

(1960) 04 CAL CK 0011

In the Calcutta High Court

Case No : Appeal from Appellate Decree No. 1109 of 1954

Santosh Kumar Adya

APPELLANT

Vs

Jatindra Nath Banerjee

RESPONDENT

Date of Decision : 11-04-1960

Acts Referred:

Specific Relief Act, 1963 — Section 27, 43

Citation : (1961) 1 ILR (Cal) 583

Hon'ble Judges : Sen, J;N.K. Sen, J

Bench : Division Bench

Advocate : Lala Hemanta Kumar and Sudhir Kumar Dutta, for the Appellant;Dwijendra Nath Das, for the Respondent

Final Decision : Allowed

Judgement

Sen, J.—This second appeal is by the Defendant and arises from a suit for specific performance of a contract for the sale of 2 cottons of land situated on Khurut Road at Ramkrishnapur within Howrah Municipality. The facts are briefly as follows. One Rajendra Nath Dutta died leaving- two daughters Nabanalini and Jatanbala. There was a partition suit pending in the First Court of Subordinate Judge, Howrah, and both Nabanalini and Jatanbala were Defendants in that partition suit. On December 21, 1943, Nabanalini executed a bainanama in favor of the Plaintiff Jatindra Nath Banerjee agreeing to sell 2 cottons of land at Khurut Road, Ramkrishnapur, Howrahj for Rs. 3,800. There was a recital in the document that Nabanalini required the money for defraying the expenses of the partition suit and for the marriage of her daughters and that she had received Rs. 1,000 as the earnest money. In the partition suit finally decreed Nabanalini got only 8 chhataks and 3 sq. feet out of the 2 cottons plot. Nabanalini died on September 10, 1946, leaving a son Puma Chandra Pyne, Defendant No. 2. Jatanbala was alive when the present suit was instituted on December 20, 1949, that is, just within six years from the date of the bainaiwma which was a registered document. During the pendency of the suit Jatanbala died and her

sons Santosh Kumar Adhya and Sisir Kumar Adhya were substituted for her. These sons of Jatanbala are the Appellants in this Court.

2. Jatanbala filed a written statement contending that the suit is not maintainable, that Nabanalini had no legal necessity for alienation of the land, that as successor to Nabanalini's share of the property by survivorship she was not bound by the agreement for sale and that also the bainanama was a collusive document. The learned Munsif, Additional Court, Howrah, who tried the suit, held that there was legal necessity because Nabanalini had need of money to defend the partition suit and there was no evidence to show that her husband Grokul Pyne, who lived at the house of his father-in-law, had any independent income, and that there was also need for the money for the marriage of the daughters of Nabanalini. As regards the question whether Jatanbala who got the property on survivorship was bound by the contract, the learned Munsif referred to the provisions of Section 27, Clause (c) of the Specific Relief Act and held that the clause was applicable to the facts of the case, and in view of that clause Jatanbala was also bound under the contract. Accordingly the suit was decreed in favor of the Plaintiff. The proportionate price of 8 chhataks 30 sq. feet being Rs. 1,029 the Plaintiff was directed to deposit Its. 29 in Court and the Defendant were thereupon called upon to execute the sale deed in respect of 8 chhataks 30 sq. feet which had fallen in the allotment of Nabanalini as a result of the partition decree.

3. There was an appeal by the sons of Jatanbala who had during the course of the original suit been substituted for their mother as the contesting Defendants. The learned Subordinate Judge, Howrah, however, agreed with the learned Munsif in holding that there was legal necessity for Nabanalini to obtain money by agreeing to sell her share of the property and the learned Subordinate Judge also agreed that the provisions of Section 27, Clause (c) of the Specific Relief Act was applicable, and in view of that clause Jatanbala and her heirs were bound by the contract. Accordingly the appeal was dismissed.

4. Accordingly, the sons of original Defendant No. 1 Jatanbala Adya have filed this second appeal. Mr. Lala Hemanta Kumar appearing for the Appellants has urged that the contract which was by Nabanalini alone, without any suggestion that it had been made with the consent of her sister Jatanbala, would not be binding on Jatanbala who got the interest of Nabanalini by survivorship. In this connection Mr. Lala has referred to a number of decisions of the Judicial Committee. The earliest of these cases is Bhugivandeen Doobey v. Myna Bae (1867) 11 M.I.A. 487 where it was held that where a childless Hindoo 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. In (1875) L.R. 2 I.A. 113 (Privy Council) it was laid down that two daughters inheriting their father's estate were in the same position as two co-widows and that at the death of one of them the survivor, even though she was a

childless widow, would take the entire estate by survivorship. In *Sri Gajapati Radhamani v. Maharani Shri Pusapati Alakarajeswari* it was held that the mortgage by a Hindu widow even for necessary purposes without the concurrence of her co-widow was not binding upon the joint estate which had descended from their deceased husband so as to affect the interest of the co-widow. In *Gauri Nath Kakaji v. Gaya Kuar* (1928) L.R. 55 IndAp 399 it was held that if a Hindu dies, leaving two widows they succeed as joint tenants with a right of survivorship, but they can partition the property so that each may separately enjoy an equal share of the income, but neither can prejudice the right of survivorship by alienations save by the consent of the other or possibly where that consent had been applied for and unreasonably withheld. The law is settled by these Privy Council decisions and has been summarised in Section 181C of *Mallah's Hindu Law* so far as co-widows are "concerned and Section 43, Clause (5) so far as daughters are concerned. In Section 43, Clause (5) the following observations occur:

Two or more daughters of a class take the estate jointly as in the case of widows, with rights of survivorship. Any one daughter may alienate her life-interest in the property, but not so as to affect the rights of survivorship of the other daughters. And, like widows, daughters may enter into any agreement regarding their respective rights in their father's estate, provided such agreement does not prejudice the rights of reversioners. They may divide the estate merely with a view to convenient enjoyment, retaining the right of the survivor to take the whole on the death of one of them....

5. Mr. Dwijendra Nath Das appearing for the Plaintiff Respondent has pointed out that many of the decisions of the Judicial Committee referred to by Mr. Lala relate to cases arising outside Bengal, that is cases governed by the *Mitakshara* Law, and that only one of them, namely, the case of *Aumirtolall Bose v. Rajoneeltcmt Mitter* (supra) arises from Bengal where the parties were governed by the *Dayabhag* School, and the only thing settled there was that the two daughters of one class inheriting their father's estate would have a joint estate and the rule of survivorship would apply to them. He has referred in this connection to a Full Bench case, namely, *Janohi Nath Mukhopadhyaya v. Mothuranath Mukhopadhyaya* (1883) ILR 9 Cal. 580 (F.B.). In that case the question referred to the Full Bench were? firstly, whether under the Hindu law in force in Bengal the alienation by *Brojo Sunduri*, one of the two co-widows, of her interest in her husband's estate was valid, and secondly, whether the Plaintiff, that is the transferee from *Brojo Sunduri*, was entitled to a partition of the property in suit. Their Lordships answered both the questions in the affirmative, and incidentally discussed the relevant Hindu law as applicable to Bengal. They pointed out that the decision in *Bhugwandeem Dobey v. Myna Baee*, (supra) did not decide anything more than that two widows inheriting their husband's estate hold the estate as joint tenants and one of them could not alienate her share without the consent of the other, and that this decision was in no way inconsistent to the view that there could be a partition between two co-widows which

would be valid during their lifetime. In fact, so far as partition is concerned, the later Privy Council decision namely, the case of Gauri Nath Kakaji v. Gaya Kaur (supra) already referred to expressly laid down that partition could be effected between two co-widows but such, partition would not affect the interest of the survivor to take the entire estate on the death of the other. The Privy Council in the case of Baugwandeem Dobey v. Myna Baee (supra) did not also decide that one of the holders of the joint estate could not alienate her estate during her lifetime and so it was held that transfer by one of the co-widows would be valid during her lifetime and to that extent the transferee could also seek partition just as a co-widow could have done. The Full Bench decision of the Calcutta High Court therefore does not really tone down the force of the decisions of the Privy Council on which Mr. Lala relies particularly the Full Bench case does not touch on the question whether a co-widow or one of two sisters having a joint estate may bind the estate on the ground of legal necessity. There being no decision to the contrary in the present case even if we accept the decision of the courts below that the agreement of transfer by Nabanalini was for legal necessity it must be held that that decision would not be binding on her sister who was a joint tenant among the survivor.

6. Mr. Dwijendra Nath Das has referred to certain observations in Golap Chandra Shastri's Hindu law to the effect that the law of survivorship was wrongly applied by the Judicial Committee to co-widows and to daughters of one class inheriting their father's property. We cannot however go back on the law as settled by decisions of the Privy Council which are of 80 or 90 years standing. The law as settled by the Privy Council decision must be accepted and we must proceed on the footing that not only co-widows hold their husband's estate as joint tenants and the law of survivorship applies, but also that two daughters of one class inheriting their father's property hold the property as joint tenants and the law of survivorship applies, so that when alienation is made without the consent of the co-owner, the alienation cannot affect the right of her co-owner to get the entire estate free from all encumbrances by survivorship.

7. Section 27, Clause (c) of the Specific Relief Act on which the courts below relied runs as follows:

Except as otherwise provided by this chapter, specific performance of a contract may be enforced against-

(c) any person claiming under a title which, though prior to the contract and known to the Plaintiff, might have been displaced by the Defendant;

8. The word "Defendant" in this clause means "one of the parties to the original contract". Where the person against whom the contract is sought to be enforced, claims a title to the property which is prior to the contract, the contract may be enforced against him only when the title of such person might be displaced by one of the original parties to the contract. In the present case the contract is sought to be enforced against the survivor Jatanbala or the heirs of

the survivor who have; the same rights as the survivor herself. The survivor derives her title to the property as the heir of her father, that is under a title which is prior to the contract. Only if Nabanalini who was a party to the contract could have displaced or defeated the title of Jatanbala to Nabanalini's share of the property, the Plaintiff could have claimed to enforce specific performance! against the survivor Jatanbala. Therefore the question reduces itself to the question whether Nabanalini could have defeated Jatanbala's claim to Nabanalini's half share of her father's property. She could have done so only if a transfer by her for legal necessity would have been binding against the estate; but it has been held that the transfer for legal necessity is not, binding except when the transfer is made with the consent of the other joint owners (vide *Gajapati Radhamani Garu v. Maharani Sri. Pasupati Alakarajeswari* (supra) and *Gourinath Kakaji v. Gaya Kaur* (supra).) In the circumstances it must be held that Nabanalini without the consent of Jatanbala could not have displaced or defeated the claim of Jatanbala to succeed by survivorship. That being so, it is clear that the Plaintiff cannot enforce the contract against the survivor Jatanbala. It must therefore be held that the courts below were wrong in holding that Section 27, Clause (c) of the Specific Relief Act would be applicable to the facts of the present case and that under that clause the contract could be enforced against Jatanbala or her heirs.

9. Mr. Lala Hemanta Kumar also challenged the decision of the courts below that the contract for sale was made for legal necessity. It is not however necessary for us to enter into the question whether that finding was based on sufficient evidence, because we have found that even if the contract was made for legal necessity this contract not having been made with the consent of Jatanbala, would not bind her or prevent her from getting the share of Nabanalini in an unencumbered form by right of survivorship. Therefore this appeal must succeed.

10. It is, therefore, ordered that the appeal be allowed with costs and the decrees of the courts below be set aside and the Plaintiff's suit be dismissed. The Defendants Appellants will be entitled to the costs of the Trial Court.

N.K. Sen, J.

11. I agree.