

**Bolo Vs. Koklan**

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**Court :** Mumbai

**Decided On :** Jul-03-1930

**Reported in :** (1930)32BOMLR1596

**Judge :** Tomlin,; Lancelot Sanderson,; George Lowndes and ;Binod Mitter, JJ.

**Appellant :** Bolo

**Respondent :** Koklan

**Disposition :** Appeal allowed

**Judgement :**

**Binod Mitter, J.**

1. These are two consolidated appeals, one by the plaintiff, Mst. Koklan, and the other by the defendant Mst. Bolo, from a judgment and decree, dated October 12, 1928, of the Court of the Judicial Commissioner, North-West Frontier Province, Peshawar, which reversed a judgment and decree, dated January 31, 1928, of the District Judge of Peshawar, and made a decree partly allowing the plaintiff's claim and partly dismissing it.

2. Kanhaya Lal executed his last will and testament on May 27, 1896, and died in the year 1899, leaving surviving his sole widow the plaintiff, Mst. Koklan, his infant son Tara Chand, and his great nephew Mohan Lal, as will appear from the

following pedigree:-

Sultan Singh. |-----| | |Wiaakbi Bam Jul Mal Kanhaya Lal  
= Musammat Koklan | | (died 1899) (Plaintiff) Moti Ram Muaammat Sarasti ||  
----- Mohan Lal | | || Musammat Musammat Tara Chand (died 1910)  
Nikki Bhappo (died 1918) | marriad | Musammat Bolo Surjan Das (Defendant No.  
3)(died 1918) || Mehr Chand | (died March 1927 | aged 10 years)-----|  
| Sant Ram Hari Bam, minor (Defendant No. 1) (Defendant No. 2)

3. The properties left by Kanhaya Lal consisted of movables and immovables. They were self-acquired and were not ancestral.

4. Two questions are before their Lordships for their decision in this appeal.

(1) What is the interest of the plaintiff and the defendant Mst. Bolo in the property left by Kanhaya Lal ?

(2) Is the claim of the plaintiff in this suit barred by limitation ?

5. The important clause in the will is the fourth and it runs as follows:-

If I die, my real son-Tara Chand, minor, aged two years, may be held and considered as proprietor of half of the whole property specified in the will, jointly with Mst. Koklan, his mother. If, God forbid, the mother of the said Tara Chand minor dies before him, then the said Tara Chand shall become the owner of the said half share and in case Tara Chand minor dies before his mother, then the latter shall be held and considered to be the owner of the said minor's half share in the entire property. Mst. Koklan shall act as guardian of the person and property of Tara Chand during his minority. It is further noted here that if Tara Chand is not present, i. e., if he dies, then Mst. Koklan shall be competent in every respect to alienate the said half share in the property by way of Dharam Khata, etc., (i.e., charitable purposes, etc.) but she shall have no power to alienate by gift or by other way any portion of the said property either to her parents or relations on her mother's side.

'As regards the remaining one half share of the property noted in the will it shall go to Mohan Lal, son of Narinjan Das, caste Arora (by profession a physician) of Mohallah Kocchi Khan ilaqa Dabgari gate, Tahsil Peshawar, who is the son of my brother's daughter, and after his death his children shall succeed to this half share of the property.

6. Tara Chand died in 1918, leaving him surviving his sole widow Mst. Bolo and an infant son Mehr Chand. The question for decision is whether on Tara Chand's death his mother, Mst. Koklan, became entitled absolutely to a moiety of the estate left by Kanhaya Lal and, if not, then what on the construction of Kanhaya Lal's will is the interest of Mst. Koklan or of Mst. Bolo.

7. Counsel for Mat. Bolo submitted that the testator by the words 'In case Tara Chand minor dies before his mother, then the latter shall be held and considered to be the owner of the said minor's half share in the entire property' intended that the interest which Tara Chand was to acquire under the will would go over to his mother only if Tara Chand died before the testator or if he died during Ms minority, but not otherwise.

8. He further submitted that in construing this will, which is the will of a Hindu, it is proper to take into consideration what are known to be the ordinary motives and wishes of a Hindu with respect to the devolution of his property, and that a Hindu, except in rare cases, would not deprive his sons or grandsons of their rights of inheritance, or even curtail the same, for the benefit of his widow.

9. No doubt the submission of the learned Counsel is perfectly legitimate and proper, but the primary duty of a Court of construction is to give to the words of the will their plain and natural meaning, and the words of this will are specific. Their Lordships think that, whilst they must give due weight to the submission of the learned Counsel, they must construe the words as they find them. They therefore hold that the intention of the testator as expressed was that the defeasance clause would come into operation on the death of Tara Chand, if the same happened during the lifetime of his mother, and cannot be restricted in the way that counsel suggested. The answer to the first question propounded is therefore that on the death of Tara Chand Mst. Koklan became entitled to a moiety of the property left

by Kanhaya Lal and Mst. Bolo has no interest therein.

10. The learned District Judge found the facts as follows :-

When Kanhaya Lal died, Mohan Lal managed the property. On his death Surjan Das managed it and a year or two later Tara Chand also took part in the management. On the death of Surjan Das and Tara Chand, agents were appointed under registered powers of attorney by Musammats Sarani and Bolo, the mothers of the minors Sant Ram, Hari Ram, and Mehr Chand, to manage the property and that arrangement has been continuing up to date. The account books of the property show that the income has been credited half and half to the two branchss of Sultan Singh's descendants : an allowance of Rs. 20 p.m. has been made to Musammat Koklan and it has been debited all along first to Tara Chaud's account and later to Mehr Chand's, Since the death of Surjan Das and Tara Chand the mothers of the minors have been receiving from the property a sum of about Rs. 400 a month for their various expenses. Kanhaya Lal's widow and descendants continued to live jointly until four or five years ago when Musammat Koklan and Bolo began to live separately.

11. The Court of the Judicial Commissioner did not come to any different finding and their Lordships accept the finding of the learned District Judge as correct.

12. As suit was filed on July 11, 1922, on behalf of the infant Mehr Chand by his mother Mst. Bolo against the two minor sons of Surjan Das through their mother for partition and possession of the properties left by Kanhaya Lal in equal shares. Mst. Koklan petitioned to be added as defendant, denying that her minor grandson had any right at all and claiming under the will to be the absolute owner of the half share in suit. The suit was subsequently withdrawn with liberty to bring a fresh suit.

13. On these facts the question arises whether the claim of the plaintiff' is barred by limitation.

14. Learned counsel for Mst. Bolo argued that Article 120 applies to this suit in respect of the movable properties, and that when Tara Chand died the right to sue accrued to the plaintiff and the suit as regards the movable properties is therefore

barred by limitation.

15. Learned counsel for the plaintiff, Mst. Koklan, also submitted that Article 120 of the Indian Limitation Act is applicable but that the right to sue did not accrue until Mehr Chand on July 11, 1922, instituted the suit which was subsequently withdrawn. He further submitted that if Article 120 did not apply, then Article 127 or 123 is applicable. If Article 127 or 123 is applicable, then the suit is clearly within time, but even if Article 120 applies to this suit, then their Lordships are of opinion that the suit is within time.

16. Article 120 is as follows :-

Suit for which no period of limitation | Six years. | When the right to sue is provided elsewhere in this schedule. | | accrues.

17. There can be no ' right to sue ' until there is an accrual of the right asserted in the suit and its infringement or at least a clear and unequivocal threat to infringe that right by the defendant against whom the suit is instituted.

18. No doubt Mst. Koklan's right to the property arose on the death of Tara Chand, but in the circumstances of this case their Lordships are of opinion that there was no infringement of, or any clear and unequivocal threat to her rights till the year 1922. when the suit, as stated above, was instituted.

19. Mst. Koklan was living as a member of a joint family, consisting of herself, her infant grandson, and daughter-in-law, and they constituted Kanhaya Lal's branch of the family of Sultan Sing.

20. The grant of powers of attorney by Msts. Sarani and Bolo to a manager to manage the joint property, and the method in which the account books were kept, show the way in which the joint properties were managed. Such methods of management, are not uncommon amongst Hindus.

21. Their Lordships therefore hold that the suit is not barred by limitation. They are of opinion that the appeal of Mst. Bolo should be dismissed and that of Mst, Koklan allowed, and that the following declaration should be made : That on the

true construction of the will the plaintiff is entitled to an absolute interest in the one-half share in which she and Tara Chand were interested at the time of the latter's death, but this declaration is without prejudice to the question whether any, and if so to what extent, the restriction on alienation imposed by the will of Kanhaya Lal is valid.

22. It follows therefore that Mst. Koklan is entitled to a decree for partition and that this suit should be remitted to the learned District Judge to carry out the directions of their Lordships. The appellant, Mst. Bolo, must pay the costs of Mst. Koklan before this Board. There will be no order for costs in the Courts below and any costs paid under any order should be returned to each other respectively. The costs of partition would be dealt with by the learned District Judge.

23. Their Lordships will humbly advise His Majesty accordingly.

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