

(1912) 12 CAL CK 0018
In the Calcutta High Court

Case No : Appeal from Original Civil Jurisdiction No. 54 of 1912

Keshub Lall Pyne and others

APPELLANT

Vs

Radha Raman Nundy and others

RESPONDENT

Date of Decision : 04-12-1912

Acts Referred:

Citation : (1912) 12 CAL CK 0018

Judgement

Jenkins, C.J.—The Plaintiffs have brought this suit for establishment of their title to premises known as No. 4, Shib Thakoor's Lane, in the town of Calcutta and for possession and incidental relief. This property was on 13th May 1871 expressed to be assured to Sreemutty Hemmoni Dassi and Sreemutty Ongodabar Dassi, their heirs, representatives and assigns for ever as tenants in common in the shares and proportions indicated in the instrument of transfer. By a transfer of 17th of April 1876, Sreemutty Ongodabar Dassi assured her undivided shares in the property to Sreemutty Hemmoni Dassi, her heirs representatives and assigns for ever. On the 4th December 1909, Hemmoni died and the Plaintiffs claim that they thereupon became entitled to the property and they put their claim in an alternative shape. First, they maintain that the property was acquired by the husbands is of the two ladies benami in the names of their wives, and that they, the Plaintiffs, thus became entitled as reversionary heirs. In the alternative they allege that they are the stridhan heirs of Hemmoni and so entitled to the property.

2. The Defendants 2 and 3 on the other hand claim that they are entitled to the property under an instrument of trust of the 17th July 1899.

[His Lordship then referred to the issues of which the following are material.

3. Was the deed of trust signed by Hemmoni ?

4. If so, was it validly executed, and is the same binding on her?]

3. The Judge tried issues 3 and 4 first, and on them he held that there was no evidence what advice was given to the lady and therefore he was bound to

assume that no advice was in fact given. He held as a consequence that the instrument of trust was not binding on the lady. A decree was passed in accordance with this conclusion in the Plaintiffs' favour. From this judgment the present Appeal has been preferred, and the only question argued before us is whether the instrument was binding on Hemmoni or not. Now the instrument of trust is in Bengali, and its provisions may be briefly summarized, for the document itself is short and free from complication.

4. It purports to be addressed to Hemmoni's younger brother, Panna Lall Dutt, a lunatic represented by his father-in-law, Babu Kessub Lall Pyne, the committee appointed by the High Court.

5. It is expressed to be an irrevocable deed of trust, and recites her stridhan title to the property, and then proceeds as follows; you are my younger uterine brother. I am attached to and have affection for you from your childhood. But unfortunately during your youth you became insane and with a view to take care of you and look after your wife and minor sons and daughters, &c, your father-in-law, Srijukta Babu Kessub Lall Pyne, put in a petition on the Original Side of the High Court on 7th September 1897 and on the 9th December 1897 the said Babu Kessub Lall Pyne was appointed the committee." Then the instrument purports to create a trust in respect of the property in suit, and to declare that Hemmoni shall not be competent to revoke the deed of trust or to sell, mortgage or give away the property or to charge it by way of security for anyone or grant *mourasi mokatari* on a long term to anyone. Then it proceeds in these terms: "After my death you shall hold and enjoy this trust properly through the committee appointed by the Court and on your death your sons, grandsons and heirs in succession shall continue to hold and enjoy with all manner of right such as sale, gift, &c. To this my heirs or representatives shall not be competent to raise any plea or objection, that is, on my death you shall be the absolute owner in possession of this trust property.... To this effect I execute this irrevocable deed of trust of my own free will and while in a composed state of mind."

6. The instrument contemplates mutation of names but whether this was effected or not does not appear.

7. These then are the terms of the instrument. I will next set out the facts that bear on the point now at issue.

8. For the purposes of this Appeal it has to be assumed that the property was Hemmoni's stridhan, and if that be so, its descent would be governed by the rules relating to stridhan under the Dayabhaga School of Law. Her brother Panna Lall after his lunacy resided with Hemmoni as did his family, and she used to look after his children, his two sons and one daughter.

9. It is the evidence of Keshub Lall Pyne that Hemmoni told him that she would like to set apart her property for the benefit and maintenance of her brother and his family and that he thereupon saw Bhupendra Sri Ghosha, an attorney of this Court and at that time an assistant in the firm of Messrs. Sanderson & Co., and

the son of an old college-friend of Keshub.

10. According to Keshub he told Bhupendra that Hemmoni had this property which she wanted to give away to her brother, and Bhupendra said he would have it done. This, Keshub says, was the instruction he received from Hemmoni.

11. Then he says that when the document was ready he came and saw Hemmoni about it with Mathura, the writer of the document and a mukhtear in Messrs. Sanderson's office, that Mathura read over the document to Hemmoni, that she heard its contents and said that was all right. Hemmoni, he declares, gave him Rs. 30 for the requisite stamp, and this he made over to Bhupendra.

12. The next event, according to Keshub, is the execution of the document; he, Bhupendra and Mathura were present, the document was read to her; the lady put her thumb impression on the document by way of execution; it was attested by Bhupendra and Mathura. Later, he tells us, the document was registered and, for the purpose of effecting the registration, the Registrar came to Hemmoni's house. "The Registrar," he deposes, "came and asked Hemmoni a number of questions if the document had been executed by her. She answered the questions put to her and admitted execution and then the Registrar left." This then is Keshub's evidence and I believe it to be true. The learned Judge was evidently favourably impressed by this witness and he does not discredit his evidence on any point. I now turn to Bhupendra Sri Ghosha's evidence. It certainly cannot be said that his evidence shows him to be a partisan of the Defendants by whom he was called. He declares that he has no recollection of the execution of the document and seeing that the execution was in 1899 this well may be. But seeing his signature on the document he says he witnessed it, and he is able to say that it is in Mathura's handwriting; in reply to the Court he explains that in Messrs. Sanderson's office several Bengali documents used to be prepared, and for that purpose this mukhtear was kept. He says he does not remember whether before execution the document was explained to the lady by anyone.

13. Then his evidence runs as follows:

Q, According to your usual practice, would you attest the document to be executed by the lady, without the document being first explained to her ?

A. No, I would not.

Q. Would you attest such a document without explaining to the executant the full contents and purport of the documents ?

A. No, I would not, unless it is explained by some one else.

Q. What is your belief in respect of this document?

A. My belief is, it must have been read out to her. I believe it was read out and explained to her.

I have no recollection who, if any one, was present at the execution of the document.

14. In cross-examination he says:

I don't think I have ever explained a document to a purdanashin lady myself and not recorded the fact on the document.

This document bears nothing to show it was explained by me. Regard being had to that, I don't think I could possibly have explained that document myself.

Q. If that document had been explained in your presence and if you had attested in your professional capacity, would you have omitted to see there, the fact that the document had been explained, is not endorsed on the document itself ?

A. Yes, I should think so.

Q. It is a precaution, which it is inconceiveable that a solicitor would not take?

A. I can't talk of any other solicitor, but I myself would do it. It is exceedingly common to do so.

Q. It would be considered grossly negligent and highly improper to omit to do so, in the case of a purdanashin lady :

A. I should think so.

I was written to produce my Day books in this matter. I was subpoenaed to produce them.

Q. Is there any entry in any of your Day books, at all, relating to this document ?

A. I have not been able to refer to that because it was not in my possession.

If there are any entries, it would be in the Day book of Messrs. Sanderson and Co.

15. Mathura, the draftsman and attesting witness is dead, and so the only evidence on the record is that of Bhupendra Sri Ghosha and Babu, Keshub Lall Pyne and on this evidence I come to the following conclusions.

16. First, I hold that the idea of this provision for her brother and his family originated with Hemmoni herself, and that the instructions on which the draft was prepared accurately reflected the lady's wishes as to the beneficial disposition of her property after her death. Further, I hold that the instrument was executed by her, and attested by Bhupendra and Mathura, and was subsequently registered.

17. Then again it is established to my satisfaction that the instrument was read to Hemmoni by Mathura, that she expressed her approval of it, and that she was subsequently questioned by the Registrar, and answered these questions and admitted execution. It is true that the lady was illiterate, but the allegation in the

plaint that she was blind is opposed to the fact. It is further said she was old:-in fact she was 52, and lived 10 years or more after the execution of the instrument of trust. The utmost that can be said is that there is no evidence as to what advice was given to the lady.

18. But the importance of this must depend on the circumstances of each case; it cannot be accepted as a formula conclusive of every case that the absence of advice vitiates the transaction. Advice is not in itself essential; it is merely a means to secure that which is essential, an intelligent apprehension of the transaction. It was said by Lord Macnaghten in *Mahomed Buksh Khm v. Hosseini Bibi* L R. 15 I. A. 81 at p., 92 (1888) that ""The first and practically perhaps the most important question is, was the transaction a righteous transaction, that is, was it a thing which a right-minded person might be expected to do ?"

19. What is the answer if this test be applied to the present case ?

20. Fletcher, J., thought the story of her wishing to make such a provision for her brother and his family was not an improbable one. I agree, indeed I would go further and say that it was eminently probable, and even a righteous transaction.

And I am by no means sure that the learned Judge would not have held the same view had he not supposed that the gift had the effect of reducing the lady from a position free from financial cares to one of dependence on the good will of her lunatic brother and his family. But this was not the fact, for the lady retained a life interest in the property.

21. In *Hakim Muhamed Ikramuddin v. Najiban* L. R. 25 I. A. 137 (1898) the Privy Council had to deal with a case where there was an absence of independent advice, and yet in a transaction far more complicated than the present they held this absence was not fatal, and they evidently considered they were not throwing the slightest doubt on the sound doctrine laid down in numerous cases as to the obligations of persons taking benefits from a *puidanashin* lady.

22. In *Gitish Chander Lahoree v. Bhuggobutty Dibia* 13 M. I. A. 419 (1870) it is true a gift by a *purdanashin* lady of her *stridhan* property in favour of her sisters was after her death set aside at the instance of her husband's adopted son, but the gift was in the nature of a death-bed disposition; the evidence was conflicting as to the person intended to be benefited, there was uncertainty as to what were the instructions and from whom they emanated and in their Lordships' opinion the evidence was so untrustworthy, so uncertain and so conflicting that it did not enable them to declare affirmatively that the gift was in any sense the act and deed of the *purdanashin* lady or even that she had put her hand and seal to it. The evidence in this case in no way corresponds with this picture of infirmity. The principle expounded by their Lordships in that case was that the Courts should be careful to see that deeds taken from *purdah* women have been fairly taken; that the party executing them has been a free agent and duly informed what she was about. This test is, I think, satisfied in this case. It was argued that as some of the words in this Bengali instrument were in English the lady could not have

understood them, and in this connection it is pointed out that the words "committee," "revocable" "deed of trust," "revoke," and "trust" were in English.

23. It is true that the evidence does not, show that these words or the irrevocable character of the document were explained to her, and that is an infirmity in the Defendants' case, but I cannot regard it as destructive of their claim under the instrument of trust. In my opinion, then, Hemmoni knew all about the transaction, it originated with her, the instrument carrying it into effect: was read to her, she gave an intelligent assent to its provisions.

24. There is therefore in my opinion no ground for saying that this instrument was not her act and deed in the fullest sense.

25. I therefore think the decree of Fletcher, J., should be set aside and the case remanded for the determination of the relevant issues that have been left untouched and the final decision of the case. The question of costs is reserved.

Woodroffe, J.

I agree.