
(1940) 02 CAL CK 0001
In the Calcutta High Court

Hamed Gazi and Others

APPELLANT

Vs

Sadat Ali Sikdar and Others

RESPONDENT

Date of Decision : 06-02-1940

Acts Referred:

Letters Patent Act, 1865 — Section 15

Citation : AIR 1940 Cal 241

Hon'ble Judges : B.K. Mukherjea, J

Bench : Division Bench

Judgement

B.K. Mukherjea, J.—This appeal is on behalf of the plaintiffs, and it arises out of a suit commenced by them to recover possession of the lands in suit on establishment of their title to the same. The material facts lie within a short compass and may be stated as follows : According to the plaintiffs the three plots which constitute the subject-matter of the suit, appertained to a raiyati holding which was held by one Prasanna. Prasanna died leaving behind him his widow Nabintara, who is defendant 3 in this case, and two sons, to wit Aswini and Bholanath. Both the sons died some time in the year 1905 and Nabintara, succeeded to the property as their mother. In 1908 Nabintara sold the holding to defendant 2 Raicharan by a kabala, and two years later she adopted Raicharan as her son, purporting to act under an authority given to her by her husband during his lifetime. Since then Raicharan possessed the lands, and it was he who paid rents to the landlords, though in the Dakhilas, the name of Prasanna was maintained and Raicharan was described as a "marfatdar." In 1931, the landlords instituted a rent suit in respect of the holding, making Nabintara a party defendant and having got a decree, put up the holding to sale in execution of the same, and it was purchased by the plaintiffs on 17th June 1933. It is alleged that Nabintara, Raicharan as well as defendant 1 who was a mortgagee from the latter resisted the plaintiffs, in their attempt to take possession of the property and this led to the institution of the present suit.

2. The suit was contested by all the three defendants, and the defence in

substance was of a two-fold character. It was alleged in the first place, that defendant 3 having no interest in the holding after she adopted defendant 2 as her son, the sale in execution of the decree which was obtained against defendant 3 could not give the plaintiffs any right to the holding. The second ground taken was that the plaintiffs sale certificate itself would show that the disputed lands were not sold to and purchased by the plaintiffs. The trial Court gave effect to both these contentions and dismissed the plaintiffs' suit. On appeal this decision was affirmed. It is against this decree that the present second appeal has been preferred.

3. Two questions arise for determination in the present appeal : first, whether the plaintiffs acquired any title to the property in suit by virtue of their purchase at the sale in execution of the decree against Nabintara and secondly, whether the description in the sale certificate is sufficient to establish the identity of the property sold with that to which the present suit relates. As regards the first point, it is not disputed that the holding was a non-transferable one and consequently the landlords were not bound to recognize defendant 2 as transferee of the same. It is contended by Dr. Paul who appears for the respondent that as defendant 2 was possessing the lands all along and the landlord was receiving rents from him, he could be deemed to have acquired the interest of a tenant by recognition or at any rate by adverse possession. It is true that the word "marfatdar" is not conclusive, and the Court could on a consideration of the entire evidence come to conclusion that there was recognition establishing a relationship of landlord and tenant between the parties, vide *Prabhabati v. Taibatannessa* (1913) 17 C.W.N. 1088; but the matter has not been investigated from that standpoint, by either of the Courts below and there is no finding on this point recorded by either of them. We might assume therefore that the landlord did not recognize the transfer, and Nabintara continued to be the recorded tenant even after she sold the holding to Raicharan. The question now is, what would be the effect of Nabintara's adopting Rai Charan, as a son to her husband in 1910. It has been found by both the Courts below that Nabintara had the requisite authority from her husband, and that the adoption was a valid adoption in law. Dr. Sen Gupta who appears for the appellants argues that the property was inherited by Nabintara, as heir to her sons, and not to her husband, and consequently the adopted son, coming as a brother to the last male owners, could not divest the mother, who was a preferential heir according to Hindu law. The contention at first sight seems to be of some weight but almost all the reported authorities are against this view.

4. *Vellanki Venkata Krishna Rao v. Venkata Rama Lakshmini* (1877) 1 Mad. 174 the original proprietor who was governed by the Madras School of Hindu law died leaving a son and a widow and the properties vested in the son. On the death of the son, a minor and unmarried, the estate vested in the widow as his heiress and some years later she adopted the plaintiff-appellant with the consent of her husband's sapindas. On a suit instituted by the plaintiff to recover the estate from the daughters of his adoptive father, the question was raised as to whether

the adoption was a valid one in law. The Judicial Committee answered the question in the affirmative and held that the adoption being in derogation of the adoptive mother's estate, although she had taken the same in succession to her son, and not to her husband, was valid. This indirectly supports her contention that the adoptive mother would be divested of her estate which she got as heir to her son, although this point was not expressly decided. This question was raised again in *Ramasami Ayan v. Venkata Ramaiyan* (1878) 2 Mad. 91, but their Lordships declined to express any opinion on it. The Bombay High Court in *Jamna Bai v. Raychand* (1883) 7 Bom. 225 held definitely that a widow who adopted a son after the death of the natural born son would divest herself of her estate, and this was followed in the subsequent decision in *Ravji Vinayakrav v. Lakshmibai* (1887) 11 Bom. 381. It is true that these are cases governed by the Mitakshara law, where the male members of a family take to the exclusion of females, the undivided coparcenary interest of a deceased member, and a brother therefore could take in preference to the mother. This, it may be argued is inapplicable to Bengal where under no circumstance a brother has a preferential right over the mother. This view finds support in some of the earlier decisions of this Court, vide *Bykant Monee Roy v. Kristo Sundaree* (1867) 7 W.R. 392 and *Gobindo Nath v. Ram Kandy* (1875) 24 W.R. 183, where it was held in circumstances similar to those of the present case that the adopted son would not divest the adoptive mother of the estate inherited by her from her son, but that he could only succeed to the estate after the death of the mother, as the brother of the last male owner.

5. All these authorities were reviewed by Banerji J. in *Rai Jatindra Nath v. Amritalal* (1901) 5 C.W.N. 20 and it was held following the observations of the Judicial Committee in *Bhubanmoyee Debia v. Ramkishore* (1865) 10 M.I.A. 279 and *Vellanki Venkata Krishna Rao v. Venkata Rama Lakshmini* (1877) 1 Mad. 174 that the adopted son, in such circumstances would divest the adoptive mother of the estate which she inherited from her son. This divesting cannot certainly be justified on the ordinary rules of inheritance. It has however been justified according to some authorities on the ground that the power of adoption is a kind of power of appointment. The adoption by the widow operates as execution of the power, and appointment of the property to the adopted son, and so the widow is divested by operation of law of the property, from whomsoever inherited: vide G. Sircar's *Hindu Law*, p. 762, Edn. 6. Banerji J. pointed out in the case referred to above that a Hindu widow who is empowered to adopt a son is not bound to exercise her powers, she need not adopt at all if she likes. But if she does choose to exercise her powers, she must get divested if the estate was vested in her. It is not really the adopted son who is destroying the estate of the mother, it is the mother herself, who, of her own free will and accord, is allowing the estate to pass from her to the adopted son.

6. I am in full agreement with the view expressed in *Rai Jatindra Nath v. Amritalal* (1901) 5 C.W.N. 20, and I hold accordingly that Nabintara became divested of the interest which she inherited from her sons as soon as she

adopted Rai Charan. As an adoption has the same legal consequence as birth the landlord, in my opinion, was bound to recognize Rai Charan, who became the heir of Prasanna, as the tenants in respect of the holding, and Rai Charan ought to have been made a party to the rent suit, if the decree was to have the effect of a rent decree. I agree therefore with the view taken by the Courts below that Nabintara had no interest left in her after she adopted Rai Charan, and the purchase by the plaintiffs at the sale in execution of that decree could not give the latter any interest in the holding.

7. On the other point also I am inclined to think that the decision of the lower Court is right. The sale certificate of the plaintiffs not only gives a wrong khatian number; but the dags of the Order Section records are not mentioned at all, and the area given is also wrong being much less than what the actual area is. Dr. Sen Gupta points out that the yearly rental is correctly stated, and the name of a previous tenant is also given correctly. It is not shown however by any evidence that the previous tenant had no other jama of that description. If there was in the sale certificate any adequate description available which would enable us to identify the lands with convenient certainty, we could have ignored any other mis-description as a surplusage. In the present case the description in the sale certificate is not sufficient, in my opinion, to identify the lands with reasonable certainty. The result therefore is that the appeal fails and is dismissed with costs. Leave to appeal u/s 15, Letters Patent is refused.