

CALCUTTA HIGH COURT

Kanti Chunder Goswami

Vs

Bisheswar Goswami

(F W Maclean, C.J. Macpherson and Trevelyan, JJ. Banerjee and Stevens, JJ.)

09.02.1898

JUDGMENT

F.W. Maclean, C.J.

1. We directed this case to be put on the Board to-day under these circumstances. In the case heard by the Full Bench yesterday S. A. No. 1517 of 1896, objection was taken that there could not be a valid reference from a single Judge to a Full Bench. That case has been considered by us, and we have arrived at the unanimous conclusion that such a reference cannot be made. In the present case that objection was not taken, but the decision I have referred to applies equally to the present case, which was also a reference by a single Judge. Therefore the reference to the Full Bench was bad, and our judgment which has not been signed, passed and entered, must be recalled. Strictly then our course is to send the case back to Mr. Justice Stevens, but, in order to save the parties expense, and as they consent, the proper steps shall be taken to have the case heard by a specially constituted Court of the same five Judges who heard it on the previous occasion. This will, we consider, get rid of any difficulties, and save the parties expense.

2. The plaintiff in this case sued for declaration of his title and recovery of possession of 1/12 share of a tank after cancellation of a deed of sale, dated the 31st Assar 1291, alleged to have been executed by his brother Hari Madhab. It was stated in the plaint that the plaintiff became of unsound mind while living jointly with Hari Madhab, and that he became of sound mind five or six years before the suit. It was further stated that Hari Madhab and the plaintiff had together an 1/6 share in the tank, that Hari Madhab wrongfully sold the plaintiff's share to the defendant during the plaintiff's insanity, and that the plaintiff not having been benefited by the sale the sale was not binding upon him.

3. The defence inter alia was that a joint debt of the plaintiff and his brother was paid off by selling the share in question, and that the plaintiff's brother sold it as manager of the family comprising himself and the plaintiff, and that the plaintiff was benefited by the sale.

4. The lower Court dismissed the plaintiff's claim.

5. The plaintiff appealed to the High Court.

6. The question raised in the High Court was thus stated by Stevens, J., in his order of reference to a Full Bench: The point which arises in this case is, whether a sale by the managing member of a joint Hindu family, which included a lunatic, of a portion of a joint family property, including the interest of the lunatic, is bad so far as the share of the latter is concerned, on the sole ground that the manager, who was the lunatic's brother, did not hold a certificate under Act XXXV of 1858. It has been found on the facts that the transaction was a prudent one entered into for the benefit of the lunatic, and that the lunatic actually derived benefit from it. According to the ruling in the case of Court of *Wards v. Kupulmun Singh*¹ the sale of the lunatic's interest would appear to be invalid. The principle on which that case seems mainly to have been decided was that in all cases of disqualification the appointment of a guardian to the disqualified person lay according to the Hindu law with the State, and inasmuch as by Act XXXV of 1858 a particular course was marked out for the Court as representing the State, to pursue, in regard to appointing a guardian or manager of a lunatic's estate, no appointment of such guardian or manager could be properly effected after the passing of that Act otherwise than in the special manner prescribed thereby. It was held that any equitable principle that might apply to dealings bona fide for valuable consideration with a de facto manager who had not obtained a certificate under the Act could not extend to transactions which in the case of a certificated manager would have required the previous sanction of the Court under Section 14 of the Act. Those principles were applied on the authority of that decision among others in the case of *Abhassi Begum v. Rajrup Roonwar*² which was an analogous case under Act XL of 1858, Section 18 of which corresponds closely to Section 14 of Act XXXV. The latter case was overruled by a Full Bench of the Court in the case of Ram Chunder *Chuckerbutty v. Brojo Nath Mozumdar*³ The case in 19 Weekly Reporter, 163, was referred to in the argument, but was not mentioned in the judgment of the Full Bench, which moreover proceeded on the construction of Act XL of 1858 itself and on the history of previous legislation on the subject. Although, therefore, the principles, on which the case in 19 Weekly Reporter, 163, was decided, were not followed by the Full Bench, and so far the decision may be said to have been dissented from by implication, it was not expressly overruled. I think that, though all the considerations noticed in the judgment of the Full Bench are not applicable to Act XXXV of 1858, there does not appear to be any substantial difference of principle between that Act and Act XL of 1858, so as to render correct the application of Section 14 of the former Act in circumstances analogous to those in which the application of Section 18 of Act XL of 1858 has been held by the Full Bench to be incorrect. I, therefore, venture to differ from the decision in the case of Court of *Wards v. Kupulmun Singh*⁴ and I accordingly refer the matter for the decision of a Full Bench.

7. Babu Digambar Chatterjee appeared for the Appellant, and contended that on a proper construction of the deed of sale, the interest of the lunatic did not pass thereby, but only an 1/12

share, and that of the brother who executed this deed was meant to be sold. He further contended that the brother had no authority to sell the interest of the lunatic without a certificate under Act XXXV of 1858, and cited *Court of Wards v. Kupulmun Singh* (1873) B. L. R. 364: 19 W. R. 167(Supra) and *Goureenath v. Collector of Monghyr*⁵

8. Babu Nilmadhab Bose (Babu Shib Chandra Palit with him) on behalf of the Respondent argued that the principle of Hanuman Prasad's case should be applied; it appeared from the pleadings that it was understood that the plaintiff's share was sold, and the facts found were that full value was paid for the entire 1/6 share, and that the plaintiff benefited by the sale. The case cited from 7 W. R., 5, supported the defendant, and that from 19 W. R, only proceeds on the view that the unauthorized guardian should not possess more power than the authorized. That case is considerably weakened by the subsequent case in I.L.R. 4, Calcutta Series. The two Acts XXXV and XL of 1858 were passed at the same time and are similar in their scheme, and should be construed to be on the same principles. See Section 14 of the Lunatics' Act and Section 18 of the Minor's Act. The principle of the Full Bench ruling in I.L.R. 4, Calcutta Series, should be extended to the case of a lunatic.

9. Babu Diqambar Chatterjee in reply. The Judgments of the High Court (Maclean, C.J., Macpherson, Trevelyan, Banerjee, and Stevens, JJ.) were as follows:

Maclean, C.J.

10. The question we have to decide is whether a sale by the managing member of a joint Hindu family, which includes a lunatic, of a portion of a joint family property, including the interest of the lunatic, is bad so far as the share of the latter is concerned, on the ground that the manager, who was the lunatic's brother, did not hold a certificate under Act XXXV of 1858. It must be taken that the sale in this case was effected by Hari Madhab, brother of the lunatic, to pay off a debt of the joint family, and that there was necessity for the sale. I entertained during the course of the argument some doubt as to how this question should be answered; but on the whole I have come to the conclusion that it must be answered in the negative, in other words, I think the sale is good and binding.

11. Two points have been urged before us on behalf of the plaintiff, appellant, and the first point is upon the construction of kobala in question. It is contended for the appellant that on the construction of the deed Hari Madhub only sold his own interest in it and not the interest of his then lunatic brother, the present plaintiff.

12. If the document stood alone and the question were one merely of the construction of the document as it stands, there might be some difficulty in saying that it passed anything more than the interest of Hari Madhub. But the authorities cited appear to me to establish that in a case of this class, the Court may take into consideration not only the language of the deed itself, but may look into all the surrounding circumstances in order to ascertain what the true intention of the

parties was. This being so, it is not an unfair inference from the findings of the Court below that the purchaser intended to buy, and that Hari Madhub intended to sell, not only the share of Hari Madhub in the tank in question, but also the share of his lunatic brother. Taking then the deed in connection with the surrounding circumstances, the right conclusion is, I think, that the sale included, and was intended to include, both the shares.

13. Upon the second point, the decision of this Court in the case of *Court of Wards v. Kupulmun Singh*⁶ where it was held---I am now reading from the head note---" That all dealings with a lunatic's property must be made by the hands of a guardian or manager to be appointed by the supreme civil power; the legality of the guardianship depending on such appointment," is an authority in the plaintiff's favour. But in a later case decided by a Full Bench of this Court---*Ram Chunder Chuckerbutty v. Brojo Nath Mozumdar* (1879) I.L.R. 4 Cal. 929(Supra) it was held that it was not the intention of Act XL of 1858, which was no doubt an Act applicable to infants and not to lunatics---" to alter or affect any provision of Hindu or Mahomedan law as to guardians who do not avail themselves of the Act. The scope of the enactment is merely to remove legislative prohibitions to confer expressly a certain jurisdiction, and to define exactly the position of those who avail themselves of, or are brought under, the Act, leaving persons to whom any existing rules of law apply unaffected."

14. That case no doubt applies to the case of an infant and not to that of a lunatic, but the statute relating to lunatics (Act XXXV of 1858) was passed in the same year as that relating to infants, and the provisions of the two Acts, qua the present point, are substantially, if not absolutely, analogous. Although, as I said before, I, in the first instance, entertained some doubt on the point---a doubt which was fostered by the circumstance that there is no express provision in the Mitakshara for the case of a lunatic, though there is for the case of a minor---I think the reasoning upon which the judgment in the later Full Bench case is based applies with equal force to the case of a lunatic as to the case of an infant. It is difficult to see any real distinction in principle between the two cases having regard to the wide and somewhat general powers of the manager of Hindu joint family property, and which prevail according to Hindu law. The necessity for the sale must of course be shown.

15. Upon these short grounds I am of opinion that the sale in question is good, and that it binds the share of the lunatic.

16. The appeal therefore fails, and must be dismissed with costs, but there will be no costs of the reference by Mr. Justice Stevens, which proved to be abortive.

Macpherson, J.

17 I think that on the facts found, the plaintiff's brother had power to dispose of the plaintiff's interest in the tank in question, the plaintiff being a lunatic at the time of the sale. The tank was

the joint property of the two brothers, and the plaintiff's brother was in the position of the manager. Act XXXV of 1858 does not make the appointment of a guardian or manager compulsory in the case of every lunatic, nor does it deprive the managing member of a Hindu family, one of the members of which is a lunatic, of the powers of dealing with the family property in case of necessity. The authority of the case of Court of Wards v. Kupulmun Singh (1873) 10 B. L. R. 364: 19 W. R. 163(Supra) has, I think, been greatly shaken by the case of Ram Chunder Chuckerbutty v. Brojo Nath Mazumdar (1879) I.L.R. 4 Cal. 929(Supra) decided by a Full Bench of this Court. Reasons which led the Full Bench to hold that a de facto guardian of a minor has authority in case of necessity to deal with the infant's property, apply, in my opinion, equally to the case of a Hindu family, one member of which is a lunatic.

18. On the other point as to whether the sale did actually pass the interest of the plaintiff, I agree in the view expressed by the learned Chief Justice.

Trevelyan, J.

19. I also agree in the view taken by the learned Chief Justice on both the questions. As regards the first question, I think that it is always to be determined in these cases, from the terms of the deed and surrounding circumstances, what the parties intended should pass, whether they intended that the share of the minor, or the lunatic, as the case may be, should pass, or whether they only intended that the person who was acting for such a minor or a lunatic, should be considered as dealing with his own property. In this case one-twelfth share of the property did actually belong to the manager himself and one-twelfth belonged to the lunatic. Looking at the deed itself, and having regard specially to the decision of the late Sir Barnes Peacock, Chief Justice, and Mr. Justice Dwarka Nath Mitter in *Judoonath Chuckerbutty v. James Tweedie*⁷ I am bound to say that the property of the lunatic passed by the sale in question. In that case, as in the present case, the manager had, apparently, a share of his own besides the share with which he was dealing. The learned Chief Justice there said: "In this case it appears to be clear that the vendors intended to pass the whole property and not merely the share which they passed in their own right, first---because they professed to sell the whole, and, secondly, because in the deed they recite a necessity which it would have been wholly unnecessary for them to have done if they were selling in their own right." In the present case, also, the manager professed to sell the whole one-sixth. In this case, also, he professed to sell such property in order to pay off a debt which is admitted to be a joint family debt. It is described in the plaint as a joint family debt, and throughout it has been treated as such. It seems to me, therefore, that there is absolutely no distinction whatever between the case of *Judoonath Chuckerbutty v. James Tweedie* (1869) 11 W.R. 20 and the present case. I, therefore, hold that the parties must have intended that the whole one-sixth should pass.

20. I also agree in the view that the decision in *Ram Chunder Chuckerbutty v. Brojo Nath Mozumdar* (1879) I.L.R. 4 Cal. 929(supra) practically concludes this case on the point referred to

us.

Banerjee, J.

21. I am of the same opinion. Upon the first of the two points raised, namely, that relating to the construction of the conveyance, I do not think it necessary to add anything to what has been said in the judgments of the learned Chief Justice and Mr. Justice Trevelyan.

22. Upon the second point, which is the one that has given rise to this reference, I wish only to add a few words in answer to the contention raised by the learned Vakil for the appellant, that the case of a lunatic is distinguishable from that of a minor. The distinction which is sought to be drawn is this: Whereas the case of a minor is expressly provided for by Hindu law, and it was this express provision of Hindu law that was made the basis of the decision of the Full Bench in the case of *Ram Chunder Chuckerbutty v. Brojo Nath Mozumdar* (1879) I.L.R. 4 Cal. 929(Supra), there is no such provision relating to the case of a lunatic. And there being no such provision relating to the case of a lunatic, it is argued that the only authority dealing with his property must be that derived from Act XXXV of 1858.

23. The answer to this argument, in my opinion is this: Though the passage of the Mitakshara which is referred to, namely, Mitakshara, Chapter I, Section I, para. 29, relates only to the case of minors, the text of Brihaspati upon which that passage is a comment, and which is quoted in the preceding paragraph, is quite general in its terms, and would include the case of a lunatic, or other disqualified person, just as much as that of a minor; and if that is so, it cannot be said that the case of a lunatic is absolutely unprovided for in Hindu law. The view I take is supported by a decision of this Court in the case of *Gource Nath v. Collector of Monghyr* (1867) 7 W. R. 5(Supra). That being so, I do not think that there can be any reason for distinguishing the case of a lunatic from that of a minor, in regard to whom it has already been settled by the decision of this Court in the case of *Ram Chunder Chuckerbutty v. Brojo Nath Mozumdar* (1879) I.L.R. 4 Cal. 929(Supra) that a de facto guardian or manager has the power of dealing with his property in case of necessity. I think the rule of law which requires a purchaser in such a case to prove necessity in order to sustain the alienation in his favour, is a sufficient safeguard against the interest of the lunatic being sacrificed.

Stevens, J.

24. I agree.

Cases Referred.

1(1873) 10 B. L. R. 364 : 19 W. R. 163

2(1878) I.L.R. 4 Cal. 33

3(1879) I.L.R. 4 Cal. 929

4(1873)B. L. R. 364: 19 W. R. 167

5(1867) 7 W. B. 5

6(1873) 10 B. L. R. 364: 19 W. R. 163

7(1869) 11 W.R. 20