Hukam Singh and others v. Duli and others

Bhandari, C. J.

debtor in cash or in kind. It is also admitted that the debt was advanced before the commencement of the Act. It may be that the plaintiff in this case who is a legal-representative of the original debtor, is not a debtor as defined in sub-section (2) of section 7, but that fact cannot alter the fact that the suit has been brought in respect of a debt as defined in section 7(1). In these circumstances it was in my opinion the duty of the Court to do what it has actually done, namely to give effect to the rule of Damdupat and to refrain from passing a decree in contravention of the provisions of section 30 of the statute. The language of the section is plain and unambiguous; it conveys a clear and definite meaning and there is no occasion for us to resort to complicated rules of interpretation. It is not open to a Court of law to create an ambiguity when none-exists and then to clear it up by statutory construction.

For these reasons, I would uphold the order of the learned Single Judge and dismiss the appeal. There will be no order as to costs.

Falshaw, J.

FALSHAW, J.—I agree.

B. R. T.

APPELLATE CIVIL

Before Mehar Singh and I. D. Dua, JJ.

MST. SHAM KAUR,—*Appellant*

versus

SANTA *alias* SANTA SINGH, AND OTHERS,—*Respondents.*

Regular Second Appeal No. 481 of 1952.

1959

Aug., 19th

Code of Civil Procedure (V of 1908)—Section 100—Second Appeal—New point—Whether can be allowed to be raised when it requires evidence—Riwaj-i-Am—Entries

in—Whether relate to ancestral property only—Customary law—Non-ancestral property—Daughter, whether a preferential heir to a collateral.

Held, that where a new point sought to be raised in a second appeal would involve evidence to be taken, it cannot be allowed to be raised.

Held, that the entries in Riwaj-i-Am refer only to ancestral property.

Held, that in all cases of contest between a daughter and a collateral in the matter of succession to self-acquired property left by the former's father, the presumption is in favour of the former and the onus lies very heavily on the collateral to displace that presumption.

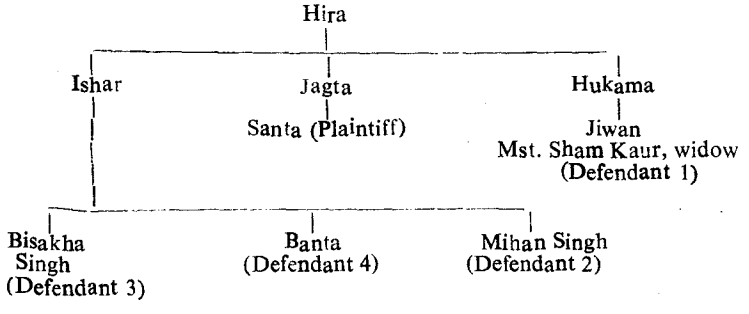
Second Appeal from the decree of the Court of Shri Shamsher Bahadur, District Judge, Jullundur, dated the 16th day of April, 1952, affirming with costs that of Shri Basant Lal, Sub-Judge, Ist Class, Nakodar, dated the 9th August, 1950, dismissing the plaintiff's suit with regard to the house property and the non-ancestral land.

S. D. BAHRI, *for Appellant.*

RAJINDER NATH AGGARWAL, for Respondents.

JUDGMENT

DUA, J.—The following pedigree-table would be helpful in understanding the present contro- Dua, J.



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On Jiwan's death, his estate was mutated in the name of his widow Mst. Sham Kaur, defendant No. 1. It is alleged by the plaintiff that Mst. Sham Kaur had started living with Mihan Singh since 8 or 9 years and had given birth to children. On her re-marriage, and if the re-marriage is not proved, on account of her unchastity she has forfeited her rights in her husband's property. Mst. Raj Kaur, mother of Jiwan succeeded to her son's estate. Mst. Dipo, daughter of Jiwan, got married about a year and a half or so before the institution of the suit and Mst. Raj Kaur died about 5 months prior to the suit. The plaintiff; claiming along with defendants 2 to 4 to be the next heirs of Jiwan, instituted the present suit for possession sometime in 1944.

Mst. Sham Kaur and Mihan Singh resisted the suit denying the alleged re-marriage and unchastity on the part of Mst. Sham Kaur and also pleaded that under custom unchastity on the part of a widow did not entail forfeiture of her right in her husband's estate. In their statement before issues, however, Mst. Sham Kaur and Mihan Singh admitted that they lived together and four children had been born to them. On the pleadings of the parties the following issues were framed by the trial Court:—

(1) Has Mst. Sham Kaur re-married ?

(2) Does the liaison of Mst. Sham Kaur with Mihan Singh not amount to unchastity under custom ?

(3) Does Mst. Sham Kaur not forfeit her estate on account of unchastity under custom ?

(4) Is the land in suit ancestral *qua* plaintiff ?

(5) Is Mst. Dipo married daughter of Jiwan a preferential heir ?

(6) If issue No. 5 is decided in favour of the deffendant; then has the plaintiff *locus standi* to file the suit ?

(7) Did the defendant make any improvements in the house in dispute ? If so, at what cost and when; and its effect ?

(8) Did Haveli B in suit belong to Jiwan, deceased ?

The trial Court decreed the suit in June, 1948.

On appeal, the Court of first appeal remanded the case for fresh decision on issues 4 to 8 after permitting the plaintiff to amend the plaint and to implead Mst. Dipo and Amru, etc., and after framing a fresh issue on limitation. The trial Court after remand added the following two issues:—

(1) Is the suit within time ?

(2) Whether Mst. Sham Kaur had been in adverse possession of property in dispute for more than 12 years prior to the institution of the suit, and what is its effect ?

This time the learned Subordinate Judge dismissed the suit with respect to house property and the non-ancestral land and passed a decree for possession of one-half of the land which was proved to be ancestral. The Court observed that in the circumstances of the case marriage between Mst. Sham Kaur and Mihan Singh could be safely presumed, but if re-marriage was not to be presumed

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then admitted liaison between Mst. Sham Kaur and Mihan Singh amounted to unchastity on the part of the former. Mst. Sham Kaur was thus held to have forfeited her right in her late husband's estate on account of re-marriage or on account of unchastity. For this view reliance was placed by the trial Court on Question and Answer No. 44 of the *riwaj-i-am* of District Jullundur. Part of the land was found to be ancestral and part non-ancestral. The house property was also not proved to have descended from the common ancestor.

Aggrieved by the judgment and decree of the Court of first instance both parties went up in appeal to the Court of the District Judge, but both the appeals were dismissed and the judgment and decree of the trial Court affirmed.

Feeling dissatisfied with the judgment and decree of the lower appellate Court. both sides have come here on second appeal. Mr. Bahri, appearing on behalf of Mst. Sham Kaur, contends that re-marriage of Mst. Sham Kaur with Mihan Singh does not, under custom, entail forfeiture because by such re-marriage she remains in the same family and, therefore retains her rights in her first husband's estate. This matter was not argued before the learned District Judge before whom the only question argued related to limitation and the question of adverse possession was debted before the Court of first appeal for the purposes of determining the *terminus-a quo*. The learned District Judge has expressly observed in his judgment that no other point had been urged on behalf of Mst. Sham Kaur. Indeed, I find from the memorandum of appeal filed in the lower appellate Court that the point which is now being raised by Mr. Bahri was not included in the

grounds contained therein. It is true that there are some decided cases where, according to the custom governing the parties to those case, widows were held not to forfeit rights in their deceased husband's estate merely by marrying their late husband's brothers, but it has not been shown by Mr. Bahri that such is the custom universally recognised throughout the State by all tribes or that such custom prevails among the parties to the present litigation. Besides, Mihan Singh belongs to the line of Ishar and not to that of Hukama and it would be a question of evidence whether or not Mst. Sham Kaur by entering into remarriage with Mihan Singh continued in actual fact to live in her husband's family or left it and took shelter under the roof of Mihan Singh's house. It is in the circumstances not possible to permit Mr. Bahri to raise this new point on second appeal and this was the only point sought to be raised by him. Regular Second Appeal No. 481 of 1952 preferred by Mst. Sham Kaur is thus dismissed with costs.

The appeal (Regular Second Appeal No. 525 of 1952) preferred by Santa is equally without merit. It is contended by Mr. Aggarwal that among Jats of Jullundur District daughters are excluded even with respect to non-ancestral property and reliance has been placed on *Dewan Singh and others* v. *Mt. Santi and others* (1). In my opinion, it is too late in the day now to advance this argument. The reasoning adopted in the reported case was disapproved by the Privy Council in *Mt. Subhani and others* v. *Nawab and others* (2), where entries in *Riwaj-i-am* were held to refer only to ancestral property. To the same effect is the decision of a Full Bench of the

(1) A.I.R. 1937 Lah. 223
(2) A.I.R. 1941 P.C. 21

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Lahore High Court in *Hurmate and another* v. *Harbiarn and another* (1). The following passage from this judgment at page 24 is worth quoting:—

> "It is reasonable, therefore, to assume that when manuals of Customary Law were originally prepared and subsequently revised, the persons questioned, unless specially told to the contrary, could normally reply in the light of their own interest alone and that, as stated above, was confined to the the ancestral property only. The fact that on some occasions the questioner had particularly drawn some distinction between ancestral and non-ancestral property would not have put them on their guard in every case, considering their lack of education and lack of intelligence in general. Similarly, the use of the terms 'in no case' or 'under no circumstances' would refer to ancestral property only and not be extended so as to cover self-acquired property unless the context favoured that construction."

Indeed, as observed by Sarkar, J., while delivering the judgment of the Supreme Court in *Ujagar Singh* v. *Mst. Jeo*, Civil Appeal No. 296 of 1955, the Full Bench in the above case really authoritatively laid down a rule which had been the prevailing opinion in the Courts in the Punjab. This disposes of the argument advanced by the learned counsel for Santa that the *riwaj-i-am* of Jullundur District excludes daughters with respect to acquired property in a contest between her and her father's collaterals. It would not be out of place here also to state that the Customary

(1) A.I.R. 1944 Lah. 21

Law of Jullundur District has in a large number of decided cases been held by the Lahore High Court to be a carelessly prepared document: See *Inter alia Narain Singh* v. *Mt. Chand Kaur and another* (1) and *Mt. Santi* v. *Dharm Singh and others* (2). In *Qamr-ud-Din and others* v. *Mst. Fateh Bano and others* a Division Bench of the Lahore High Court after reviewing all the previous authorities clarified the position of daughters under Customary Law in relation to non-ancestral properties of their fathers and it was held that in all cases of contest between a daughter and a collateral in the matter of succession to self-acquired property left by the former's father the presumption is in favour of the former and the onus lies very heavily on the collaterals to displace that presumption. This decision was later approved by M. C. Mahajan and Achhru Ram, JJ., in Regular Second Appeal No. 107 of 1946. In my opinion, these decisions represent the correct position of law. This appeal must also, therefore, fail with costs.

For the reasons given above, both the cross-appeals (R.S.A. 481 of 1952 and R.S.A. 525 of 1952) are dismissed with costs.

MEHAR SINGH, J.—I agree.

Mehar Singh, J.

APPELLATE CIVIL

Before S. S. Dulat and D. K. Mahajan, JJ.

TEJA SINGH AND OTHERS,—*Appellants.*

versus

NARANJAN SINGH AND ANOTHER,—*Respondents.*

Regular Second Appeal No. 163 of 1953.

1959

Aug. 21st

Punjab Restitution of Mortgaged Lands Act (IV of 1938)—Section 4—Mortgage effected before 1901 but additional charges created in 1918 and 1937—Collector—Whether

(1) A.I.R. 1935 Lah. 607
(2) A.I.R. 1935 Lah. 834
(3) I.L.R. 1945 Lah. 110