

Mt. Bolo Vs. Mt. Koklan and Others

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Court : Privy Council

Decided On : Jul-03-1930

Judge : Lords Tomlin, Sir Lancelot Sanderson, Sir George Lowndes & Sir Binod Mitter

Appeal No. : Privy Council Appeal No. 106 of 1929 (From N.W.F.P.)

Appellant : Mt. Bolo

Respondent : Mt. Koklan and Others

Advocate for Pet/Ap. : A.M. Dunne and J. Nissim, for Appellant; L.De Gruyther and B. Dube, for Respondents. Solicitors for Appellants. Hy. S.L. Polak; Solicitors for Respondents, T.L Wilson and Co.

Judgement :

Sir Binod Mitter:

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

Kanhaya Lal executed his last will and testament on 27th May 1896, and died in the year 1889, leaving surviving him his sole widow, the plaintiff Mt. Koklan, his infant son Tara Chand, and his great nephew Mohan Lal, as will appear from the following pedigree :

The properties left by Kanhaya Lal consisted of moveables and immovable. They were self-acquired and were not ancestral. Two questions are before their Lordships for their decision in this appeal :

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

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

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 Mt. 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. Mt. 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 Mt. 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 mothers 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 Mohalla 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."

Tara Chand died in 1918, leaving him surviving his sole widow, Mt. Bolo and an infant son Mehr Chand. The question for decision is whether on Tara Chand's death his mother Mt. 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 Mt. Koklan or of Mt. Bolo.

Counsel for Mt. 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 his minority but not otherwise.

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.

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 Mt. Koklan became entitled to a moiety of the property left by Kanhaya Lal and that Mt. Bolo has no interest therein.

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 Mts. Sarani and Bolo, the mothers of the minor 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 branches of Sultan Singh's descendants : an allowance of Rs. 20p. m. has been made to Mt. Koklan and it has been debited all along first to Tara Chand's account and later to Mohr 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 Mts. Koklan and Bolo began to live separately."

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. A suit was filled on 11th July 1922 on behalf of the infant Mehr Chand by his mother Mt. 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. Mt. 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. On these facts the question arises whether the claim of the plaintiff is barred by limitation.

Learned counsel for Mt. Bolo argued that Art. 120 applies to this suit in respect of the moveable properties, and that when Tara Chand died the right to sue accrued to the plaintiff and the suit as regards the moveable properties is therefore barred by limitation.

Learned counsel for the plaintiff Mt. Koklan also submitted that Art. 120, Lim. Act, is applicable but that the right to sue did not accrue until Mehr Chand on 11th July 1922, instituted the suit which was subsequently withdrawn. He further submitted

that if Art. 120 did not apply, then Art. 127 or Art. 123 is applicable. If Art. 127 or Art. 123 is applicable, then the suit is clearly within time but even if Art. 120 applies to this suit, then their Lordships are of opinion that the suit is within time. Article 120 is as follows :

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

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 clear and unequivocal threat to infringe that right by the defendant against whom the suit is instituted. No doubt Mt. 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.

Mt. Koklan was living as a member of a joint family consisting of herself, her infant grandson and daughter-in-law, and they constituted Kanhaya Lai's branch of the family of Sultan Singh. The grant of powers of attorney by Mts. 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.

Their Lordships therefore hold that the suit is not barred by limitation. They are of opinion that the appeal of Mt. Bolo should be dismissed and that of Mt. 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 the 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.

It follows therefore that Mt. 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, Mt. Bolo, must pay the costs of Mt. 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. Their Lordships will humbly advise His Majesty accordingly.

Order accordingly.

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