CALCUTTA HIGH COURT

Surendra Nath Rath

Vs.

Sambhu Nath Dobey

(Mukerji, J.)

09.06.1927

JUDGMENT

Mukerji, J.

1. This appeal arises out of a suit which was instituted by the plaintiffs for certain declarations, namely, that the plaintiffs have got brahmottor niskar right to the plaint lands, that the defendants 1 to 8 are not the landlords of the plaintiffs, and further that the solenama and the solenama decree that were respectively filed and passed in Suit No. 958 of 1918 were not binding on the plaintiffs and for other reliefs. The suit has been dismissed by both the Courts below and the plaintiffs have thereupon preferred this second appeal to this Court. Shortly stated, the facts which led to this litigation are as follows:

> The plaintiffs are the sons of defendant 9 in the suit. The plaintiffs' case is that they belonged to a family governed by the Miteksbara school of law; that defendants 1 to 8 instituted a rent suit being Suit No. 958 of 1918 against their fatfier, the defendant 9, and in that suit the defendant 9 filed a solenama, and a decree was ultimately passed on the basis of that solenama. The plaintiffs' case is that the defendant 9 did not in that suit disclose that he and the plaintiffs were members of a family governed by the Mitakshara school of law but that, on the other hand, defendant 9, in his written statement, asserted his exclusive title to the lands which formed the subject-matter of the suit and, although the lands were in point of fact the plaintiffs' brahmottor niskar lands, defendant 9 ultimately filed a solenama in collusion with defendants 1 to 8, and, acting under their influence, agreeing to pay rent for the lands at the rate of Sections 5 per year. The plaintiffs' case shortly stated is that this solenama is not binding on them and that they are entitled to the declarations which they sought for in the present suit.

2. The defense of defendants 1 to 8 was that the lands are not brahmottor niskar lands, but are lands paying rents and have been recorded as such in the settlement records. As regards the solenama : their case was that it was not vitiated by collusion or undue influence as alleged on behalf of the plaintiffs and furthermore that it was a bona fide and binding document.

3. The Court of first instance held that the family was governed by the Dayabhaga school of law

and that defendant 9 the father had acted perfectly bona fide in the matter of solenama and that, as a matter of fact the lands were rent paying and accordingly the plaintiffs' suit should fail. The learned District Judge has affirmed the decision of the trial Court. He has held, however, that the family is governed by the Mitakshara school of law, but that in the matter of compromise that was entered into by defendant 9 with the plaintiffs in Suit No. 958 of 1918, the said defendant acted perfectly bona fide and that the said compromise had greatly benefited the other members of the family including the appellants. He has held that the document of 1272 upon which the plaintiffs relied for the purpose of establishing their niskar brahmottor right to the property was not genuine and that the plaintiffs had accordingly failed to prove that they had any such right. He has held that, on the other hand, the respondents proved a chitta and a jamabandi which contained the signature of the appellants' father and which showed that the lands were held under the said defendants and that the annual rental of the tenancy was L 8-15-6 exclusive of cesses. He has further observed that, inasmuch as by the compromise decree the rental of the tenancy was reduced to L 5, the compromise was to be considered as being beneficial to the plaintiffs. He has characterized the suit as not being a bona fide one and has observed that defendant 9 who is the karta of the family has kept himself in the back ground and has put forward his minor sons to institute the present suit only in order to get rid of the solenama and the decree in Suit No. 958 of 1918.

4. The contentions that have been urged on behalf of the appellant in this appeal are mainly two. The first contention is to the effect that in considering the question of the genuineness or otherwise of the document of 1272 the Courts below have ignored the presumption which arises under Section 90, Evidence Act, from the fact that the document purports to be more than 30 years old, and that if that presumption had been relied upon the said Courts would have been in a position to hold that the document was a genuine one. Now, as regards this contention it is sufficient to say that upon the plain language of Section 90 the presumption that is referred to in that section is not one which it is obligatory on a Court to raise in favour of a person who desires to prove a document more than 30 years old, but that it is discretionary with the Court either to rely on that presumption or not. It is a presumption which the Court is not bounce to make, and, notwithstanding that the elements mentioned in that section are satisfied, the Court may require the document to be proved in the ordinary manner. If any authority is needed for this proposition, reference may be made to the case of *Shafiq-un-nissa v. Shaban Ali Khan*[1] of course, if the plaintiffs asked the Court to make a presumption in their favour in accordance with the, provisions of this section it would have been necessary for the Court to deal with that matter, but it appears from the judgments of the Courts below as well as from the record itself that in point of fact the plaintiffs did not rely upon this presumption but, on the other hand, adduced evidence in order to prove the genuineness of the document. The evidence so adduced has been disbelieved by the learned District Judge. In these circumstances the appellants can hardly complain if this presumption has not been referred to in the judgments of the Courts below.

5. The second contention of the appellants relates to the solenama and the solenama decree. The argument in the form in which it has been put forward before us is that the father not having acted in the suit of 1918 on behalf of the members of the family but on his own behalf and, on the other hand, having asserted in that suit his own exclusive and absolute right to the lands which formed the subject-matter of the suit, should be deemed

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to have acted adversely to the plaintiffs who were then, and are now, minors, and consequently

the solenama and the solenama decree should be held to be not binding on the plaintiffs. Charges of misrepresentation, collusion and undue influence were laid in respect of this solenama, but the findings being against the plaintiffs on these points they need not be considered any further. Now if the lands were not niskar and the defendants 1 to 8 are the landlords of the plaintiffs, as has been found by the learned District Judge upon the view that the sanad of 1272, upon which the plaintiffs relied, is not genuine and the jamabandi of 1308 containing the signature of the plaintiffs, father is to be relied on and the settlement record stands as correct, there must be an end of the plaintiffs case. In that event, I do not think it will be at all advantageous to the plaintiffs to challenge the solenama and the solenama decree, as by them the rent that is noted in the jamabandi, viz. L 8-5-6, has been reduced to L 5. As, however, the question has been dealt with by the Courts below it is perhaps necessary to state our views with regard to it. It should be remembered that the defendant 9 was admittedly the karta of the family, and he was also the recorded tenant. The suit was instituted against him alone. The mere fact that he did not disclose in his written statement that he was but the karta of the family and that the members of the family were co-parceners, but averred in the written statement that he came to be entitled to the property on the death of his father and suggested thereby that the family was governed by the Dayabhrtga law, does not indicate that he was acting adversely to the interest of the other members of the family. The appellants' argument is that if the defendant 9 had disclosed that there were minors concerned, the Court would not have allowed the compromise to be recorded unless it was satisfied that the compromise was beneficial to the minors. This argument is not well founded, because the minors were not on the record as parties to the suit and so long as the compromise was between the parties who were sui juris the Court would not be called upon to enter into the question whether the compromise might not affect parties who were not parties to the suit and who were not sui juris. The powers of a Mitakshara father who is the karta of the family, to bind his infant sons with regard to disposal or management of joint family properties as explained by the decision of the Judicial Committee in *Sahu Ram Chandra v. Bhup Singh*[2] and other cases, are wider than those of other kartas of such families and rest upon an implied consent on the part of all the members and a presumption that what is done is for the benefit of the family. Nothing has been shown in the case to destroy that presumption. If the solenama be regarded as containing an admission of liability and if it be argued that the plaintiffs are not bound thereby as they do not derive their interest through defendant 9, then the answer to that argument is that in the case of a Mitakshara father who is the karta, an implied authority to make an admission for the benefit of his minor sons may Jvery well be presumed. Such a presumption is quite in consonance with the authority of a Mitakshara father who is karta, as explained in the authoritative decisions. For these reasons, I am of opinion that there is no substance in this contention as well. The appeal accordingly fails and must be dismissed with costs.

Mitter, J.

6. I agree.

[2] A.I.R. 1917 P.C. 61