that various properties besides those included in the deed of 1249, some of which he mentions Egarasutie and Dewanbagh, were held in these proportionate shares of seven annas and nine annas. And whilst he attributes the holding of the properties in these shares to the deed of 1248 he at any rate asserts that the method of enjoyment generally in the family was in shares of seven annas and nine annas. In the absence of any evidence to the contrary we think the lower Court was justified in coming to the conclusion from the general statements of competent witnesses supported by so many particular instances that that was the mode of enjoyment between the two branches of the family. We therefore ought not to interfere with the finding of the Court below. All the appeals will be

dismissed and the cross-objections will be disallowed also.