APPELLATE CIVIL

Before Eric Weston, C.J.

KISHORI LAL,—*Defendant-Appellant*

versus

BEG RAJ AND OTHERS,—*Plaintiffs-Respondents.*

1952

June 23rd

Regular Second Appeal No. 703 of 1950.

Specific Relief Act (I of 1877), Section 42—Scope of —Whether an heir of a living full owner can sue to control his dealings with his property—Section 42, whether exhaustive—Hindu Law—Reversioner—meaning of—Practice—Second Appeal—Objection to the maintainability of the suit, whether can be allowed to be raised.

Kishori Lal
v.
Beg Raj and others

Eric Weston C. J.

Held, that the land being non-ancestral, it cannot be said that the plaintiffs are persons having any legal rights. They are merely heirs of a person who is alive. He is free to dispose of his property as he desires. The plaintiffs have no right whatever to control or restrain his actions in any way in the matter of disposal by sale, gift, will or otherwise, under section 42 of the Specific Relief Act. Moreover section 42 of the Specific Relief Act is exhaustive on the subject of declaratory decrees, and no declaration can be given outside its precise terms.

The term "revisioner" is used in Hindu Law to describe the heirs of the last full owner entitled to succeed to the estate of such owner on the death of a widow or other limited heir.

Held further, that if the suit itself was not competent under section 42 of the Specific Relief Act and the suit was not otherwise competent, then the objection to its competence could be raised at any stage, even for the first time in Second Appeal.

The *Secretary of State for India in Council* v. *Kocherlakota Subba Rao* (1), dissented from, *Sheoparsan Singh* v. *Ramnandan Prasad Singh* (2), *Deokali Koer* v. *Kedar Nath* (3), relied upon. *Isri Dut Koer and others* v Mst. *Hansbutti Koerain and others* (4), distinguished.

Second Appeal from the decree of Shri Maharaj Kishore, District Judge, Hissar, dated the 29th July, 1950, affirming that of Shri Pitam Singh Jain, Senior Sub-Judge, Hissar, dated the 25th May, 1950, granting the plaintiffs a decree for a declaration as claimed against the defendants and ordering that Kishori Lal, defendant No. 2, will be liable for the costs of the plaintiffs and Arjan, Defendant No. 1, will bear his own costs, the appellate Court allowing costs of his court.

SHAMAIR CHAND and FAQUIR CHAND MITAL, for Appellant.

P. C. PANDIT, for Respondents.

---

(1) I.L.R. 56 Mad. 749.
(2) I.L.R. 43 Cal. 694.
(3) I.L.R. 39 Cal. 704.
(4) 10 I.A. 150.

JUDGMENT

Kishori Lal v. Beg Raj and others

Eric Weston C. J.

This is a second appeal from a decision of the District Judge, Hissar, upholding a decree of the Senior Subordinate Judge, Hissar, decreeing the plaintiffs' suit for declaration that the adoption of defendant No. 2 Kishori Lal by defendant No. 1 Arjan was not proved and a gift of land made about the time of the adoption was merely a gift made on account of the adoption and therefore failed when the adoption failed.

The facts found were that on the 4th of January 1948, a report was made to the Patwari by Arjan reciting that Arjan had adopted Kishori Lal, he had given possession of land and asking that appropriate entries may be made. On the 17th of February 1948, Arjan executed a formal deed of adoption in favour of Kishori Lal and this deed was registered. On the 10th of August 1948, mutations were sanctioned in favour of Kishori Lal both of agricultural land of which Arjan was the owner and occupancy rights possessed by Arjan in other lands. The present suit which was filed on the 2nd of May 1949, is by three collaterals in the fourth degree. Their case was that the land was ancestral and they sued for declaration that the adoption was never performed and that the gift also failed and was otherwise not binding upon them. Both Courts below have held that the property of Arjan both in land and in occupancy rights is not ancestral property. Both Courts held that the adoption was not proved and that the gift was made on account of the adoption and not independently to Kishori Lal. The plaintiffs therefore were granted the declaration which was sought by them.

It is clear by reason of the Punjab Tenancy Act that in respect of the occupancy rights Kishori Lal could claim title only by virtue of the adoption and not by virtue of the gift. The defendant Kishori Lal who contested the suit had in his written statement disputed the right of the plaintiffs to sue and an issue No. 1-A was struck at his request—

"1-A. Have the plaintiffs a right to sue ?"

Kishori Lal
v.
Beg Raj and others

Eric Weston C. J.

The contest between the parties as to the ancestral or non-ancestral nature of the property seems to have obscured this issue and there has been no consideration by the Courts below of the question which obviously arises, namely whether, when it has been found that the property is non-ancestral, the plaintiffs who happen to be the nearest heirs of Arjan have any right to sue during the lifetime of Arjan to challenge either the adoption made by him or any alienation made by him. The Courts below in fact seem to have proceeded on the basis that the plaintiffs are reversioners.

The term 'reversioner', however, is used in Hindu Law to describe the heirs of the last full owner entitled to succeed to the estate of such owner on the death of a widow or other limited heir, and clearly the plaintiffs are not reversioners. Mr Pandit for the plaintiffs-respondents has argued against this objection on two grounds. He first of all claims that the suit is one which falls within the scope of section 42 of the Specific Relief Act, and secondly he claims that even if it does not, section 42 is not exhaustive of all types of declarations which may be given, and in any event as the argument against maintainability of the suit has been argued for the first time in second appeal this objection should not now be entertained.

On the question of the suit falling within the scope of section 42 of the Specific Relief Act, on the finding that the land is non-ancestral it seems to me impossible to say that the plaintiffs are persons having any legal rights. They are merely heirs of a person who is alive. He is free to dispose of his property as he desires and the plaintiffs have no right whatever to control or restrain his actions in any way in the matter of disposal by sale, gift, will or otherwise. The Illustrations to section 42 show that the form of suit covered by the section is to be extended to suits by reversioners seeking declaration against alienations made by the limited holder of the estate. It may be said that even the interest of a reversioner

is not more than a *spes successionis* just as the interest of an heir is not more than this, and reversioners should be on the same footing and have the same rights, as regards rights as are conferred by section 42. I do not think, however, that this argument can be accepted. The Illustrations no doubt indicate that the legal right required by the section may be as little as the *spes* of a reversioner, but I do not think the scope of the section can properly be extended beyond this. I myself am not aware of any instance in which an heir, whether a Hindu or anyone else, has claimed a right to interfere with and control the dealings with property of the full owner to whom the plaintiff hopes to succeed.

On the second point as to the scope of section 42 of the Specific Relief Act, it is true that the Madras High Court in several decisions, particularly *The Secretary of State for India in Council* v. *Kocherlakota Subba Rao* (1), and *M. Ramchandra Rao* v. *The Secretary of State for India in Council* (2), has taken the view that the decision of the Privy Council in *Robert Fischer* v. *The Secretary of State for India in Council* (3), requires that section 42 of the Specific Relief Act, should not be held exhaustive of simple declaratory decrees which can be granted. The Privy Council in *Fischer's case* had expressed doubts whether the suit before them was or was not within the purview of section 42 of the Specific Relief Act. The objection to the suit was that although consequential relief could have been asked such consequential relief had not been asked for, and therefore a declaratory decree could not be granted. The decision, which is very briefly expressed, is that the suit was properly framed and not open to objection under the Specific Relief Act. I think the general view taken by the various High Courts has been that this decision is not basis sufficient for the view taken by the Madras

(1) I.L.R. (1933) 56 Mad. 749.
(2) I.L.R. (1916) 39 Mad. 808.
(3) I.L.R. (1899) 22 Mad. 270.

Kishori Lal
v.
Beg Raj and others

Eric Weston C. J.

High Court that suits for simple declaratory decrees are competent outside the restrictions imposed by section 42 of the Specific Relief Act. In a later case *Sheoparsan Singh* v. *Ramnandan Prasad Singh* (1), the Privy Council were dealing with a suit to revoke probate after will had been affirmed by the Probate Court. In the judgment of the Board which was given by Sir Lawrence Jenkins, it was said—

> "The Court's power to make a declaration without more is derived from section 42 of the Specific Relief Act, and regard must therefore be had to its precise terms."

And then after setting out the section it was said—

> "A plaintiff coming under this section must, therefore, be entitled to a legal character or to a right as to property. Can these plaintiffs predicate this of themselves. Clearly not; and this is, in effect, stated in the plaint, where they described themselves as entitled to Bachu Singh's estate *in case of an intestacy* after the death of the defendant widows.

But as things stand there is no intestacy : Bachu Singh's will has been affirmed in a Court exercising appropriate jurisdiction, and the propriety of that decision cannot in the circumstances of this case be impugned by a Court exercising any other jurisdiction".

The Madras High Court has taken the view that this was a very special suit, but with great respect it seems to me that the first passage from the judgment just set out is a general statement restricting the grant of "declarations without more" to section 42 of the Specific Relief Act. A few years earlier Sir Lawrence Jenkins as Chief Justice of the Calcutta High Court in *Deokali Koer* v. *Kedar Nath* (2), had, when ruling that the limit imposed by section 42 is on decrees

(1) I.L.R. (1916) 43 Cal. 694.
(2) I.L.R. (1912) 39 Cal. 704.

which are merely declaratoy, at least impliedly laid down the principle that section 42 must be exhaustive on the subject of declaratory decrees. The view that section 42 is exhaustive of the cases in which a decree merely declaratory can be made has the weight of authority of the learned authors of Pollock and Mulla, Indian Contract and Specific Relief Acts, at page 748 of the Seventh Edition, and in my opinion represents the correct position.

Lastly as to the argument that the point has been substantially raised for the first time in second appeal, it seems to me that this also must fail. If the discretion of a Court is exercised in a suit properly brought under section 42 of the Specific Relief Act which being challenged for the first time in second appeal, it might well be said that it was too late to do so, and this is what was held by the Privy Council in *Isri Dut Koer and others* v. *Mussumut Hansbutti Koerain and others* (1). But if the suit itself was not competent under section 42 of the Specific Relief Act and if the suit is not otherwise competent then the objection to its competence can be raised at any stage, even for the first time in second appeal. In the present instance it seems to have been raised by pleading in the trial Court and an issue was framed although, as I think, that issue receded into oblivion.

I think therefore that during the lifetime of Arjan it is not open to his collaterals to challenge either the adoption said to have been made by him or the alienation said to have been made by him, when the only property which Arjan holds is his separate property in which the collaterals have no interest and the disposition of which they have no right whatever to control. It is unfortunate that certain questions of fact have been decided in this suit. Some questions of fact it was necessary to go into, particularly the ancestral or non-ancestral nature of Arjan's property, and it cannot be said that the suit should have been

(1) 10 M.A. 150.

Kishori Lal
v.
Beg Raj and others

Eric Weston C. J.

decided on the question of the applicability of section 42 alone. However, this may be, it is impossible on the view I take to permit a decree to stand which is not authorised by law. I think therefore I must accept this appeal and set aside the decrees of the Courts below and direct the suit to be dismissed. Parties to bear their own costs throughout.