

(1978) 04 CAL CK 0065
In the Calcutta High Court
Case No : A.F.A.D. No. 1882 of 1968

Sankar Prasad Khan and Others

APPELLANT

Vs

Smt. Ushabala Dasi and Others

RESPONDENT

Date of Decision : 07-04-1978

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 12, 100, 101
Guardians and Wards Act, 1890 — Section 39, 41, 41(2)
Hindu Succession Act, 1956 — Section 14, 14(1), 4(1)
Hindu Widows Remarriage Act, 1856 — Section 1, 2

Citation : AIR 1978 Cal 525 : 82 CWN 880

Hon'ble Judges : B.N. Maitra, J

Bench : Single Bench

Advocate : Purna Chandra Basu, for the Appellant; Monomohan Mukherjee and Gouri Prasad Mukherjee, for the Respondent

Final Decision : Allowed

Judgement

B.N. Maitra, J.—One Ushabala (plaintiff) filed the present suit on the allegation that the disputed properties belonged to her husband, Gostha Behari Khan. The latter died leaving her as widow and a son. Sashanka Sekhar. Her son also died leaving his minor widow, Kalibala pro forma defendant No. 2, Defendant No. 1, Gobinda Charan Khan, who is Gostha Behari's elder brother, was appointed guardian of Kalibala's person and property by the District Judge, Midnapore, and so the property in question was under his management, On the 29th of Ashar 1361 B.S. Kalibala was married to one Bhutnath Chowdhury, pro forma defendant No. 3. By such remarriage she was divested of her interest in the disputed property and the same devolved on the plaintiff as the next reversioner of her son Sashanka Sekhar. Hence, Gobinda Chandra's guardianship also came to an end with Kalibala's remarriage. He is in wrongful possession of the disputed property. The suit was filed for declaration of title and recovery of possession and mesne profits and also for injunction. Subsequently by amending the plaint the prayer for partition was added.

2. Defendant No. 1 filed a written statement denying the plaintiffs allegations. He alleged that he still continued to be Kalibala's guardian. The alleged remarriage was invalid because no consent of the Court guardian was obtained.

3. The learned Munsif accepted the plaintiff's version in p Article He stated that since defendant No. 1 was appointed guardian by the Court, his possession was not wrongful. So he allowed the plaintiffs other prayers but refused the claim for mesne profits.

4. Against that decision defendant No. 1 preferred an appeal. The plaintiff also filed a cross-objection for getting the mesne profits. The learned Subordinate Judge, Midnapore, allowed the appeal and the cross-objection and remanded the case to find out whether all were ejmali properties and if the plaintiff was entitled to a partition of the same. Against that order the High Court was moved. The High Court stated that the marriage was true. The case was remitted to the Subordinate Judge, Midnapore, to determine the other points and to ascertain the quantum of mesne profits.

5. Thereafter the learned Subordinate Judge found in favour of the plaintiff on all the points. He stated that after Kalibala's remarriage the guardianship of defendant No. 1 came to an end for all intents and purposes. He also stated that with the enactment of Hindu Succession Act, 1956, the provisions of the Hindu Widow's Remarriage Act. 1856 were impliedly repealed. Against that decision the present appeal has been filed.

6. The learned Advocate appearing on behalf of the appellants has contended that it is common ground that defendant No. 1 was appointed Kalibala's guardian regarding her person and property by the District Judge, Midnapore. But the plaintiff did not appoint her guardian for the purpose of the present suit. It has thus been contended that the provisions of Order 32, Rules 3 and 4 C. P. C. have been violated. The case of Nirmal Chandra Ray and Others Vs. Khandu Ghose and Others, has been cited to show that where the minor is not properly represented, the decree is of no effect. This contention cannot be accepted because no such ground WP taken in the memo, of appeal. Again she is merely a pro forma defendant and she attained majority before the appeal was filed. This point was not canvassed before the learned. Subordinate Judge. So the appellant cannot be permitted to canvass this point.

7. It has been next contended on behalf of the appellants that the guardianship of defendant No. 1 did not automatically cease on Kalibala's remarriage. Before the institution of the suit the plaintiff approached the District Judge, Midnapore, for removal of defendant No. 1 from the guardianship on the ground that Kalibala was remarried to one Bhutnath. But that prayer was turned down. It has been stated that the contingencies for cessation of guardianship have been embodied in Sub-sections (1) and (2) of Section 41 of the Guardians and Wards Act, 1890. According to the provisions of Sub-section (1) (d) *ibid* the powers of a guardian of the person of a female ward cease on her remarriage. But no such provision

appears in Sub-section (2) and thus in case of a female ward's marriage the powers of a guardian of her property do not cease. The cases of Chandra Bhukhan Singh Vs. Sujan Kunwar, and Rajarajeswari Ammal Vs. S. Sankaranarayana Aiyar and Another, , have been cited. The learned Advocate appearing on behalf of the respondent has placed reliance on the case of Shiv Charan Lal v. Bhawani Shankar AIR 1928 Lah 495 and contended that there will be cessation of guardianship over the person and property as well when the female ward remarries. This case shows that just as guardian's death puts an end to the guardianship, so does the ward's death though it has not been specifically noted in Sub-section (3).

8. The provisions of Section 41(1) and (2) are clear on this point. The relevant provisions have been quoted below. Unlike the provisions of Section 41(1) where the guardianship of a female ward regarding her person ceases on her remarriage the provisions of Sub-section (2) are untrammelled by any consideration of marriage regarding the ward's property.

41 (1) The powers of a guardian of the person cease-

(d) in the case of a female ward, by her marriage to a husband who is not unfit to be guardian of her person or, if the guardian was appointed or declared by the Court, by her marriage to a husband who is not, in the opinion of the Court so unfit;

(2) The powers of a guardian of the property cease-

(a) by his death, removal or discharge;

(b) by the Court of Wards assuming superintendence of the property of the ward;
or

(c) by the ward ceasing to be a minor.

(3) When for any cause the powers of a guardian cease, the Court may require him or, if he is dead, his representative to deliver as it directs any property in his possession or control belonging to the ward or any accounts in his possession or control relating to any-past or present property of the ward.

We think that the views of the Bench decisions of the Allahabad High Court in Chandra Bhukhan Singh Vs. Sujan Kunwar, and of the Madras High Court in Rajarajeswari Ammal Vs. S. Sankaranarayana Aiyar and Another, are correct. We are of opinion that the guardian's powers regarding the property of female ward do not end with her marriage. If the respondent's contention is to be accepted, then we shall have to import the fact of marriage in Sub-section (2) though such provision is conspicuous by its absence therein and that will be infringing the rules regarding constructions of a statute. Of course Sub-section (3) deals with case of guardian's cession of power "for any cause". But a harmonious construction will have to be made and those words cannot mean that such guardianship over a female ward's property will peter out on her remarriage.

9. Let us then discuss the other aspects of the case. Section 4(1)(b) of the Hindu Succession Act, 1956, says that save as otherwise expressly provided for in the Act any other law in force immediately before the commencement of the Act shall cease to apply to Hindus so far as it is inconsistent with any of the provisions contained in the Act. It does not appear that the provisions of Hindu Succession Act, 1956, are in conflict with Hindu Widows Remarriage Act, 1856, in this respect. The same view will appear from Mulla's Hindu Law, 14th Edition at page 869. Section 14(1) of the Hindu Succession Act is important in this respect. That Sub-section (1) says that any property possessed by a Hindu female whether acquired before or after the commencement of the Act shall be held by her as full owner thereof and not as a limited owner. Of course the word "possessed" used in that sub-section connotes both ownership and possession and not possession alone without any title, say the case of a trespasser widow. The principles of the cases of Mangal in AIR 1967 SC 1786 and Dindayal and Another Vs. Rajaram, may be cited. The relevant portion of section 2 of the Hindu Widow's Remarriage Act says that rights and interests which any widow may have in her deceased husband's property by way of maintenance or inheritance or by will or testamentary disposition without any express permission to marry shall, upon her remarriage, cease or determine as if she had then died.

10. Kalibala was re-married on the 14th of July, 1954 corresponding to the 29th of Ashar 1361 B.S. At that time Hindu Succession Act was not enacted. So in view of Section 2 of the Hindu Widows Remarriage Act, 1856, the interest which she acquired from her husband, Sashanka Sekhar in the suit land ceased to exist.

11. Then about the provisions of Section 14(1) of the Hindu Succession Act. She was in constructive possession through the guardian (defendant No. 1) appointed by the District Judge. Now the important question arises if such constructive possession of Kalibala would confer on her an absolute estate, within the meaning of Section 14(1) of the Act. It has already been pointed out that the expression "possessed" denotes ownership and possession as well. After her remarriage there was no legal ownership in her regarding the disputed property. She continued to be in constructive possession of the disputed land through defendant No. 1 and that was her mere possession without any title. It is therefore held that the provisions of Section 14(1) of the Hindu Succession Act did not confer any absolute estate in the disputed land in her favour.

12. Then the most important question arises what will be the effect of District Judge's refusal to remove defendant No. 1 from the guardianship of the disputed property after Kalibala's marriage. It has been stated for the respondent that the District Judge gave permission to the plaintiff to move to Civil Court, That was done and so the suit is tenable. Now, the right of removal of such a guardian is governed exclusively by the provisions of the Guardians and Wards Act, 1890. That power is in the District Judge and not in the ordinary Civil Court. Munsif's Court at Garbeta had no power to remove. The order-sheet, exhibit B, is clear on this point. The present plaintiff made an application to the District Judge for

removal of defendant No. 1 on the ground of Kalibala's remarriage with another person. The District Judge did not remove defendant No. 1 from the guardianship and stated the question of remarriage might be agitated in a Civil Court and after filing a suit the present plaintiff might take appropriate steps in the Civil Court for staying the hands of the guardian in dealing with the minor's property. The High Court was not moved against that order of the District Judge. It seems that after this order the plaintiff has no case and the suit is not maintainable. Since the District Judge clearly turned down the plaintiff's prayer to remove defendant No. 1 from guardianship of the property after Kalibala's remarriage and the District Judge was not approached a second time to reconsider the matter, defendant No. 1 continued in the eye of law to be Kalibala's guardian regarding her property even after her remarriage. In that view of the matter, it must be held that the suit is not maintainable without removing him from the guardianship of Kalibala's property with the District Judge's order.

13. Then about the question of mesne profits. Since, defendant No. 1 was not removed from the position of guardianship, his position is not that of trespasser since his possession is not unlawful. The prayer for mesne profits therefore could not be entertained.

14. The appeal be therefore allowed. The judgment and decree appealed against be hereby set aside and the suit dismissed In view of the facts of the case, the parties will bear their own costs throughout.