

Har Prasad Vs. Sukhdevi Kunwar

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Court : Allahabad

Decided On : Feb-02-1915

Reported in : AIR1915All180; 28Ind.Cas.561

Judge : Tudball and; Rafique, JJ.

Appellant : Har Prasad

Respondent : Sukhdevi Kunwar

Judgement :

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 pershad, for recovery of her husband's separate estates, 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 pershad, |-----|

| Shiam Sunder, Lachmi

|-----| | Narahi,

Ram Kali Anand |

Charan Lal Charan, Behari Sons, etc.

| Lal,

Gur Pershad, |

(adopted). |

|-----|-----|

Har pershad Ganga Pershad Gur Pershad

(defendant). =Musammat =Hans Mukhia.

Sukhdevi |

(plaintiff). |

||

Musammat |

Bal Mukhi. |

|-----|

|-----|-----|

Musammat Jaggo. Musammat Rupo.

2. Ramcharan Lal adopted Gur Pershad the son of Anand Behari Lal. The parties arc 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 Pershad, and it is a half share in the estate thus acquired by Gur Pershad that is now in dispute.

4. Gur Pershad died on 21st May 190H. On 15th 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 Pershad and Ganga Pershad, in equal shares' as slated in paragraph 5 of the Will.

5. The widow held the estate till her death on 28th May 1906 when the property went, under the Will, to Har Pershad and Ganga Pershad. It will be noticed that Gur Pershad disinherited his own two daughters, Jaggo and Rupo, though he gave them a maintenance allowance payable out of the income of the estate.

6. On 27th March 1911 Ganga Pershad died and Har Pershad is in possession of the whole estate.

7. 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 Pershad under the Will and that Ganga Pershad's share therein was his self-acquired property and separately enjoyed by him. The defence of Har Pershad 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 be 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.

8. The Court below has held, on a construction of the Will, that each of the brothers took a half share in the estate of Gur Pershad 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 defendant 10 per cent, for the costs of management, Rs. 1,200 allowances paid to Gur Pershad'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.

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

10. Shiam Sundar Lal has two sons, Anand Behari Lal and Makund Behari Lal. He, Shiam Sundar, is still alive. Anand Behari, who is the defendant's own witness, admits that Shiam Sundar had got rid of the whole of the ancestral property belonging to the family many years ago, excepting the house in which the family lives. He has told a story as to how his father finally separated from his two sons dividing the family house and the moveables into three lots. The lower Court has disbelieved this and we have no doubt that it is a pure myth.

11. Be that as it may, on May 28th 1906 when Gur Pershad's widow died, the only property possessed by Anand Behari and his sons was the family house and the moveables it contained.

12. Anand Behari's wife had inherited a small zemindar I shave in the village of Deora Satri from her own parents. She is still alive and still owns this property, which, however, is not the property of the joint family, though beyond doubt its income is expended on the support of the owner's household and its members.

13. Anand Behari started life in Government service on a salary of lis. 10 a month in May 1880 and he is now at the end of 34 years' service only an ahlmad or clerk in the Collector's office with a salary of but Rs. 30 per mensem.

14. His father, Shiam Sundar Lal, is old and now paralyzed and earning nothing. His brother, Makund Lal, who is separate (as he says) from him, is Kanungo on a small salary in another district. The elder son, Har Pershad, defendant, began life as a Police clerk on Rs. 10 a month and had been in service about six or seven years when Gur Persbad's widow died. He was then a head constable, so that his income as such would have been at the utmost about Rs. 25 a month. His duties forced him to live away from home.

15. Ganga Pershad at the time of Gur Pershad's widow's death was a youth of some 16 or 17 years, studying or rather pretending to study. He is not shown as having ever been a source of income. It will thus be seen that in 1906, when the estate came to the two brothers under the Will, the family was far from wealthy. All the ancestral property had long since vanished. Anand Behari supported himself on his income as a clerk and liar Pershad was away from home a head constable in the Police. Ganga Pershad was only a youth. When the widow died, Har Pershad resigned his appointment in the Police and came home to manage the property newly acquired.

16. 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.

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

18. 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 his 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.

19. 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 Pershad and Babu Ganga Pershad, 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 I he reason for my inking this course as it would bring disgrace on the family, etc.,' The rest of the document does not affect the point now in dispute.

20. 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 oven went so far as to say that though the words 'bahissa masari' (in equal shares) usually mean 'inequal shares', still in the Will they meant 'jointly.'

21. We are also asked to consider the decision in Mankamma Kunwar v. Balkishan Das 28 A. 38 : A.W.N. (1905) 170 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. 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. Further more, we would call attention to the language used by their Lordships of the Privy Council in *Jugeswar Narain Deo v. Ram Chandra Dutt* 23 C. 670 : 23 I.A. 37 which was quoted in the case of *Gopi v. Jaldhara* 7 Ind. Cas. 697 : 33 A. 41 : 7 A.L.J. 941: 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.' 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.

22. We have already noted that when this property came to the two brothers in 1906, the family was possessed of no joint family property except the ancestral house; that Anand Behari and Har Pershad were both separately earning small incomes by Government service, while Ganga Pershad (in 1966) was only a youth of 16 or 17 years of age. He died in 1911. We are asked to consider the following evidence: (1) The statements of Anand Behari Lal, Chimman Lal and Angan Lal,

(2) the accounts of the family produced by Angan Lal.

(3) The khewats of some of the villages concerned.

(4) The accounts of a certain cloth seller.

(5) A number of bonds in favour of Har Pershad and Ganga Pershad. The oral evidence is to the effect that Anand Behari and his two sons lived jointly and that the income of the new estate was thrown into the family chest and treated as joint family income. The evidence of Chimman Lal and Angan Lal is of little use, for they had no personal knowledge of the accounts kept. They are not in a position to say more than that the family to all outward appearance lived like a joint family.

23. Anand Behari Lal, of course, was in a position to testify fully on the point and his evidence would carry considerable weight, if it had been supported by the family account books. He is far from being a disinterested witness, for if his find the defendant's contention he correct, then he himself has an interest in the property now in suit sis lie is one of the joint family with the defendant and his sons.

24. He stated that the income of the property all came into his ands and he defrayed therefrom all the expenses of the family, that he maintained accounts by entering all items of expenditure and income on slips of paper from which he from time to time wrote up the account books. He admitted that he made deposits in the Post Office Ravings Bank in the names of himself and his two sons, each having a separate account. He had to admit that mutation of names was made only in favour of his two sons and not of himself, and that on the death of Ganga Pershad mutation was again not made in his favour, through, if his story be true, his name should certainly have been recorded especially as he was the managing member. The excuse he gives is that he was in Government service in the district where the property was situate, but, Government rules do not forbid Government servants from inheriting property. The litter have merely to declare all properties belonging to themselves and their near relatives. He further had to admit that on the death of the widow of Gur Pershad, when under the Will the property went in his two sons, a claim was put forward to it on behalf of the two daughters of Gur Pershad (Musammat Jaggo and Mussammat Rupo) and the Revenue Court of first instance passed an order¹ in their favour, which was upset on appeal made by Har Pershad. In that case he appeared and acted as guardian on behalf of the two daughters, but was subsequently removed from the post and another person appointed. It thus appears that he at first at least was hostile to the claim of his two

sons. As to his accounts, we note that these were not put forward by the defendant at the proper time. They were produced very late in the case and an affidavit was filed by Har Pershad to excuse the delay. It was to the effect that his father would not let him have them, saying he would produce them when he gave his evidence. We note that some other accounts in regard to the funeral expenses of Ganga Pershad which also, if genuine, must have been in the hands of Anand Behari, were put forward at the proper time and that as Anand Behari is greatly interested in the suit, he could have had no reason for keeping back the family accounts. An examination of these accounts, as pointed out by the Court below, will show that they have not been regularly maintained. They do not show the daily income and expenditure. A whole month's income and expenditure are frequently shown under one date, though, if the story of the slips be true, the details were all available. Finally, Anand Behari Lal had to admit that in a former case in regard to the village of Shahbazpore he had testified that no daily accounts had been kept and that he maintained no accounts whatever of the family expenditure. Combining this with the very late and suspicious production of the accounts in the present suit, we have no hesitation in describing them as 'specially manufactured for the purposes of this suit.' We agree with the lower Court in rejecting them as unworthy of any trust.

25. Again, this witness had to admit that there were separate accounts in the Post Office Savings Bank in the names of his two sons and a third one in his own name.

26. Gur Pershad's widow died in May 1906. A considerable period must have been taken up by the contested mutation case.

27. On 10th December 1907 the two accounts were opened in the names of the two sons with a deposit in each case of Rs. 200. Anand Behari states that the rules would not allow him to deposit more than Rs. 200 at a time in any one account, therefore he opened two accounts. The plea is absurd for he could have made a deposit everyday. Moreover an examination of the two accounts shows that up to the time of Ganga Pershad's death in 1911 only five deposits were made in each of the two accounts, that they were all made on the same dates for each

account and with one exception the sum deposited in each account was exactly the same. The one exception is that of the 30th April 1908 when Rs. 150 was deposited in Har Pershad's account and Rs. 100 only in Ganga Pershad's account. Excepting the first deposits all were below Rs. 200.

28. Those accounts were opened only when the estate came to the two sons and they are a clear indication that the income, far from being treated as a joint family income, was divided half and half and two separate accounts opened in the Savings Bank.

29. We do not place any value thus on the evidence of Anand Behari, or he has not hesitated to produce false documentary evidence.

30. The khewats prove nothing. In the case of some of the villages the names of Har Pershad and Ganga Pershad were recorded without any specification of shares, but in the cases of other villages they were recorded as owners in equal shares.

31. As for the accounts of the cloth-seller, they merely show that an account was opened with him in the name of Anand Behari and that purchases were made, now by one son and then by the other and some times by Anand Behari himself. This in itself proves nothing to the point.

32. Lastly, we are asked to consider the fact that loans were made and bonds taken in favour of both the brothers. We fail to see any assistance in this to the defendant's case. Ganga Pershad was but a youth and Anand Behari his guardian. If the family accounts had been maintained or true account books produced, these bonds might perchance have given some support to them. One loan was contracted on a bond executed by the two sons and Anand Behari signed as a witness. If the family had treated the estate as joint family property and the loans were made from joint funds, Anand Behari as manager ought to have carried out these transactions in his own name.

33. 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.

34. 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. 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.

35. The two first are Rs. 94-0-9-0, funeral expenses of Ganga Pershad, and Rs. 10-11-0 spent on subsequent ceremonies in connection with the death. It is urged that the widow was bound by Hindu Law to perform these ceremonies and as the expense was incurred by the defendant, these sums should be made good by her before the estate is handed over to her. In the first place, assuming that the plea is correct, we have practically only the evidence of Anand Behari and his false accounts in which no reliance can be placed to prove the expenditure; secondly, the defendant had deliberately kept a woman out of the estate when he knew full well that she was entitled to possess it. His action has been, in our opinion mala fide, throughout. He seized her property and prevented her from receiving its income and doing her duty as a widow in this respect. He spent money as he pleased without consulting her in a matter in which the expenditure was in her discretion. The defendant was not protecting the estate or discharging a burden thereon when he thus took the law into his own hands, and we see no equity in forcing the widow to refund to him sums which he thus voluntarily spent. We decline to allow these claims. The two next claims are for Rs. 120 per annum as the pay of a Karinda and Rs. 120 per annum as the pay of peons, expenditure incurred in managing the property since the death of Ganga Pershad.

36. The Court below had already in its decree allowed the defendant 10 per cent, on the income to cover his fees as a lambardar and the costs of management. This is a liberal allowance and we decline to allow any more. The fifth item is a sum of Rs. 25. The defendant voluntarily subscribed Rs. 12 to a hospital fund and Rs. 18 towards the cost of an exhibition at Etawah. He seeks to be generous at the expense of the respondent. They were not charges on the estate and he must

bear the expense himself, as lie did not consult the plaintiff.

37. We decline to award any of these items. The result, therefore, is that the appeal fails and is dismissed with costs, including fees on the higher scale.

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