

Sukhdevi Kunwar Vs. Har Prasad

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SooperKanoon Citation : sooperkanoon.com/448713

Court : Allahabad

Decided On : Feb-02-1915

Reported in : (1915)ILR37All241

Judge : Tudball and ;Rafiq, JJ.

Appellant : Sukhdevi Kunwar

Respondent : Har Prasad

Judgement :

Tudball and Rafiq, JJ.

1. This is a defendant's appeal arising out of a suit for possession brought by the widow of the defendant's deceased brother, Ganga Prasad, for recovery of her husband's separate estate plus mesne profits. The court below decreed the claim. The following genealogical tree will assist the understanding of the case. It is not a complete tree of the whole family of Rai Chote Lal, but is sufficient for the case.

RAI CHOTE LAL

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Rashk Lal. Manohar Lal.

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Baldeo Prasad. Shiam Sundar. Lachmi Narain.

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Anand Behari Lal Sons etc.

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Ram Charan Lal Kali Charan |

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Gur Prasad Har Prasad Ganga Prasad= Gur Prasad=

(adopted). (defendant). Mt. Sukhdei (plaintiff). Hans

| Mukhi.

Mt. Dal Mukhi _____

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Mt. Jaggo. Mt. Rupo.

2. Ram Charan Lal adopted Gur Prasad, the son of Anand Behari Lal. The parties are Kayasths by caste.

3. It is common ground that a dispute having arisen between Ram Charan and his adopted son, there was a partition and a half share of the former's property was handed over to Gur Prasad, and it is a half share in the estate thus acquired by

Gur Prasad that is now in dispute.

4. Gur Prasad died on the 21st of May, 1906. On the 5th of May, 1903, he made a will. He gave a life interest in his estate to his wife with remainder over to his two natural brothers, Har Prasad and Ganga Prasad in equal shares, as stated in para. 5 of the will. The widow held the estate till her death, on the 28th of May, 1906, when the property went under the will to Har Prasad and Ganga Prasad. It will be noticed that Gur Prasad disinherited his own two daughters Jaggo and Ruppo, though he gave them a maintenance allowances payable out of the income of the estate. On the 27th of March, 1911, Ganga Prasad died and Har Prasad is in possession of the whole estate. The former's widow is the plaintiff and her case is as follows:

(1) That the two brothers were separate.

(2) That the two brothers each took a separate share in the estate of Gur Prasad under the will, and that Ganga Prasad's share therein was his self-acquired property and separately enjoyed by him.

5. The defence of Har Prasad was-

(1) That the devise to the two brothers was made to them jointly so that on the death of one the other took the whole by survivorship.

(2) That even if this was not so the two brothers threw the estate into the joint family estate, and it was treated as joint family property and must now be held to be such, as the family has all along been joint.

(3) That in equity, if the plaintiff is legally entitled to the estate, she is bound to refund to him certain expenditure incurred by him.

6. The court below has held on a construction of the will-

(1) That each of the brothers took a half share in the estate of Gur Prasad and that they did not take jointly;

(2) That though there had not at any time been any partition or separation in the family of Anand Behari Lal and his sons, still the shares taken by the two sons had been held and enjoyed separately, and that the widow was entitled to her husband's separate acquisition;

(3) That the plaintiff was entitled to Rs. 1,128 as mesne profits up to the date of suit after allowing the defendant 10 per cent, for the costs of management, Rs. 1,200 allowances paid to Gur Prasad's daughters, Rs. 74, for survey expenses and Rs. 200, paid for owner's rate. The defendant appeals and three points are pressed before us:

(1) That on a proper construction of the will the two brothers took the estate jointly and did not hold as tenants in common.

(2) That even if they got separate shares under the will still they treated it as joint family property and not as separate acquisitions; and it thus became joint family property.

(3) That the defendant is entitled to credit for certain items of expenditure disallowed by the court below.

7. To properly estimate the value of the evidence on the record it is necessary to set out the circumstances of this family.

8. The Judgment then set out those circumstances.

9. There, therefore, had been no cause for separation or partition in the family of Anand Behari and his sons. There was no property to divide beyond the ancestral home, part only of which belonged to them. The father and elder son were each earning a separate income. In a sense they formed a joint family, but without any joint family property of any import.

10. We now consider the terms of the will. It is to be found translated at page 21 A. We have examined the original which is in Urdu.

11. The testator left his estate to his widow for her life-time in case the child which was about to be born to her should be a girl or being a boy should die at his birth.

If the child should be a boy and he lived, the estate was to be his. He also by a separate deed granted her authority to adopt; and if she did adopt as directed, the adopted son was to take the estate. In the absence of a son, the widow was to hold the estate for life with certain limited powers of alienation. After the death, his daughters were not to inherit but were to receive Rs. 25 per mensem each from the estate as maintenance which they were empowered to enforce in a certain manner.

12. Then comes the fifth paragraph with which we are concerned.

I direct that after the death of my wife and in the absence of a son begotten or adopted, my own brothers Babu Har Prasad and Babu Ganga Prasad shall be the owners of the aforesaid property, together with all rights, 'in equal shares.' I do not think it proper to commit to writing the reason for my taking this course as it would bring disgrace on the family, &c.;, &c.;

13. The rest of the document does not affect the point now in dispute.

14. The appellant's case is that the devise contained in the will is to the two brothers jointly. He even produced oral evidence to prove that the testator had expressed this intention. One witness even went so far as to say that though the words *ba hissa masavi* (in equal shares) usually mean 'in equal shares' still in the will they meant 'jointly.'

15. We are also asked to consider the decision in *Mankamna Kunwar v. Balkishan Das* (1905) I.L.R. 2 All. 38, wherein it was observed that under the English law a conveyance of land to two or more persons without words indicating an intention that they were to take as tenants in common constitutes a joint tenancy.

16. The reply to this is a simple one. The will in the present case clearly uses language indicating that the two brothers were to take the estate as tenants in common, for they were to take in equal shares. Furthermore, we would call attention to the language used by their Lordships of the Privy Council in *Jageswar Narain Deo v. Ram Chandra Dutt* (1886) I.L.R. 23 Calc. 670, which was quoted in the case of *Gopi v. Musammat Jaldhara* (1910) I.L.R. 33 All. 41; - 'In the first

place, it appears to their Lordships that the learned Judges of the Madras High Court 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 co-parcenary between the members of an undivided family.'

17. It is urged that the testator was on bad terms with his adoptive father and had great natural affection for his own father and brothers who formed a joint family, and that while he was disinheriting his own daughters, would not have wished to let the property go to the daughters of his brothers who at that time had no male issue. There is no force in any of these pleas. The brothers were not old men, but young, and there was every probability of their having male issue, and there is the plain simple language of the will which directed that the two brothers were to take in equal shares. We have no hesitation in holding that the will in clear terms created a tenancy in common; moreover, we agree with the lower court in holding on the second plea that the two brothers treated the tenancy as one in common and did not treat it as joint family property which is the second plea raised before us and which we now proceed to discuss.

18. The oral and documentary evidence was then discussed.

19. Where the two brothers inherited the property in equal shares, the burden of proof that after the inheritance they threw the property into the family hotch potch, is upon those who assert it. There is no presumption that this was so. The evidence produced by the defendant is not in our opinion worthy of belief and we therefore agree with the court below and hold that the defendant has failed to prove his case.

20. There remains one point for decision. The appellant claims credit for certain items of expenditure alleged to have been incurred by him. Five such are placed before us for our decision

21. The Judgment then dealt with these items.

22. We decline to award any of these items. The result therefore is that the appeal fails and is dismissed with costs.

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