Appellate Civil

Before Falshaw and Kapur, JJ.

1951

Nov. 29th

MAHANT HEM RAJ,—*Plaintiff-Appellant,*

versus

BAWA MATHRA DASS,—*Defendant-Respondent.*

Regular First Appeal No. 171 of 1948

Will—Construction—Two persons given property under the will in equal shares, whether tenants in common or joint tenants—Indian Succession Act (XXXIX of 1925), Sections 106 and 107—One of the devisees dying in the life-time of the testator, whether his share of the property under the will lapses—Custom Punjab—Right of Representation—Extent of recognition.

Under his will R. D. bequeathed his entire estate to M. D. and R. R., his *chelas*. in equal shares. In 1925, R. R. died leaving behind a son H. R. R. D. died in 1929. In 1945 H. R. sued for partition of the estate of R. D. on the ground that it was the property of the Joint Hindu Family and also that under the will of R. D. he was entitled to half of it. M. D. denied that there was any joint Hindu Family and also pleaded that as R. R. had died during the lifetime of R. D. he alone was entitled to the entire estate under the will. M. D.'s contentions prevailed and the suit of H. R. was dismissed. H. R. appealed to the High Court.

Held, that on the true construction of the will the property was given to M. D. and R. R. as tenants in common and not as joint tenants. But as R. R. had died in the life-time of the testator there was intestacy as to his share, the devise having lapsed and the property which would have been taken by R. R. if alive became available to the heirs of R. D. in accordance with the rule of succession, i.e., the

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Hindu as modified by custom and that H. R. was entitled to one-half of what R. R. would have taken under the will.

Held further, that in the Punjab amongst high caste Hindus the right of representation in collateral succession has generally been recognized and it may be considered to be part of the general Common Law of the Province.

Regular First Appeal from the decree of Shri Gurcharan Singh, Senior Sub-Judge, Ludhiana, dated the 1st October, 1948, dismissing the plaintiff's suit with costs.

K. L. GOSAIN, RAM KISHEN, and H. L. SIBBAL, for Appellant.

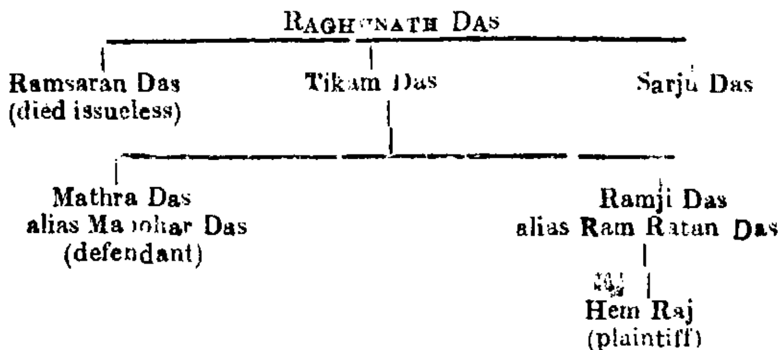
N. L. WADEHRA, for Respondent.

JUDGMENT

Kapur J.

KAPUR, J. This is a plaintiff's appeal against a judgment and decree of Mr. Gurcharan Singh, Senior Subordinate Judge, Ludhiana, dated the 1st October 1948, dismissing the plaintiff's suit for partition by putting the plaintiff into separate possession.

A reference to the pedigree-table which is as follows will help in understanding the case :—



Sarju Das, it is alleged in the plaint, had separated and other persons shown in the pedigree-table remained joint as members of the joint Hindu family. On the 1st October 1908, Ramsaran Das made a will, Exh. D. 1, which is printed at page 102 by which he made his two nephews, sons of Tikam Das, as *chelas* and bequeathed to them the whole of his estate in equal shares and gave certain other directions. In 1925, Ramji Das alias Ram Ratan Das died leaving a son, Hem Raj, plaintiff. In 1929, Ramsaran Das died,

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Hem Raj at that time being a minor was brought up by his uncle Mathra Das alias Manohar Das.

A mutation of the agricultural land was entered in the name of Mathra Das alias Manohar Das, *chela* of Ramsaran Das, Fakir Bairagi. Opposition to the mutation in the name of Mathra Das came from certain citizens who claimed that the property was *wakf* and should be entered in the name of the Thakardwara, but inspite of this opposition the mutation was effected in the name of Mathra Das alone. It appears that he did make statements at that time saying that mutation be entered in the name of his nephew Hem Raj and himself in equal shares but the mutation was entered only in the name of Mathra Das, the defendant.

On the 10th November 1945, Hem Raj brought a suit for partition of the property alleging that there was a joint Hindu family and he also relied on the will and also claimed that on the death of Ramsaran Das the defendant Mathra Das and he were the heirs according to Hindu Law and that rent deeds of the property in dispute were executed in the names of both these persons from the year 1910 to the year 1929. The property was claimed by the plaintiff on these rather contradictory allegations. The defendant admitted that the properties marked 'A', 'B' and 'D' were the joint properties of the parties as they belonged to Tikam Das, but the defendant claimed properties 'C' and 'E' to 'K' to be his exclusive property and he also claimed to succeed to Ramsaran Das by virtue of being the *chela* of the deceased. He denied the joint Hindu family. As to the will he pleaded that as Ramji Das had died during the lifetime of the testator, he alone was therefore entitled under the will and not the plaintiff.

The learned Senior Subordinate Judge framed the following four issues :—

(1) Whether the property in dispute is joint Hindu family property, if any, of the plaintiff with the defendant ?

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(2) If issue No. 1 is not proved, whether the plaintiff is entitled to ½ share in the suit property under the will marked Exh. D. 1 ?

(3) Whether the defendant is the sole heir of Ramsaran Das, testator ?

(4) To what relief and to what extent is the plaintiff entitled ?

He held that there was no joint Hindu family, that the plaintiff was not entitled to a half share under the will, Exh. D. 1, as it was governed by section 106 of the Succession Act and that the defendant was the sole heir of Ramsaran Das, the testator, and the plaintiff was not therefore entitled to any part of the estate. The plaintiff has come up in appeal to this Court.

One of the devisees Ramji Das having died during the lifetime of the testator, the question to be decided is what would happen to that share of the property which was devised to him under the will, Exh. D. 1. The testator had stated in the will :—

> "On my death both my aforesaid *chelas* shall be owners and possessors in equal shares of my property of every description, movable and immovable, situate at * * * ".

The effect of this will, as I see it, is that if it had taken effect, that is, if the devisees were to take under the will, each one of them would take half share of the property of the testator, but by the death of Ramji Das, in my opinion, the doctrine of lapse would apply which is that a devise or legacy lapses by the death of the devisee or legatee before the testator, or even before the date of the will :*see Elliot* v. *Davenport*, and *Maybank* v. *Brooks* (2). This is the statement of the law as given in Theobald on Wills at page 662. In other words, if a devisee or legatee dies during the lifetime of the testator, the will to the extent of the devise left to such devisee lapses and there is intestacy to that extent.

(1) I. P. W. 83.
(2) 1 B. C. C. 84.

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In the Indian Succession Act in section 107 it is stated :—

> "If a legacy is given to legatees in words which show that the testator intended to give them distinct shares of it, then, if any legatee dies before the testator, so much of the legacy as was intended for him shall fall into the residue of the testator's property."

It has been held in several cases that if the devise fails as to one of the devisees from its being originally void, or subsequently revoked, or by reason of the decease of the devisee in the testator's lifetime there will be a partial intestacy—to the extent of the share which would have gone to Ramji Das if he had been alive. This statement of the law is supported by many cases which are collected together at page 484 of Basu's Indian Succession Act.

The learned Senior Subordinate Judge took the view that in the present case section 106 of the Indian Succession Act would apply and, therefore, the whole of the estate would go to the other devisee, i.e., Mathra Das. In my opinion, the learned Judge was in error on this point. In the first place, as I have shown, the will is differently worded, and on its true construction both the devisees were to take half and half and on the death of Ramji Das the doctrine of lapse would apply : in other words section 107 of Indian Succession Act would be applicable and not section 106 of that Act.

Mr. Gosain has relied on a judgment of their Lordships of the Privy Council in *Jogeswar Naraindeo* v. *Ram Chandra Dutt*, (1), where Lord Watson observed :—

> "In his argument for the appellant, Mr. Branson raised a new point which is not indicated in the plaint, and was not submitted

(1) I. L. R. (1896) 23 Cal. 670 at p. 678.

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to either of the Courts below. He maintained, upon the authority of *Vydinada* v. *Nagammal* (1), that, by the terms of the will, the Rani and the appellant became, in the sense of English law, joint-tenants of the four annas share of Silda, and not tenants in common · and that the alienation of her share before it was severed, and without the consent of the other joint-tenant, was ineffectual. The circumstances of that case appear to be on all fours with the circumstances which occur here; and, if well decided, it would be a precedent exactly in point. There are two substantial reasons why it ought not to be followed as an authority. In the first place, it appears to their Lordships that the learned Judges of the High Court of Madras were not justified in importing into the construction of a Hindu will an extremely technical rule of English conveyancing. The principle of joint tenancy appears to be unknown to Hindu Law, except in the case of coparcenary between the members of an undivided family. In the second place, the learned Judges misapprehended the law of England, because it is clear, according to that law, that a conveyance, or an agreement to convey his or her personal interest by one of the joint tenants, operates as a severance."

which means that an estate taken under the will is a tenancy in common and not a joint tenancy. In *Mussummat Jio* v. *Mussummat Rukman and another* (2), a Division Bench of the Lahore High Court followed the rule laid down in the Privy Council case and also referred to other cases and said as follows :—

"These cases, in substance, lay down that when a deed of gift or a will is in favour of

(1) I. L. R. (1888) 11 Mad. 258.
(2) I. L. R. (1927) 8 Lah. 219.

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two persons without any definite specification of the extent of their shares, they take as tenants-in-common and not as joint owners. In fact the case of *Kishori Dubain* v. *Mundra Dubain* (1), clearly lays down that the principle of joint tenancy is unknown to Hindu Law except in connection with the joint Hindu family."

In a more recent case *Smt. Shiv Devi and others* v. *Nauharia Ram and another* (2), it was held that if a testator makes a bequest in favour of his wife and daughters of his property in equal shares in the absence of any clear exclusion and indication as to who is to take in case a legatee should die in his lifetime, the bequest to the wife on her death during the lifetime of the testator lapses.

Following these authorities I am of the opinion that the proper way to construe the will in the present case is that the two devisees were not given as joint tenants. As Ramji Das died during the lifetime of the testator, there is intestacy as to his share as the devise had lapsed and therefore that portion of the property which was covered by the will and which would have gone to Ramji Das, if he had been alive would now be available to the heirs of Ramsaran Das and would have to be distributed in accordance with the rule of succession under Hindu Law.

The question then arises what is the law applicable in cases of succession under the Hindu Law as applied to the Punjab. Counsel for the respondent relies on the rule as given in Mulla's Hindu Law where the order of succession is given in section 43, according to which a brother succeeds in preference to a brother's son. But in the Punjab it has been held that the custom recognising the right of representation prevails all over the province to such an extent that it may be considered to be a part of the general common law of the province. This was held

(1) I. L. R (1911) 33 All. 665.
(2) A. I. R. 1940 Lah. 318.

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in *Kanhya Lal* v. *Kishan,* in the case of Aggarwal Banias of Gurgaon (1). Amongst high caste Hindus of the Punjab, right of representation in collateral succession has generally been recognised.

In *Devi Sahai and others* v. *Mangal Sain* (2), the parties were Banias of the Ambala District and custom of representation was established by evidence. At page 247, Melvill, J., said :—

> "We accept this finding, which besides being supported by the evidence of competent witnesses is in accordance with the law of inheritance prevailing very generally in the Punjab both among Hindus and Mohammadans."

Sir Meredyth Plowden, J., in *Ajudhia Parshad and others* v. *Dwarka Dass and another* (3), a case of Mahajans of Karnal, held that a nephew succeeds along with his uncles by right of representation to the estate in the case of collateral succession. At page 200 the learned Judge said :—

> "There have been many instances in this Court within the recollection of the Judges, in which the right of representation has been admitted without dispute to extend to sons of a collateral relative who would have succeeded if he had survived, and the course of defence taken in the Jagadhri case above referred to, a case also between Agarwal Bunniahs, was exactly in accordance with the experience of this Court."

The next case on this point is *Kanhya Lal* v. *Kishna* (4), to which I have made reference above. This

(1) 39 P. R. 1884.
(2) 81 P. R. 1874 (F.B.).
(3) 71 P. R. 1882
(4) 39 P. R. 1884.

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was also a case of Aggarwal Banias but of Gurgaon District. There are two cases of Khatris of Lahore and Amritsar, namely *Abnashi Ram* v. *Mul Chand* (1), and *Shiv Dial* v. *Mathra Das* (2), in which the right of representation was held proved.

In *Pitambar* v. *Ganesha Ram* (3), the same rule was found to exist. The observations of Lal Chand, J. in *Mehtab-ud-Din and others* v. *Abdullah and others* (4), are of particular importance. That was a case of Shamsi Khojas of Lahore and at page 647 the learned Judge said :—

> "Moreover the custom alleged by the plaintiffs is established by decisions of this Court to prevail generally in the province and is in no manner rare or exceptional."

The learned Judge also said at page 644 :—

> "The usage relating to representation in case of collateral succession is opposed even to the provisions of Hindu Law, but it is found to prevail generally in this province without distinction of caste, creed and calling."

In *Kahni Ram* v. *Molar* (5), Tek Chand, J., held that though the Mitakshara does not recognise the right of representation in succession amongst collateral heirs, yet amongst the Aggarwal Mahajans of Rohtak District, the rule of law has been modified by custom and such right is recognised by custom, and the nephew is allowed to succeed along with the uncle to the property of a deceased sonless uncle. The same learned Judge sitting with Beckett, J., in *Diwan Chand* v. *Beli Ram* (6), held that the right of representation prevails amongst Khatris of Rawalpindi District.

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(1) 44 P. R. 1884.
(2) 61 P. R. 1916.
(3) 148 P. R. 1890.
(4) 140 P. R. 1908.
(5) A. I. R. 1937 Lah. 710.
(6) I. L. R. 1941 Lah. 620.

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In *Mangta* v. *Mangat* (1), *Tek Chand*, J., again held that the strict Mitakshara rule in matters of succession is not followed among high caste Hindu tribes of the districts of Rohtak, Karnal and Gurgaon.

Against the rule of representation, there is a case of Mst. *Lorandi* v. *Nihal Devi* (2). But this case is distinguishable as there was no question of collateral succession. The only point to be decided in that case was whether a son of a pre-deceased daughter would succeed equally with the surviving daughters. No reference is there made to any other case excepting the observations of Lal Chand, J., in *Mehtab-ud-Din and others* v. *Abdullah* (3), and I am very doubtful about the correctness of the decision in that judgment because it is contrary to the general rule which prevails in the Punjab which has been accepted in such a large number of cases. Reference was also made by Mr. Wadehra to *Pandit Murli Dhar* v. *Pandit Amar Nath* (4), where in the headnote it is given that under the Hindu Law the brother of the deceased excludes from inheritance deceased's brother's son. There the dispute was between an adopted son and one brother and the son and grandson of another brother. The question whether there was any right of representation was never raised. Moreover, it was a case from Delhi and is not of much assistance to us.

Mr. Wadehra took a further objection and that is that in all these cases there was a specific plea taken that the Hindu Law had by custom been varied in the Punjab in regard to representation. But when a custom has been repeatedly brought to the notice of a Court of a country and has been accepted by them, the Courts may hold that custom to have been introduced into the law without the necessity of proof in each individual case. This was the view taken by the

(1) A. I. R. 1942 Lah. 27.
(2) I. L. R. (1925) 6 Lah. 124.
(3) 140 P. R. 1908.
(4) (1940) 42 P. L. R. 348.

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Privy Council in *Rama Rao* v. *Rajah of Pitapur* (1), and in *Effuah Amissah* v. *Effuah Kraban*, (2). In the latter case Lord Maughan said at page 462 :—

> "Material custom must be proved in the first instance by calling witnesses acquainted with them until the particular customs have, by frequent proof in the Courts become so notorious that the Courts take judicial notice of them."

This rule was followed by a Division Bench in the Lahore High Court in *Tara Singh* v. *Suraj Kaur* (3), and by this Court in *Sukhwant Kaur's* case (4).

I am therefore of the opinion that the plaintiff would be entitled to succeed to half the property which was bequeathed to Ramji Das, but which fell into the residue because of the doctrine of lapse, and in regard to this property the rights of Mathra Das and Hem Raj are equal.

It is finally to be decided as to which property is to be divided amongst the contestants. On the 11th June 1947, Mr. Ram Krishan Diwan, Advocate for Hem Raj, made a statement :—

> "My suit now relates only to the landed property situate in Village Dholewal, and the property situate in Ludhiana Town, as mentioned in para 4 (Rey) of the plaint."

To this the reply of the defendant was that the property mentioned belonged to Ramsaran Das and was covered by the will. On the 19th August 1947, Hem Raj made an application for amendment saying that by a mistake the suit was confined to clause (Rey) of the property given in para 4 and that really he wanted to claim the whole as was given in his plaint. He supported this by an affidavit, but the learned Senior Subordinate Judge dismissed this on the 17th January 1948, because the Advocate for the appellant

(1) I. L. R. (1918) 41 Mad. 778.
(2) 162 I. C. 461.
(3) I. L. R. 1941 Lah. 546.
(4) A. I. R. 1951 Simla 242.

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had not put in an affidavit. In my opinion, it was a mistake pure and simple, and, therefore, the learned Judge was in error in disallowing the amendment at that stage. I would, therefore, allow the case to extend to the whole of the property which was mentioned in paragraph 4 of the plaint. Counsel for the defendant admitted that properties shown as 'A' (*Alif*), 'B' (*Be*) and 'D' (*Dal*) belonged to Tikam Das, and, therefore, both the plaintiff and the defendant would be entitled to half and half of these properties. But as these are agricultural lands a Civil Court can only give a declaration that the parties will be entitled to it in equal shares. Properties 'F' (*Ze*) and '*I*' (*Shin*) have been admitted to belong to Mst. Dwarki, the wife of the defendant, and, therefore, the plaintiff can have no claim to them. The rest of the property, i.e., 'C' (*Jim*), 'E' (*Rey*), 'G' (*Yeh*), 'H' (*Sin*), 'J' (*Suad*) and 'K' (*Zuad*) belonged to Ramsaran Das and was therefore covered by the will. The share of the plaintiff in these properties which are covered by the will would be one quarter, as half would go to the defendant under the will and the rest would be equally divisible between the plaintiff and the defendant by right of succession. Property (C) (*Jim*) is agricultural land. In this also the share of the plaintiff would be one quarter and a Civil Court can only give a decree declaring the shares of the two parties, i.e., the plaintiff one quarter and the defendant three-quarters.

In the result, this appeal is allowed to the extent indicated above and the decree would be modified accordingly. In the circumstances of this case, I leave the parties to bear their own costs in this Court and the Court below.

FALSHAW, J. I agree.