
(1924) 02 AHC CK 0063
In the Allahabad High Court

Musammat Duega Kunwar	Vs	APPELLANT
Musammat Chunna Kunwar and Others		RESPONDENT

Date of Decision : 15-02-1924

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 23

Citation : 78 Ind. Cas. 633

Hon'ble Judges : Mukerji, J

Bench : Single Bench

Final Decision : Disposed Of

Judgement

Mukerji, J.—The plaintiff in the Court of first instance is the appellant here. She brought this suit for recovery of certain property on the following allegations. Raj Bahadur and Kunwar Bahadur were two first paternal cousins. Raj Bahadur was the sole owner of the property in dispute. In the life time of Raj Bahadur there was a litigation between him and Kunwar Bahadur in which Kunwar Bahadur lost. On the death of Raj Bahadur, however, Kunwar Bahadur again laid claim to his property. The dispute was referred to three arbitrators on the 15th of August 1895 and they made an award the next day. (This is a registered document and a copy of which is on the record). By this document Kunwar Bahadur was to remain in possession of the property as a trustee for the plaintiff and was to pay her a certain amount of maintenance. On the death of Kunwar Bahadur the plaintiff became entitled to the possession of the property. But in his life-time, Kunwar Bahadur made a transfer and his transferees made further transfers. The widow of Kunwar Bahadur and the present holders of the property are the defendants in the suit.

2. Both the Courts below dismissed the suit on the ground of limitation. The learned Munsif decided certain other points raised by the defendants but the learned District/Judge did not enter into those matters. The lower Appellate Court held that either Kunwar Bahadur was a full owner or was a trustee as is stated by the plaintiff herself. In either view, the alienation having taken place so

far back as in 1897, the suit could not be treated as being within time.

3. In this Court it has been urged that, under the terms of the award, the right to recover actual possession adored to Musammat Durga Kunwar, the appellant, only after the death of Kunwar Bahadur and that the suit was not barred by time. It is common ground that Kunwar Bahadur died on the 31st of May 1916.

4. The learned Counsel appearing for some of the respondents has urged that to allow the appellant to argue this point would be to allow her to set up a new case altogether. He has cited several cases but I do not propose to notice all of them, for the simple reason that each of these cases was decided on its own facts. In the case of *Ilahi Khan v. Sher Ali Khan* 26 A. 891, two sets of plaintiffs brought a suit for recovery of their respective shares in a house by means of partition. It was found that one of the defendants and one set of the plaintiffs had been out of possession. The set of plaintiffs who were found to be in possession asked that their share should be augmented by reason of the fact that the other parties to the suit had lost their share by adverse possession on the part of the co-owners. It was held that this was a new case and it could not be urged. The Full Bench case of *Balmakund v. Dalu* 25 A. 498: (1903) A.W.N. 112, was distinguished. The Privy Council case of *Syedani Mahomeda Khatun Chowdhurani v. Mahomad Elahabad Khan Pani* 28 Ind. Cas. 882 : 17 C.W.N. 427, (P.C.), is also distinguishable. In that case a lady claimed the setting aside of a deed of gift and asked for an account in respect of the profits of the entire property covered by the gift. It appears that she was going on a pilgrimage and, before doing so, she transferred the entire property to her nephew by way of a gift and the nephew executed an agreement that, in case she came back alive, he would give her one-quarter of the income from the property. The plaintiff's suit for the setting aside of the gift failed. Then she said that she ought to get at least one-quarter of the income from the property. Their Lordships of the Privy Council said that the general issue as to whether the defendant was liable to render an account of the entire property did not cover the case for rendition of account in respect of the quarter share. This case also is quite distinguishable.

5. For the appellant the case of *Badha Mohan Mundul v. Jadoomonee Dossee* 23.W.K. 369 : 8 Bat. P.C.J. 482, decided by their Lordships of the Privy Council, has been cited. In that case a lady sued for possession of certain property as an heir to her late husband. It was found that the property was an endowed one but her husband was one of the Shebait. It was found that even if she could not succeed as an heiress she could certainly succeed as a Shebait, on succession to that title on the death of her husband. She was allowed to succeed on the latter title. In the Full Bench case of *Balmakund v. Dalu*, the plaintiff brought a suit for recovery of property on the ground that he had leased it out to the defendant. The lease was not proved, then the plaintiff asked to be allowed to succeed on the ground of his title to it. It was held that he was entitled to succeed. It will thus be seen that each case must be decided on its own facts. In the case before me, the plaintiff set up specifically her title and her right to possession under the

award. The only point on which she differs from her allegations made in the plaint is this. In the plaint she said that the position of Kunwar Bahadur was that of a trustee for herself. Now her learned Counsel urges that Kunwar Bahadur had only a life interest in the property and no more. Can we then say that the plaintiff is really so changing her case that it would be a just and proper Act to estop her from urging what were the positions of the respective parties under the award. Construction of a document is not an easy matter. Eminent Judges have taken different views of the same document. Examples need not be quoted. The plaintiff is a woman who probably does not even know the characters in which the award is drawn up. She was acting only on legal advice in saying that the position of Kunwar Bahadur was that of a trustee. Counsel she is now saying that under the same award Kunwar Bahadur's position was that of a life tenant only. She distinctly based her claim on the award and she distinctly stated that her cause of action arose on the death of Kunwar Bahadur. She is not altering or amending any of these allegations. In my opinion, the plaintiff is entitled to urge the new view and it is open to this Court to look into the award and to find for itself what were the legal positions of the parties to the award.

6. The award has been read out more than once and it has been commented upon. It appears that several cases were instituted by the appellant and Kuuwar Bahadur against each other, on the death of Raj Bahadur, the husband of the appellant. The arbitrators decided that these cases should be withdrawn. They said that Durga Kunwar should have possession over the moveables; that her name should be recorded in the revenue papers, and that she should get a substantial amount of maintenance, namely, Rs. 800 and odd a year. The arbitrators decided that Kunwar Bahadur was to be in possession and to manage the property but must not have any power of alienation. This is very important. They further decided that on the death of Kunwar Bahadur if any son survived him that son should get the property, and in default of the son, the property should go to the two widows, namely, the appellant and the widow of Kunwar Bahadur in equal shares. Whether we regard the award as the handy work of the three arbitrators or as an agreement between the two claimants, there can be no two opinions about its binding character. If Durga Kunwar's statement in the plaint be true that there was a litigation between Baj Bahadur and Kunwar Bahadur in respect of this property and Kunwar Bahadur lost, the property in suit was the absolute property of Kunwar Bahadur and Durga Kunwar was the only heir. Kunwar Bahadur would be the reversioner. The reversioner and the life owner Durga Kunwar could certainly agree between themselves as to how the property was to be enjoyed. The only limitations to their agreement were those that are imposed by the provisions of Chapter II of the Transfer of Property Act. I have carefully examined the award and I do not find that any of the provisions of Chapter II of the Transfer of Property Act have been contravened. It was open to the parties or the arbitrators to decide that Kunwar Bahadur would have a life interest and that on this death the property would go to his son, if one survived him, and in default it would go to the persons living at the death of Kunwar

Bahadur. This was perfectly a legal arrangement. It was distinctly stated in that award that, so long as Durga Kunwar got her maintenance, she had no right to have the arrangement set aside. The mere fact that Kunwar Bahadur sold the property" could not give her any right to bring a suit for setting aside the award and recovery of possession. Even if she could bring such a suit, there was no bar to her suing now on the death of Kunwar Bahadur. The cause of action for the suit arose on the death of Kunwar Bahadur and not earlier. It will, however, be a matter to see whether Durga Kunwar is entitled to the entire property or to only half the property, the other half going to respondent No. 1, Chunna Kunwar, the widow of Kunwar Bahadur.

7. Such being my opinion the appeal succeeds. I set aside the decree of the Court below which was on the preliminary point of limitation. I remand the appeal under Order XLI, Rule 23, Civil Procedure Code, to the Court below with the direction that it will re-enter it on the register and dispose of it according to law. Costs here and hitherto will abide the result.