

Kedar Gain Vs. Ramoni Dassi

Kedar Gain Vs. Ramoni Dassi

SooperKanoon Citation : sooperkanoon.com/876919

Court : Kolkata

Decided On : Aug-10-1910

Reported in : 7Ind.Cas.884

Judge : Mookerjee and ;Sharf-ud-Din, JJ.

Appellant : Kedar Gain

Respondent : Ramoni Dassi

Judgement :

1. This is an appeal on behalf of the third defendant in a suit for recovery of possession of immovable property which admittedly belonged at one time to Madan Sundar, the father of the plaintiff-respondent. Madan died many years ago leaving him surviving his widow Surjamoni and two daughters, Sonamoni and Ramoni. After the death of Surjamoni the estate of Madan came into the possession of his two daughters On the 26th August 1895, Sonamoni executed a usufructuary mortgage of the entire property in favour of the present appellant. The result was that the mortgagee got into possession and dispossessed Ramoni. Ramoni forthwith sued the mortgagee, as also her sister, for declaration of her title to a half share of the property and for recovery of joint possession. A decree was made in her favour which entitled her in express terms to recover joint possession of the property. Sonamoni died in 1901 and left a son the second defendant before us. On the 20th June 1906, Ramoni commenced this action for declaration of her title to the property and for recovery of exclusive possession thereof. The

mortgagee defendant resisted the claim substantially on the ground that the mortgage in his favour had been executed by Sonamoni for legal necessity, and was consequently binding on Ramoni as the reversionary heir. He further contended that the plaintiff was not entitled to claim the half share of her sister Sonamoni, inasmuch as at the time of the death of the latter, she herself had become a childless widow and so could not succeed as heir. The Courts below have concurrently overruled this objection, and made a decree in favour of the plaintiff.

2. The mortgagee has now appealed to this Court and on his behalf the decision of the Subordinate Judge has been assailed on two grounds, namely, first, that the finding of the Court below upon the question of legal necessity is not sufficient to dispose of the case, and, secondly, that in view of the decision in the suit of Ramoni commenced by her in 1895 against her sister and the mortgagee from her, she was not entitled to take by survivorship any interest in the estate of Madan which upon his death has passed to Sonamoni and her son. In our opinion, there is no substance in either of these contentions.

3. In so far as the first point is concerned, it is not necessary to examine it at any length. The Courts below have found that there was no satisfactory and reliable evidence to show that Madan had any debt in liquidation of which the mortgage bond in favour of the appellant had been executed. Indeed, there is ample evidence to show that Madan was a man of substance and was indebted to no one. There is also nothing to show that at the time when Sonamoni executed the usufructuary mortgage in 1895, she was placed in such embarrassed circumstances as would justify an alienation by her. On the other hand, it is fairly clear from all the surrounding circumstances that the mortgage of 1895 must have been executed by Sonamoni with a view to oust her sister. The first contention of the appellant must, therefore, be overruled.

4. In so far as the second contention of the appellant is concerned, it has been argued that although, according to the decision of the Judicial Committee in the case of *Amrito Lal Bose v. Rajanee Kant*, 23 W.R. 214 : 15 B.L.R. 10 : 2 I.A. 113, the plaintiff would be entitled to take by survivorship the whole of the property

of her father which had originally descended jointly to herself and her sister, not withstanding the fact that at the time when it became open to her to claim the whole estate by right of survivorship, she had become a childless widow, yet as a result of the litigation of 1895 her position had become materially altered and it was no longer open to her to claim the whole estate by right of survivorship. In support of this position reliance has been placed upon the case of *Kailash Chandra Chuckerbutty v. Kashi Chandra Chuckerbutth* 24. C. 389. Reference has also been made to the decisions of their Lordships of the Judicial Committee in the cases of *Appovier v. Rama Snnbba Aiyar* 11 M.I.A. 75 : 8 W.R. 1 (P.C); *Bal Kishan Das v. Ram Narain Sahu* 30 I.A. 139 : 5 Bom. L.R. 461 : 7 C.W.N. 578 : 30 C. 738 (P.C.) and *Musammat Parbati v. Chaudhri Naunihal Singh* 36 L.A. 71 : 11 Bom. L.R. 877 : 3 Ind. Cas. 195 31 A. 412 : 10 C.L.J. 121 : 6 A.L.J. 596 : 5 M.L.T. 437 : 13 C.W.N.983. In our opinion, the cases to which reference has been made, have no real application to the circumstances of the present case and there is no foundation in Hindu Law for the contention of the appellant. No doubt in the case of *Appovier v. Rama Snnbba Aiyar* 11 M.I.A. 75 : 8 W.R. 1 (P.C), it was ruled by their Lordships of the Judicial Committee that according to the true notion of an undivided family under the Hindu Law, no individual member of that family, whilst it remains undivided, can predicate of the joint and undivided property that he, that particular member, has a certain definite share, and that consequently a definition of the shares of different members of a joint Mitakshara family in any particular property, constitutes a separation in interest, so far as that property is concerned. This doctrine is obviously inapplicable, in all its bearings and to its fullest extent, to the case of an estate inherited by two daughters from their father under the Dayabhaga Law. In the case of members of a joint Mitakshara family, if there is no separation in interest amongst the members, the shares from time to time increase or diminish, either by reason of the death of any existing member or the birth of a new member into the family. In the case of inheritance by two daughters to the estate of their father, no such contingency is possible. In the case before us, for instance, although the two daughters were jointly interested in the estate of their father, and although upon the death of one, her interest would pass by survivorship to her sister, yet there can be no question that each daughter was entitled to a half share of the property. But even if it be assumed for a moment that the doctrine of

survivorship as recognized under the Milakshara Law is applicable in its entirety and to the fullest extent to the case of succession of daughters to the estate of their father under the Dayabhaga, Law, it is clear that in the case before us, there has not been such, a definition of interest of the plaintiff as to justify the conclusion that she had separated from her sister and that the principle of survivorship had ceased to operate. Her sister had granted a usufructuary mortgage in respect of the entire estate which she had no authority to do. Ousted in this manner, the plaintiff brought an action for recovery of joint possession. This she was undoubtedly entitled to do and the decree which was made in her favour expressly reserved to her the right to recover joint possession only. Under the circumstances like there, it is impossible to hold that there has been any effective separation in interest between the sisters. There was no renunciation of the right of survivorship as in *Ramakkal v. Rama Sami* 22 M. 522 and *Comnathi Ammal v. Rupputhayi* 14 M.L.J. 175. In fact, if the two sisters instead of being governed by the Dayabhaga Law had been two members of a joint Mitak-shara family and one of them had been ousted by the other and had brought a suit for recovery of joint possession, it could hardly be contended that the doctrine of survivorship had no application. It is not necessary, in this view, to examine the decision of the Judicial Committee in *Bal Kishen Das v. Ram Narain Sahu* 30 I.A. 139 : 5 Bom. L.R. 461 : 7 C.W.N. 578 : 30 C. 738 (P.C.) and *Musammal Parbati v. Chowdhry Naunihal Singh* 36 L.A. 71 : 11 Bom. L.R. 877 : 3 Ind. Cas. 195 31 A. 412 : 10 C.L.J. 121 : 6 A.L.J. 596 : 5 M.L.T. 437 : 13 C.W.N.983. The cases do not lay down any principle inconsistent with what underlies the earlier decision of the Judicial Committee. But it may be observed, as was pointed out by their Lordships in the case of *Ram Pershad Singh v. Lakhpati Koer* 30 C. 231 at p. 253 : 7 C.W.N. 162 : 5 Bom. L.R. 103 : 30 L.A.I., that in order to determine whether there has been any separation of title indicated by the conduct of the parties, we must remember that what constitutes the true test of partition according to Hindu Law is the intention of the members of the family to become separate owners. If this test is applied to the case before us, only one conclusion is possible. There was no intention, on the part of Ranjoni, in the suit in which she obtained a decree for joint possession, to effect a severance of title. In this view of the case, it is not necessary to examine the decision of this Court in the case of *Kailash Chandra Chuckerbntly v. Kashi Chandra Chuckerbutty*

24. C. 389, upon which considerable stress has been laid by the learned Vakil for the appellant. But it may be pointed out that in that particular case the sisters had effected a division of the property inherited by them as daughters of their father and they had also created in favour of each other an absolute estate in the properties allotted to her, to be freely alienable by her and descendible to her heirs. Under these circumstances, it was held that there had been a complete severance of title so far as the daughters were concerned. That doctrine, however, is clearly inapplicable to the facts and circumstances of the present case.

5. The result, therefore, is that the view taken by the Court below must be affirmed and this appeal dismissed with costs.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com