**Kedarnauth Doss and anr. Vs. Protab Chunder Doss and ors.**

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**SooperKanoon Citation** : sooperkanoon.com/852573

**Court** : Kolkata

**Decided On :** Feb-07-1881

**Reported in** : (1881)ILR6Cal626

**Judge** : Richard Garth, C.J. and ;Pontifex, JJ.

**Appellant** : Kedarnauth Doss and anr.

**Respondent** : Protab Chunder Doss and ors.

**Judgement** :

Richard Garth, C.J.

1. I think that the judgment of the Court below should be affirmed, upon the single ground that the plaintiff has not shown who is the common ancestor through whom he claims title to the property in question from Nobocoomar Dhara.

2. The case comes before us under rather peculiar circumstances. The original plaintiff, Kedarnauth Doss, claimed as the sole heir of Nobocoomar Dhara; but it turned out at the trial that if the plaintiff should make out his title to the property, his mother, the witness Koylashmoney Dossee, would be entitled to a share of it. Upon this it was objected by the defendants' counsel that her name ought to be added as a co-plaintiff, and an order was made by the Court to that effect, although the plaint does not appear to have been amended.

3. The decree of the Court below being then given for the defendants with costs, the plaintiff Kedarnauth did not pay the costs; consequently he has been made an insolvent by the defendants, and the Official Assignee has declined to proceed with the appeal on behalf of the creditors. Koylashmoney Dossee is, therefore, the only appellant, and an objection was taken before us that as it did not appear upon the proceedings that she was a party to the record, the appeal should be dismissed. But we thought it right under the circumstances to allow the argument to proceed, upon the understanding that an amendment was to be made by the proper officer in accordance with the order of the Court below.

4. We have, therefore, properly speaking, to consider only the case Of Koylashmoney Dossee; but, as both plaintiffs claim under the same title, it will really be necessary to consider the whole if Kedernauth had not become an insolvent.

5. The plaintiff Kedarnauth claimed to be the heir of Nobocoomar Dhara, as being the only surviving son of his paternal uncle's daughter; but it turned out in the course of the case that he had a brother, who is now dead, and who, if he had lived, would have been his co-heir. This brother's share, if he bad any, would now have passed to his mother Koylashmoney, and this is the reason why she was ordered to be made a co-plaintiff.

6. Koylashmoney was herself called as a witness at the trial; and if her story is to be believed, she proved the following facts:

7. Rammohun, Ramjoy, and Rambuddo were three brothers; Koylashmoney herself was the only daughter of Ramjoy, and her father and mother were both dead. Rammohun left no children, and he and his wife are both dead; but Rammohun's mother, although an old woman, is not proved to be dead. Rambuddo, who would seem to have been known by other names, was the father of Nobocoomar, who died without issue, and his wife is dead also.

8. Several points were raised in the Court below and pressed upon us here by the defendants' counsel with regard to the insufficiency of the evidence; but I would decide the appeal upon this one point only.

9. The common ancestor is of course alleged by the plaint to have been the father of the three brothers; but it is not shown who or what he was, nor is even his name mentioned. No information whatever has been given to the Court respecting him, and no sufficient reason has been suggested why such a material element in the case has been omitted. It is certainly very remarkable that Koylashmoney, if her story be true, should not know who her father's father was; and it does not appear that any steps have been taken to ascertain that fact.

10. It must be borne in mind, that the brothers would not have inherited directly from one another, but through their father; and that the father would, if alive, be entitled to the property in question before Ramjoy. In this respect the rule of Hindu law is similar to the law of England since the Statute 3 and 4 Will. IV, c. 106, Section 5; and I believe that the rule of evidence there in cases like the present is correctly laid down in the last Edition of Eoscoe's Nisi Prius Evidence p. 1010, that where the plaintiff claims as a collateral heir, he is bound to allege and prove his title through the common ancestor in all its stages; and one most important stage is of course the common ancestor himself.

11. It is obviously only fair to the defendants that this rule should be strictly observed; because although Ramjoy, Rammohun, and Rambuddo may be said and believed by the witnesses to be three brothers, it is possible that they may in fact be cousins or related in some other degree, or that their legitimacy may be doubtful, or that they may have other brothers, who, if alive, would take as heirs in priority to the plaintiffs.

12. I think, therefore, that, upon this ground alone, the appeal should be dismissed with costs on scale 2.

**Pontifex, J.**

13. I agree with Broughton, J., that the evidence is untrustworthy and insufficient to entitle the plaintiff to a decree.

14. It seems to me incredible that Koylashmoney should not know her grandfather's name. But it may have been material to suppress it, as it might have

given the defendants a clue. In my opinion the plaint ought to have stated the descent from a common ancestor, and the evidence ought to have supported such statement.

15. Then the failure of the male plaintiff to present himself as a witness is very gravely suspicious. According to the evidence of the Doctor, his father-in-law, Nobocoomar arranged his marriage and acknowledged him as his nephew. But if this is true, it must have happened immediately before Nobocoomar's death, and the necessary consequence must have been that the male plaintiff must have performed Nobocoomar's shrad.

16. Now the evidence does not show that he did perform the shrad, and according to the evidence the defendants must have been aware from being in the house whether he did so or not. If he had presented himself as a witness, the first question would have been-Did you perform the shrad or not; and if not, why not? It seems to me that he could not face this question; and not only do I think the evidence is insufficient to give the plaintiff's a decree, but I also have a very grave suspicion that the whole case is untrue.