

"of the person in whose name the fictitious conveyance is made out, and that the plea of the transaction being a benamed one will not be listened to."

The pleader for the opposite party cites the Sooboodra Bebee, pages 543-544 of the Decisions of the Sudder Dewanny Adawlut for 1858. But there was more than one peculiarity distinguishing it from the case of Obhoy Churn Ghuttuck. It was held in Sooboodra's case that a purchase, made in the name of another with a view of preventing the real purchaser's creditors laying hold of the property, is not such a *legal fraud* as will *estop* the original purchaser, or those who represent him, from *bringing an action* for the enforcement of the transaction *against the party* in whose name the property was purchased; and that a plaintiff cannot sue to render void an act done by him in fraud, or to be relieved from the effect of his own fraudulent act, but may, however, sue to have a *legal act*, that is, an act legal in itself, such a benamee purchase, enforced, even though made, as in the present instance, with a motive of keeping the property out of the reach of his creditor.

But that was not a case like this where the plaintiff, as heir, comes in to regain property alleging his own father's fraud as the cause of action. Further, the case of Obhoy Churn is, moreover, the later ruling.

We, therefore, consider the decision of the Court below wrong, and we decree this appeal, and dismiss plaintiff's suit with all costs.

The 17th May 1865.

Present :

The Hon'ble E. Jackson and F. A. Glover,
Judges.

Hindoo family—Presumption of being joint—
Allegation of separation—Onus probandi.

Case No. 3664 of 1864.

Special Appeal from a decision passed by the Judge of Hooghly, dated the 9th September 1864, modifying a decision passed by the Principal Sudder Ameen of that District, dated the 27th January 1864.

Mun Mohinee Dabee and others (Defendants),
Appellants,

versus

Sooda Monee Dabee and others (Plaintiffs),
Respondents.

Baboo Prosunno Coomar Sein for Appellants.

Baboos Mohindro Lall Shome and Bhowanee Churn Dutt for Respondents.

In a Hindoo family the presumption of law is that they are joint, and the *onus* proving that the family is separate lies on the party making such assertion. The mere fact of property standing in the name of one brother does not prove that it is his separate and self-acquired property.

THIS was a suit by a Hindoo widow for recovery of a share in what is alleged to be the ancestral family property. The defendants (who are special appellants before us) are the widows of another of the brothers, and claim on the ground that the property was self-acquired.

The accompanying genealogical table will explain the position of the parties:—

Jankeenath.

Ramdhun, Modhun Mohun, Kasheenath, Kalipuddo, Kadernath

Plaintiff is the widow of Modhun Mohun, and defendant of Kaleepuddo.

Of the five sons of Jankeenath, two, Kasheenath and Kadernath, died before their father.

Special respondent, who sues in *forma pauperis*, alleges that her husband Ramdhun and Kalipuddo lived together as a joint undivided Hindoo family; that Ramdhun died childless before her husband, and that after Modhun Mohun's death, she, as his widow, became entitled to one-half of the family property, and had, indeed, retained it, living in commensality with the widows of Kalipuddo, until the latter, by obtaining a certificate to administer to all the properties left by their husband, dispossessed plaintiff of her share.

Special appellants urge that the special respondent's husband died before his elder brother Ramdhun, and that, after the latter's death Kalipuddo, their husband, succeeded to all the property, having already purchased Modhun Mohun's share during his lifetime. They add that the family property consisted of 2 beegahs of land only, and all the rest of which Kalipuddo died possessed was his own self-acquired estate.

Both lower Courts held that the property was joint, the judge giving the plaintiff a one-third share of all the property claimed, whereas the Principal Sudder Ameen had excluded from it certain property which he held to have been acquired by the special appellant's husband after the death of special respondent's husband.

It is urged in special appeal that the Judge has laid the *onus probandi* on the wrong party, and that the special respondent ought to have proved that the property was purchased by the joint family funds. Special appellants refer to the Full Bench ruling of this Court, dated 11th November 1862, *Musst. Soobedhun Dossee*, appellant (*Sutherland's Weekly Reporter, Full Bench Cases, page 57*).

We think there can be no doubt that in all Hindoo families the presumption of law is that they are joint and undivided, and that the *onus* of proving that a family is separate in mess and business lies on the party making such assertion; and that the mere fact of the property standing in the name of one brother does not prove that it is that one brother's separate and self-acquired property. The Judge in the present case has gone upon the ordinary presumption of Hindoo law. It is admitted that the family was joint and undivided, and he threw upon the special appellants, who claimed the property in suit, on the ground that it has been self-acquired by their husband, the *onus* of proving their allegation.

The Full Bench ruling quoted by the special appellants does not apply. In that case the Judge found, as a fact, that the property was self-acquired, and that no part of it was ancestral. In the present, it is not denied that a part of the property was ancestral; and it was held not to be proved that the remainder was acquired with *Kaleepuddo's* separate funds.

With this finding of fact, we, of course, cannot interfere in special appeal; and, as regards the *onus*, we think that the Judge was right, and that the special appellants were bound to rebut the presumption of Hindoo law which arose on the face of the pleadings in favour of the special respondent. Dismissed with costs.

The 17th May 1865.

Present:

The Hon'ble E. Jackson and F. A. Glover,
Judges.

Purchaser of "Milkeut" and "Hukeequt" of former proprietor—Rights acquired by.

Case No. 3718 of 1854.

Special Appeal from a decision passed by the Judge of Shahabad, dated the 28th

September 1864, affirming a decision passed by the Sudder Ameen of that District, dated the 25th May 1864.

Ram Jhan Gunderee (Defendant),
Appellant,

versus

Lalla Godadhur Lal and others (Plaintiffs),
Respondents.

Baboo Mohinee Mohun Roy for Appellant.

Baboo Kalee Mohun Doss for Respondents.

The purchaser of the "milkeut" and "hukeequt" of a former proprietor in a village does not acquire his rights in his house or in any garden attached to the house, nor the rights to any orchard or mangoe-tope planted by the late proprietor.

THE question at issue in this case, and which is raised on special appeal, is whether the purchaser of the rights and interests of a former proprietor in a village obtains by his purchase only the proprietary rights, or also all other rights which the former proprietor may have held. The words used in the certificate of sale are that the purchase was of the "milkeut" and "hukeequt" of the former proprietor. It is admitted that this would not carry with it the rights and interests of the proprietor in his house or in any gardens attached to the house. But it is said it carries with it the rights to an orchard or mangoe-tope planted by the late proprietor. We think it must be restricted to the proprietary rights in that orchard. The late proprietor would still be entitled to retain possession, as a tenant, of the topes which he planted. We cannot see any difference between his rights to his house and garden, and his rights to the mangoe-tope. It is evident also in this case that the purchaser did not attempt to take possession of the disputed mangoe-topes when he made the purchase and took possession of the proprietary rights; but now he brings forward this claim when the mangoe-topes have been sold in execution of decree to a third party.

We reverse the Judge's decision, and restore the decree of the first Court dismissing plaintiff's suit.

Plaintiff will pay all the costs.