PRIVY COUNCIL.

WALIHAN
v.
JOGESHWAR NARAYAN.

P.C.*
1907
Nov. 7, 20.

[On appeal from the High Court at Fort William in Bengal.]

Declaratory decree—Power of Court to make declaratory decree—Suit for possession by alleged next reversioners on ground that their mother who held a woman's estate in immoveable property was dead—Failure to prove mother's death—Dismissal of suit so far as possession was concerned, and declaratory decree made as to plaintiffs' title.

The plaintiffs brought a suit for certain immoveable property as the next reversionary heirs of a deceased Hindu, and the only relief they claimed was possession on the allegation that their mother who had succeeded to a woman's estate in the property was dead:—

Held, that on the finding by the Court that the evidence failed to establish the fact of the mother's death, the suit should have been wholly dismissed.

Other allegations made in the plaint that alienations made by the alleged mother were not justified by legal necessity, and that the plaintiffs were really her sons, which were both denied, were merely argumentative steps towards the only decree sought, namely, possession; and under the circumstances the Court was not entitled to make a declaratory decree in the plaintiffs' favour on those allegations after the failure of the sole cause of action.

APPEAL from a judgment and decree (June 25th, 1903) of the High Court at Calcutta, which affirmed a judgment and decree (March 31st, 1900) of the Court of the Subordinate Judge of Bankipur.

The defendants were appellants to His Majesty in Council.

The circumstances out of which the suit arose were that Gopi Nath, who was the proprietor of a village called Dhawlpur Akowna, died on 28th November 1859, leaving a widow Gend Koer and a daughter Kewal Koer who subsequently married one Chandan Lal. On the death of Gopi Nath his widow succeeded him and remained in possession of the estate until her death on 2nd December 1886 when she was succeeded by her daughter, Kewal Koer.

* *Present:* LORD ROBERTSON, LORD COLLINS, AND SIR ARTHUR WILSON.

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Various loans were taken by both mother and daughter on the security of the village. Gend Koer borrowed Rs. 2,000 from one Wahid Ali (whom the appellants now represent) on 2nd June 1868, and another sum of Rs. 3,000 on 25th June 1868 on a mortgage of the property. After the death of Gend Koer her daughter, Kewal Koer, on 3rd April 1869, borrowed Rs. 2,000, and on 6th July 1870 she executed a deed for Rs. 5,000 on account of the amount due on the transaction of 3rd April 1869 and on account of a further advance. On 25th June 1872 she executed a mortgage deed for Rs. 22,000 which included a small balance due under the deeds executed by Gend Koer, the amount due under the former deeds executed by herself, and a fresh loan for about Rs. 13,000. Further loans of Rs. 5,500 on 17th February 1873 and Rs. 2,000 on 2nd September 1873 were also taken by Kewal Koer, and all from the same creditor, Wahid Ali. Eventually on 23rd April 1875 she executed a consolidating mortgage deed, in which all the previous transactions were included, for Rs. 30,000 in favour of Zahur Ulluq, the son of Wahid Ali, deceased. All the above deeds were executed with the knowledge of her husband, Chandan Lal.

Kewal Koer failed to pay the mortgage money in due course, and Zahur Ulluq enforced the mortgage and obtained a decree thereon in the Court of the Subordinate Judge of Patna, in execution of which the village was sold and purchased by Zahur Ulluq on 26th August 1878; and though subsequently various endeavours were made to set the sale aside, they were unsuccessful and the appellants remained in possession of the property.

Up to this time Kewal Koer and her husband had no son, but on 26th August 1878, the date of the sale of the village, one Teto Koer, the father's sister of Chandan Lal, made an application under Act XL of 1858 in which she alleged that a son had been born to Kewal Koer on 16th August 1878, and prayed that she, the applicant, might be appointed guardian of the child; and an order granting a certificate of guardianship was made on 15th November 1878. The son said to have been born to Kewal Koer was Jogeshwar Narayan, the first respondent.

On 14th September 1897 was instituted the suit out of which this appeal arose. The plaintiffs were Jogeshwar Narayan and

Kusheswar Narayan, alleged to be the younger son of Kewal Koer. They sued by their next friend Sham Peari Koer, their sister, though Jogeshwar Narayan had since attained his majority.

The defendants were the appellants as representing the mortgagee and purchaser.

The plaint stated that the village in suit was the property of Gopi Nath; that Gend Koer, and on her death Kewal Koer, succeeded to an estate for life in the village; that Kewal Koer died on 10th February 1897; and that the plaintiffs as her sons became, on her death, entitled in succession to the estate of Gopi Nath. The plaintiffs disputed the validity of the mortgages executed by Gend Koer and Kewal Koer, contended that the sale in pursuance of them were not binding on them, and prayed for possession of the property in suit.

The defendants denied that Kewal Koer was dead; alleged that the plaintiffs were not the sons of Kewal Koer, and pleaded that the mortgages of the property executed by Gend Koer and Kewal Koer, and also the sale under the mortgage decree were binding on the plaintiffs.

On these pleadings the Subordinate Judge held that the alleged death of Kewal Koer was not proved; that the plaintiffs were the sons of Kewal Koer and Chandan Lal; and that though the money had been paid to Gend Koer and Kewal Koer as alleged, the transactions were not justified by legal necessity so as to be binding on the plaintiffs.

So far as the relief asked for, namely possession, was concerned the suit was on these findings dismissed. But the Subordinate Judge made a declaratory decree that the plaintiffs were the sons of Kewal Koer, and the mortgages and sale not being justified by legal necessity were not valid or binding upon the plaintiffs. The reason he gave for doing this was that the High Court had held in another case "that although Jogeshwar Narayan was not entitled to get immediate possession because Kewal Koer was alive, the Court was bound to decide whether the necessity alleged was a legal necessity or not."

From that decree both parties appealed, and the High Court (GHOSE and PRATT JJ.) on appeal affirmed the decision of the

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Subordinate Judge and dismissed both appeals with costs. As to the declaratory decree the High Court said:—

"It was contended by Mr. Hill for the defendants that the suit could not be maintained, the cause of action upon which it was founded, *viz.*, the death of Kewal Koer, having failed. No doubt the suit, so far as it asked that a decree for possession be awarded to the plaintiffs, must fail, as Kewal Koer is not proved to be dead; but the suit practically sought for two declarations, *viz.*, that the plaintiffs are the grandsons of Gopi Nath, and that they are not bound by the sales held in execution of the decree against their mother, the loans upon which the decree was obtained not having been for legal necessity. And issues involving these questions were raised between the parties in the Court below and were decided. In these circumstances, it is not desirable that the final decision of those questions should be postponed till after the death of Kewal Koer, when much of the evidence which is now forthcoming, and which was adduced at the trial will have disappeared."

On this appeal, which was heard *ex parte*,

De Gruyther and *G. A. Branson*, for the appellants, contended that the Courts below had erred in granting the respondents a declaratory decree. The only relief asked for in the plaint was possession, and the ground for that relief failed entirely when it was found, as it was by both Courts in India, that the evidence produced for the respondents had not established the fact that Kewal Koer was dead, in which case only they were entitled to the relief sought. The cause of action failing, the suit should have been dismissed. The reasons given by the High Court for giving them relief to which they were not entitled on the pleadings (amendment of which they never asked for) were unsound. Reference was made to *Doolhun Jankee Kooer* v. *Lall Beharee Roy*(1) and *Rajessuree Koonwar* v. *Indurjeet Koonwar*(2).

The judgment of their Lordships was delivered by

Nov. 20.

LORD ROBERTSON. Their Lordships are of opinion that this action ought to have been dismissed with costs, and that therefore this appeal should be allowed.

The suit was one of the simplest and most plain sailing character, alike in the ground of action and the decree sought.

(1) (1872) 19 W. R. 32.
(2) (1866) 6 W. R. 1.

The plaintiffs (the present respondents) claimed to have possession of their mother's property on the ground that she was dead. The Courts held that it was not proved that the lady had died (and indeed there was positive evidence that she was alive). The inevitable inference would seem to be that the suit should be dismissed. The Court which tried the case, however, had, very naturally, tried the whole case at once and had to deal with some questions as to the paternity of the plaintiffs, and also as to the validity of certain gifts by the mother. These, however, were merely argumentative steps towards the only decree sought, viz., possession; they were not presented by the plaintiffs as separate and substantive questions affecting rights other than that of possession of their (alleged) deceased mother's estate. As regards one of those questions, it is plain that the validity of the gifts, the lady being alive, could only be determined with her as a party to the suit. Again, the Court might quite well have first tried the issue whether the mother was dead; and, reaching as it did, the conclusion that this essential fact was not proved, it is impossible to suggest that it could then have gone on to take up and try the other questions. Yet the present is really the same question. It appears to their Lordships that the circumstance that some of the *media concludendi* might be the same in other actions does not vest the Court with any right or duty to pronounce upon them in a suit which has gone by the board because of the failure of the ground of action. It is not surprising that no proposal was made in India to amend the record, and the record presents its original plain simplicity.

Their Lordships will therefore humbly advise His Majesty that the appeal ought to be allowed, that the decrees in both Courts below ought to be discharged, and that instead thereof the suit ought to be dismissed with costs in both Courts to be paid by the respondents.

The respondents will pay the costs of the appeal.

Appeal allowed.

Solicitors for the appellants: *Watkins & Lempriere.*

J. V. W.