
(1929) 01 BOM CK 0016
In the Bombay High Court
Case No : First Appeal No. 98 of 1926

Kershaji Dhanjibhai

APPELLANT

Vs

Kaikhushru Kolhabhai

RESPONDENT

Date of Decision : 18-01-1929

Acts Referred:

Citation : (1929) 31 BOMLR 1081 : 121 Ind. Cas. 433

Hon'ble Judges : Patkar, J; Amberson Marten, J

Bench : Division Bench

Judgement

Amberson Marten, Kt., C.J.—This is a most unhappy example of the possibilities of litigation in India. The suit began seventeen years ago in 1911, and we are yet at an appeal from a preliminary decree. The suit was one for the administration and division of the estate of one Dhanjibhai who died in 1901, The parties are all Parsis. The voluminous pedigree shown in paragraph 2 of the plaint exemplifies that the parties alleged to be interested are very numerous. Defendant No. 1 contends that even that list is not enough, and that there ought to be ten or eleven parties added, and he has accordingly set up a rival pedigree. Naturally with such a large number of parties the litigation is delayed, But apart from that the parties spent the first two years of litigation in raising technical points as to parties and so on, and in that way they succeeded in litigating for many years without the slightest practical result.

2. The real contest in the case is as to the position of defendant No. 1. If the plaintiff's pedigree be looked at he will be found as the son of Pestonji, a brother of the deceased Dhanjibhai. Accordingly as a co-heir he would in any event claim some share. But his real claim is in effect adverse to the estate, He claimed to be the adopted son of Dhanjibhai and to have acquired by adverse possession or otherwise the whole of the property either before the death of Dhanjibhai or at any rate by the date of the suit in 1911. Consequently, in this administration suit, there is, so to speak, a double action going on, viz., one, as between the beneficiaries of Dhanjibhai including defendant No. 1, and another between

Dhanjibhai's estate and defendant No. 1, who is claiming adversely. If only Dhanjibhai had left a will, the difficulties would have been solved, and defendant No. 1 would at once have been put to his election either to claim under the will or against it. But for the moment it seems to me that he cannot be put to his election. At any rate, that point has not so far been raised in the case.

3. Now I come to a most curious circumstance, and it is this that though defendant No. 1 put forward his plea of adverse possession under two branches, namely, (1) at Dhanjibhai's death, and (2) at the date of the suit, yet the lower Court only decided against him on the first branch, and did not hear the second branch notwithstanding that defendant No. 1 put in a formal purshis asking for that issue to be determined. As regards the first branch the issue was in a wide form. Defendant No. 1 does not now contend that at Dhanjibhai's death in 1901, he defendant No. 1 had acquired a prescriptive right. That claim is now specifically abandoned at the bar.

4. But what defendant No. 1 does claim before us is that he had a right by adverse possession at the date of the suit in 1911, For that purpose he relies on Articles 142 and 144 of the Indian Limitation Act..Further, he contends that in order to take advantage of the requisite period, namely, twelve years, he will contend that his adverse possession began prior to the date of Dhanjibhai's death although it did not crystallize into an absolute right at his death, For the respondents it is frankly and fairly conceded that the learned Judge has left this point open. That being so, we are forced to take steps to see that the point is properly adjudicated on. This involves, I think, a special inquiry.

5. This brings me to the next important part of the case, namely, the order the Judge actually made, I say this, because although the memorandum of appeal raises some thirty-one objections to the preliminary decree, counsel for the appellant has not pressed a large number of them as they are really unarguable. I accordingly appreciate counsel's statement that although the lower Court found in his favour that in the Baroda State where the parties were domiciled, the custom of adoption did prevail among the Pareis, yet it also held that this custom would not prevail in British India as regards immovable property situate there. It is elementary international law that the law which governs the land of a particular nation is the law of that nation. Consequently, land in British India is governed by the law of British India as the *lex loci* and not by the law of the domicile of the temporary owner. It follows, therefore, that, having egard to the law of British India and the statutory provisions which govern succession amongst Parsis, it is abundantly clear that there is no room in the law of British India for such a custom amongst the Parsis as is now put forward, Accordingly, the bulk of the points taken in appeal by the appellant must fail. Kaikhdshku But as regards the order which the learned Judge made, two C.J. mistakes have been pointed out. For some reason, which I do not altogether understand, the learned Judge, notwithstanding his experience, has apparently classed the receiver with the Commissioner, Further, he has overlooked the fact that there is no

jurisdiction to delegate to any Commissioner certain matters like an inquiry as to heirs, because there is no power in that respect in the Code. His order directed certain inquiries to be made and certain accounts taken, and it proceeded :?

It is further ordered that Mr. Gulabbhai Mr. Deasi be and is hereby appointed receiver in the suit for the purpose of the above inquiries who shall take all the necessary step in the said behalf, and certify the result to this Court on or before January 15, 1926.

6. Now there are certain limited powers in the CPC under which the Judge can delegate to the Commissioner or otherwise certain investigations, but they do not include any of enquiries Nos. (1), (2) and (3). Still less has a receiver got anything to do with inquiries of that sort. In England a Master in the Chancery Division, and in Bombay the Commissioner and Master in Equity on the original side, are judicial officers taking the place of the Judge, A receiver on the other hand is not a judicial officer. He is merely a custodian of properties by order of the Court. In that capacity it may be his duty to institute suits on behalf of the estate in the Court of the Judge. It is unthinkable that any such officer should also be the Judge in the Court in which the suits are instituted.

7. Nor on the other hand has there been any prior order appointing a receiver in this suit, As to whether a receiver should now be appointed, it was faintly argued that he should. But this litigation has been going on for some seventeen years. If a receiver in the ordinary sense of the word, namely, a receiver of the property, has not been found necessary for seventeen years, I do not think that the present moment is one for appointing a receiver either on the ground of equity or otherwise. If we did so, what would at once happen would be a contest as to whether certain properties claimed by the receiver were the property of defendant No. 1 by adverse possession or otherwise. Therefore, no useful object could be gained by our now proceeding to appoint a receiver of the estate.

8. Further the learned Judge only appointed what he called a receiver for the purpose of the inquiries. I do not read this order as having appointed anybody a receiver in the ordinary proper meaning of that word, What the learned Judge seems to have done is, by a slip of the pen, to have written the word "receiver" instead of the word Commissioner." But unfortunately even if that is the explanation, he had no power to appoint a Commissioner to make these inquiries.

9. It follows, therefore, that the order must be varied, and it must be varied in this way; Inquiry No. (1) is to stand, but it will be limited to the properties in British India. Admittedly, as regards property in the Baroda State, different considerations altogether apply. Then as regards inquiry No. (3); that will be an inquiry as to the heirs of the deceased entitled to a share in his immovable property in British India and the share payable to each. Then there must be a supplementary inquiry. I think, it should be inquiry No. (1A)?An inquiry as to whether defendant No. 1 acquired a title by adverse possession at the date of this suit in 1911 to the said immovable properties or any part thereof. Next the

direction about Mr. Gulabbhai Mr. Desai being appointed a receiver and so on, must be struck out entirely. The learned Judge is to hold these inquiries himself. It may be urged that alterations should be made in the law so as to give similar facilities to the mofussil Courts for delegating inquiries as exist in the Superior Courts in England and in India. But that is not a matter for us to deal with to-day.

10. Then I come to this point: Although the parties have been litigating for seventeen years there is still some uncertainty as to what the alleged immovable property in British India of the deceased consisted of. One would have thought that after this lapse of time this single point might at any rate have been cleared up. But as it has not been, there will be a direction following inquiry No. (1A) that the plaintiff and defendant No. 1 do each furnish particulars of what he claims that the estate of the deceased Dhanjibhai consisted of at the latter's death in 1901. With regard to the particulars to be furnished by defendant No. 1, he is further to state what portions of the immovable property of Dhanjibhai he claims to have acquired by adverse possession as at the date of the suit in 1911. There is also some question as to whether the plaintiff claims any land alleged to have been purchased by defendant No. 1 out of the income or otherwise of Dhanjibhai's estate. But if any such claim is put forward, particulars are to be given to defendant No. 1

11. I would add I recognize that in some cases it would be impracticable in a suit of this nature to decide an adverse claim to the land of a third party, particularly if any eviction was sought for. But here, as I have already pointed out, defendant No. 1 has two claims, (1) as beneficiary, and (2) adversely to the estate. The litigation is already decided in part against him as regards one of these adverse claims; and it may be that the other branch of his adverse claim can also be decided in this suit. Therefore, we need not, I think, contemplate the possibility of the learned Judge having to direct a suit to be brought by some receiver to be appointed of the estate of Dhanjibhai against defendant No. 1, as a hostile party.

12. Next with regard to costs, we do not disturb the order as to costs in the lower Court, but as regards the costs of the appeal the position is this: We appreciate that much time has been saved by the course the appellant's counsel has taken, but that does not alter the fact that up to the last moment his client was putting forward a large number of points which, if successful, would have resulted in the suit being dismissed, He has failed in that. His only success is as to the modification of the terms of the actual order the learned Judge made. In those circumstances, we think the right order will be that the appeal must be dismissed save as to the variation in the preliminary decree which I have already indicated, and that with regard to the costs of the appeal, the appellant should pay three-fourths of the costs of the respondents represented by Mr. Coyajee, The remaining one-fourth of their costs will come out of the estate of the deceased. Mr. Coyajee's clients to get one set of costs between them. As regards the other respondents represented by Mr. H.D. Thakor they support the appellant, Accordingly, they will bear their own costs of the appeal.

13. Cross-objections must be dismissed with costs.

Parkar, J.

14. I agree.