

(1940) 08 PAT CK 0012
In the Patna High Court

Khanta Mandalani and Another

APPELLANT

Vs

Smt. Hem Kumari Debi and Others

RESPONDENT

Date of Decision : 13-08-1940

Acts Referred:

Chotanagpur Tenancy Act, 1908 — Section 46

Citation : AIR 1941 Patna 29

Hon'ble Judges : Manohar Lall, J;Chatterji, J

Bench : Full Bench

Judgement

Chatterji, J.—This is an appeal by the plaintiffs who brought a suit for a declaration that two deeds of surrender executed by defendant 4 in respect of her half share in the disputed land in favour of defendant 1, the landlord, are null and void. Plaintiff 1 and defendant 4 are two widows of one Behari Mandal, the former being the senior. Plaintiff 2 is the next reversioner. Defendants 2 and 3 are said to have taken settlement of the surrendered lands from defendant 1.

2. The grounds on which the deeds of surrender were challenged were, firstly, that they were fraudulent and collusive, and secondly, that defendant 4 had no right to surrender her life-interest. The first ground raises a pure question of fact which has been decided by both the Courts below against the plaintiff. As regards the second ground, they have held that the deeds of surrender which were executed for consideration were justified by necessity?the necessity being mainly the maintenance of defendant 4. In this view the suit has been dismissed by both the Courts. Hence this appeal.

3. The first point raised by Mr. S.N. Bose on behalf of the appellants is that defendant 4 had no right to surrender her undivided interest in the lands. His contention is that under the Hindu law the two widows inherited one estate in coparcenary and therefore no one of them had any right to deal with her interest. He relies on the decision in Gauri Nath Kakaji v. Mt. Gaya Kuar AIR 1928 P.C. 251 and refers to the following passage which is quoted therein from Bhugwandeem Doobey v. Myna Baee (67) 11 M.I.A. 487. stated the law as

follows:

Where a childless Hindu dies leaving two widows surviving, they succeed by inheritance to their husband's property as one estate in coparcenary, with a right of survivorship; and there can be no alienation or testamentary gift by one widow without the concurrence of the other.

4. It is contended that as the estate held by the two widows constitutes a coparcenary, neither of them is entitled to alienate her interest without the concurrence of the other. But Lord Salvesen who delivered the judgment of the Judicial Committee in *Gauri Nath Kakaji v. Mt. Gaya Kuar* AIR 1928 P.C. 251 stated the law as follows:

The general law is so well settled that it scarcely requires restatement. If a Hindu dies leaving two widows, they succeed as joint tenants with a right of survivorship. They are entitled to obtain a partition of separate portions of the property so that each may enjoy her equal share of the income accruing therefrom. Each can deal as she pleases with her own life interest, but she cannot alienate any part of the corpus of the estate by gift or will so as to prejudice the rights of the survivor or a future reversioner. If they act together they can burden the reversion with any debts contracted owing to legal necessity, but one of them acting without the authority of the other, cannot prejudice the right of survivorship by burdening or alienating any part of the estate.

5. It is quite obvious therefore that a co-widow may deal with her life-interest in any way she pleases, but her dealing cannot in any way affect the right of survivorship of the other co-widow. Any dealing by a co-widow will be valid during her life-time and will not affect the interest of the surviving co-widow or the reversioner. Mr. Bose also lays some stress on the following passage quoted in the same decision:

The estate of two widows who take their husband's property by inheritance is one estate. The right of survivorship is so strong that the survivor takes the whole property to the exclusion even of daughters of the deceased widow. They are therefore in the strict sense coparceners, and between undivided coparceners there can be no alienation by one without the consent of the other.

6. Mr. Bose's contention is that as the co-widows are spoken of as being coparceners in this passage, neither of them can deal with the property except with the consent of the other. No doubt in the case of ordinary coparceners in a Hindu family no one has any defined share over which he can have disposing power.

7. The reason of that rule is that in a Hindu coparcenary no one can predicate what his share is in the coparcenary property. But this reasoning cannot apply to the case of co-widows because each of them has got a defined share, though their interest taken as a whole is regarded as an estate held in coparcenary.

According to the passage which I have quoted from Lord Salvesen's judgment there can be no room for doubt that a co-widow can deal with her life-interest, but not so as to prejudice the right of the survivor or a reversioner. The same principle is found to be laid down in *Hari Narayan v. Vitai* (7) 31 Bom. 560 in which it was held:

It is the right of each of the co-widows to enjoy her deceased husband's property by partition inter se, both under the Mitakshara and the Mayukha. She can, therefore, assign her share to anyone she chooses; and if she has already obtained her share by partition, she can alienate that share. But in either case the assignment or alienation cannot take effect or have validity beyond her life-time. It is good as long as she lives; and, on her death, her interest in the property ceases and the share goes to the surviving co-widow or co-widows as the case may be.

8. This to my mind represents the correct view of the law. The same view was also adopted in *Durga Datt v. Gita* (11) 33 All 443 in which an alienee from a co-widow brought a suit for partition against the other widow. In that case" the right of the plaintiff to obtain a partition was recognized, and it was held that "the rights of the plaintiffs shall only enure, during the life-time of their donor." It was also laid down in the Pull Bench decision of the Calcutta High Court in *Janoki Nath v. Mothuranath* (83) 9 Cal. 580 that where a Hindu governed by the Bengal School of Hindu law dies intestate leaving two widows his only heirs him surviving, either of those widows may sell her interest in her deceased husband's property and the purchaser thereof is entitled to enforce a partition as against the other widow, the partition if decreed should be effected in such a way as would not be detrimental to the-future interests of the reversioners.

9. That was a case under the Bengal School of Hindu law, but reading the decision, it appears that the principle is applicable to cases governed by the Mitakshara law as well, because so far as co-widows are concerned each has a defined share in her husband's estate. Mr. Bose also contends on the authority of the passage quoted above from Lord Salvesen's judgment in *Gauri Nath Kakaji v. Mt. Gaya Kuar* AIR 1928 P.C. 251 that if a co-widow has at all any right to deal with her own life-interest in her husband's estate she can exercise such right; only after partition, and this right does not exist so long as the estate is undivided. But there is nothing in the said passage to warrant this contention.

10. It is also completely negated by the above cited Allahabad decision, *Durga Datt v. Gita* (11) 33 All 443, which is directly in point. It therefore follows that the deeds of surrender cannot be null and void. But they will not be valid beyond the life-time of defendant 4 so as to affect the right of survivorship of plaintiff 1. In other words if plaintiff 1 survives defendant 4 the latter's share will revert to the former. The finding of the Courts below that the deeds of surrender were justified by necessity does not make any difference so far as plaintiff 1 is concerned, because it is not even suggested that her consent was taken to the transactions.

11. In *Sri Gajapati Radhamani Garu v. Maharani Sri Pusapati Alakarajeswari* (93) 16 Mad. 1 which is referred to in *Gauri Nath Kakaji v. Mt. Gaya Kuar* AIR 1928 P.C. 251 it was held by their Lordships of the Judicial Committee that

a mortgage by a Hindu widow even for necessary purposes without the concurrence of her co-widow is not binding upon the joint estate which has descended from their deceased husband so as to affect the interest of the co-widow.

12. Whether the deeds of surrender will be binding against the reversioner, being for legal necessity, is a question which does not properly arise now because it may so happen that of the two widows defendant 4 may be the survivor in which case the position may perhaps be different. The rights of plaintiff 2 therefore need not be now determined. He has really no cause of action for the present suit. The question then arises whether the plaintiffs are entitled to any relief in this suit.

13. It is contended by Mr. S.C. Mazumdar on behalf of the respondents that the only prayer sought in the plaint being that the deeds of surrender be declared to be null and void, the plaintiffs cannot obtain a declaration to the effect that they are not valid beyond the life-time of defendant 4. It is said that if such a case had been made out, the defendants would have taken an appropriate defence, that is to say they could have pleaded that the deeds of surrender were executed with the concurrence of plaintiff 1. There is no force in this contention. The plaintiffs challenged the deeds as null and void and to meet this challenge whatever the defences were open might and ought to have been put forward. The challenge, so far as it came from plaintiff 1, could have been most effectively met by the plea that she gave her consent to the transaction. The plaintiffs no doubt asked for a larger relief; but if the Court finds they are entitled to a smaller relief involved in that larger one, there is no reason why the Court should not give that smaller relief.

14. In my opinion the whole suit should not have been dismissed, but a declaration should have been given to the effect that the deeds of surrender will not be valid beyond the life-time of defendant 4 so as to affect the right of survivorship of plaintiff 1. The question as to how far the deeds will be binding on plaintiff 2 is left open.

15. The next contention raised by Mr. Bose is that the disputed lands being raiyati holding governed by the Chota Nagpur Tenancy Act, the deeds of surrender which amount to sale are invalid under the provisions of Section 46, Chota Nagpur Tenancy Act. Assuming that the transactions really amount to sale, the answer is that the question is not purely one of law, because to determine whether the case is governed by Section 46, Chota Nagpur Tenancy Act, it must have to be found as a fact whether the disputed lands constitute raiyati holding within the meaning of that section. This question; was not raised in either of the Courts below. and cannot therefore be entertained in second appeal.

16. In the result I would allow the appeal in part and decree the suit to the extent indicated above. In the circumstances the parties should bear their own costs.

Manohar Lall J.

17. I agree. In my opinion it is impossible to sustain this appeal after the authoritative pronouncement of their Lordships of the Judicial Committee reported in *Gauri Nath Kakaji v. Mt. Gaya Kuar* AIR 1928 P.C. 251 I would only quote that passage in the judgment of Lord Salvesen (who delivered the judgment of their Lordships) which applies to the present case. While dealing with the rights of each co-widow, his Lordship observed:

Each can deal as she pleases with her own life-interest, but she cannot alienate any part of the corpus of the estate by gift or will so as to prejudice the rights of the survivor or a future reversioner.

18. This is the only limitation on the power of alienation which each co-widow possesses. But it was argued that this passage should be interpreted to mean that this power exists in the co-widow only when she has obtained partition of separate portions of the property either by the consent of her co-widow or through an order of the Court. I do not read the passage to mean as the argument suggests.

19. Reliance was then placed upon the quotation from the well-known decision in *Bhugwandeem Doobey v. Myna Baee* (67) 11 M.I.A. 487. But in that case, as his Lordship pointed out at p. 404 of *Gauri Nath Kakaji v. Mt. Gaya Kuar* AIR 1928 P.C. 251 a division had been effected by the Court between the two widows, and the argument was that such division having been acquiesced in, the estate of the one widow became a divided and separate estate which she was competent to leave to whomsoever she pleased. This contention was overruled by the Privy Council, Sir James Colvile observing:

The estate of two widows who take their husband's property by inheritance is one estate. The right of survivorship is so strong that the survivor takes the whole property to the exclusion even of daughters of the deceased widow. They are, therefore, in the strict sense coparceners, and between undivided coparceners there can be no alienation by one without the consent of the other.

20. Reliance was strongly placed upon this passage. As my learned brother has pointed out, this passage must be read in the light of the contention raised at the time, namely, that each widow was competent to leave her share in the estate to whomsoever she pleased. The vice in the argument of the appellants is in treating the co-widows as either joint tenants or coparceners. But in truth the status of the: co-widows is a peculiar status known to Hindu law only and it is a mistake to apply thereto the notions of English law; for instance. As I pointed out to the learned advocate for the appellants in the course of the argument, the co-widows do not become full owners even after partition (unlike the male

coparceners in the strict sense). Again their shares are always well defined and can be predicated unlike the ordinary coparcenary--their shares never decrease.

21. For these reasons I agree that the appeal be disposed of in the manner directed by my learned brother.