

Brojonath Saha and ors. Vs. Dines Chandra Neogi and ors.

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Court : Kolkata

Decided On : Dec-20-1910

Reported in : 30Ind.Cas.418

Judge : Caspersz and; N.R. Chatterjea, JJ.

Appellant : Brojonath Saha and ors.

Respondent : Dines Chandra Neogi and ors.

Judgement :

1. The plaintiffs and defendants Nos. 1 to 4 are co-sharers in a certain revenue-paying estate. On the 23rd Chaitra 1292, Annada Sundari Dasya, the mother of defendant No. 4, executed what is headed as a kobala or out-and-out sale of land' in favour of the plaintiffs. These lands were khamar lands and they were specified by the vendor, who described herself as owner in possession with power and right to make gift or sale of a certain fractional share in the mahal within which the khamar lands were included. Towards the end of the conveyance, there is a stipulation that the vendees would pay annually $5\frac{1}{4}$ annas as rajashya, Government revenue, of the land conveyed into the vendor's sarkar; in other words, the vendees would pay a certain sum of money which the vendor would be bound to remit to the Collector as revenue payable in respect of the land so conveyed. The plaintiffs were not registered as proprietors of the lands in question. Thereafter, a partition was effected under the provisions of Act V of 1897 (B.C.) the proceedings ending in the year 1901. The plaintiffs did not secure their kobala

lands in those partition proceedings, nor any land equivalent to those kobala lands. In fact, they were allotted to the share of defendants Nos. 1, 2 and 3. The plaintiffs brought their present suit to obtain either those identical lands or, in lieu of them, the lands which had been allotted to defendant No. 4.

2. The first Court decreed the suit, giving the plaintiffs the lands which had been given to defendant No. 4 in lieu of the kobala lands. Various questions of fact were decided by the Munsif but on appeal to the Subordinate Judge, the case turned on a simple issue, whether the kobala was or was not an out-and-out sale, and in the opinion of the Subordinate Judge, the conveyance being of that description, the plaintiffs' suit failed.

3. In second appeal, the substantial argument of the learned Vakil on behalf of the plaintiffs is that on general principles the defendant No. 4 cannot be allowed to retain a two-fold benefit and that in any case, the Munsif's decision is one which is in accordance with justice, equity and good conscience.

4. We have read the kobala of the 23rd Chaitra 1292, and, in our opinion, though it is an out-and-out conveyance, it is impossible to ignore the peculiar condition for the payment of Government revenue by the vendees to the vendor. As a result of that stipulation the plaintiffs (vendees) were unable to represent themselves as proprietors of the land purchased. They were proprietors, but they were not registered proprietors. That being so, the butwara authorities could not take notice of the interest they claimed in the land conveyed (Section 4 of Act V of 1897, B.C.). Our attention has been called to Section 99 of the Act. It runs thus: 'If any proprietor of an estate held in common tenancy and brought under partition in accordance with this Act has given his share or a portion thereof in putni or other tenure or on lease, or has created any other encumbrance thereon, such tenure, lease or encumbrance shall hold good as regards the land finally allotted to the share of such proprietor and only as to such lands.' It will be observed that the kobala of the 23rd Chaitra 1292 was not a conveyance of a share. It was in respect of certain specified lands. But, in some respects, the burden imposed upon the share of the vendor was an encumbrance. It is not necessary to discuss the cases which have been decided on some cognate questions under Section 37

of Act XI of 1859. 'We may, however, mention the case of Thakoor Dass Roy Chowdhry v. Nubeen Kishen Ghose 15 W.R 552. In Jay Sankari Gupta v. Bharat Chandra Birdhan 26 C. 434 : 3 C.W.N. 209 an application was made in accordance with the equitable principles originally recognised and given effect to by the Privy Council in the case of Byjnath Lall v. Ramoodeen Chowdhry 1 I.A. 106 : 21 W.R. 233. We may usefully quote a passage in the judgment of the Judicial Committee where their Lordships said: 'it is, therefore, clear that the mortgagor had power to pledge his own undivided share in these villages; but it is also clear that he could not, by so doing, affect the interest of the' other sharers in them, and that the persons who took the security took it subject to the right of those sharers to enforce a partition, and thereby to convert what was an undivided share of the whole into a defined portion held in severalty.'

5. But, as we have already said, this case is not one of an encumbrance strictly so called; it is rather a case of an anomalous burden imposed by the widow on her share, in that she allotted certain khamar lands to the plaintiffs and pledged herself to pay. Government revenue on receipt of a sum from the plaintiffs. For the purposes of the partition proceedings, the widow represented her vendees, and, although it might be difficult to describe her position as being that of a trustee for the vendees, that would be the practical result of the attitude adopted by her in consequence of the conveyance.

6. Under these circumstances, we are unable to agree with the Subordinate Judge in altogether dismissing the plaintiffs' action. We must apply those general principles of equity that always govern cases which are not precisely covered by a particular section of a particular Statute.

7. There remain, however, questions which must be gone into by the lower Appellate Court. The first of these is whether the interest of the widow, Annada Sundari, was an absolute interest, as she described it. The plaintiffs' suit was based on the existence of such an absolute interest. If she had any absolute interest, we think the plaintiffs are entitled to follow the lands allotted to defendant No. 4 in lieu of, and corresponding to the lands conveyed under the kobala of the 23rd Chaitra 1292. If, however, Annada Sundari held a mere Hindu widow's

estate, the question would arise as to whether there was any legal necessity for raising Rs. 300, the purchase-money mentioned in the conveyance. The first Court observed that no issue had been raised as to legal necessity in this case, and that the defendants did not say, in their defence, that there was no legal necessity for creating the kobala. But on reference to the written statement of defendant No. 4 (paragraph 9), we find that various pleas were raised going to the root of the matter, and it was said that any act done by Annada Sundari without any authority is not binding upon the defendant No. 4. It will be necessary to frame an issue as to this. Of course, if Annada Sundari was under no legal necessity to raise the money, her conveyance to the plaintiffs would not operate after the death of the Hindu widow.

8. The only other question remaining in the case is as to the tenancy of defendant No. 11, Ram Chandra Bose. As to this also, there must be a distinct finding by the lower Appellate Court.

9. With these observations, we allow this appeal and direct that the case be sent down to the lower Appellate Court for a decision of the points indicated by us.

10. If the evidence, as recorded, is not sufficient to enable the lower Appellate Court to arrive at findings on the further points indicated, it will be at liberty to require both parties to adduce additional evidence. Such evidence may be taken by the lower Appellate Court or by the first Court.

11. Costs will abide the result.

12. The defendant No. 1 respondent is entitled to his costs of this appeal.