

## PRIVY COUNCIL

Padman and others

Vs.

Hanwanta and others

(Lord Atkinson, CJ, Sir George Farwell, Sir John Edge and Mr. Ameer Ali. J)

19.5.1915

### JUDGMENT

#### **Mr. Ameer Ali J.**

1. This is an appeal from a judgment and decree of the Chief Court of the Punjab, dated the 17th of July 1909, and the dispute relates to the property of one Daula, a Jat by origin who migrated from Bikanir many years ago and settled in the Ferozepore District. He died in April 1902, leaving a large family of sons and grandsons and considerable landed property.
2. The following pedigree will explain the relative position of the contesting parties in the present litigation.
3. In 1884 Daula had executed a will, which was duly registered at the time, under which his surviving sons and a grandson, Ram Sukh, whose father Pura had died, were to take his properties substantially in equal shares.
4. In January 1898 he revoked his former will and made another, which also was registered, by which, excluding Chetan and *Tulsa*, he left his property in six equal shares to his four other surviving sons and to Ram Sukh, the son of Pura, and to Bhinja and Lekh Ram, the two sons of Asa, who had died in the meantime.
5. On Daula's death there were the, usual mutation proceedings for the registration of the names of his successors in the Collector's Register, in the course of which the devisees under the second will claimed to have their names recorded to the exclusion of Chetan's and *Tulsa*'s representatives. In view, however, of the provisions of the will of 1884, the Collector ordered the names to be entered in eight shares and referred the contending parties to settle their respective claims in the Civil Court. This happened in September 1902, and in December following, the present suit was brought by the persons taking under the second will against the representatives of Chetan and *Tulsa*,

defendants 1 to 7, to establish the plaintiffs' claim, under the will of 1898 and to recover possession of the one-fourth share of Daulat's lands in respect of which Chetan and Tulsa had been recorded as owners. This one-fourth includes the shares of Ram Sukh and Bhinja, who, on their refusal to join in the action, had been made defendants (8 and 9).

6. The defendants 1 to 7 raised various objections to the plaintiffs' suit, the nature of which is indicated by the issues framed by the Court of first instance. They are as follows:-

(1) Whether the property in dispute was acquired by Daula alone or jointly by him and his sons.

(2) Whether the will of 1898 was executed by Daula voluntarily and whether he was competent to make such a will.

(3) If so, whether the will has been cancelled by any subsequent act on his or on the part of the plaintiffs.

7. Before trial, however, the parties agreed to refer the dispute to arbitration. The arbitrators made an award, and on the 25th November 1903 the District Judge, in accordance therewith, dismissed the plaintiffs' claim. On revision under Section 622 of the Civil Procedure Code of 1882, the Chief Court reversed the order of dismissal and remanded the case to be disposed of according to law. On remand the first Court went into evidence and in the result dismissed the plaintiffs' claim, principally on the ground that the lands in dispute were not the self-acquired properties of Daula over which he had a right of disposition *dehors* the ordinary law under which ancestral property is inheritable by sons and grandsons per stirpes in equal shares. The District Judge does not say this in so many words, but this is clearly the effect of his judgment. On the other issues he does not appear to have come to definite findings.

8. On appeal by the plaintiffs the Divisional Judge was of opinion that the properties to which the suit related were the self-acquired properties of Daula within the Hindu Law, and that the will of 1898 was not open to the objection of having been executed under undue influence or without due comprehension; but he considered that the subsequent acts of Daula showed that he had revoked or cancelled it. He was further of opinion that no sufficient foundation was laid for the admission in the first Court of secondary evidence of the will of 1898. He accordingly dismissed the plaintiffs' appeal.

9. From his judgment the plaintiffs appealed to the Chief Court, which agreed with the

Divisional Judge in his finding that the properties in dispute were the acquisitions of Daula who had a right of disposition over them. The learned Judges were also of opinion in agreement with the second Court on the question of the competency of Daula to make the will of 1898, but they differed from the Divisional Judge on the point on which he had dismissed the plaintiffs' suit. They held in substance that there was no sufficient evidence of revocation. They accordingly set aside the Divisional Judge's judgment and gave the plaintiffs a decree for the entire one-fourth share claimed by them.

10. An application for review of judgment was made to the Chief Court under the provisions of Section 622 of the Civil Procedure Code, for the exclusion of the shares of Ram Sukh and Bhinja from the decree in favor of the plaintiffs. It was also attempted to be argued on this application, on certain grounds to which their Lordships will refer presently, that the share of Shera, one of the sons of Khema who had died after the institution of the suit, should be excluded. These applications were rejected by the Chief Court.

11. The defendants have now appealed to His Majesty in Council, and the case has been argued on their behalf in great detail. It was urged in the course of the argument that a registered copy of the will of 1898 was admitted in evidence without sufficient foundation being laid for its admission. No objection, however, appears to have been taken in the first Court against the copy obtained from the Registrar's office being put in evidence. Had such objection been made at the time, the District Judge, who tried the case in the first instance, would probably have seen that the deficiency was supplied. Their Lordships think that there is no substance in the present contention.

12. As regards the question of revocation, the Chief Court, after reviewing all the circumstances, said as follows:- "We think that the more reasonable presumption in this case is that the will was mislaid and lost, or else was stolen by one of the defendants after the death of Daula;" and they held that in their opinion it was not revoked. Their Lordships think that it was perfectly within the competency of the learned Judges to come to that finding. Much stress has been laid on the view expressed by Baron Parke, in *Welch v. Phillips*<sup>1</sup> that when a will is traced to the possession of the deceased and is not forthcoming at his death, the presumption is that he has destroyed it. In view of the habits and conditions of the people of India this rule of law, if it can be so called, must be applied with considerable caution. In the present case the deceased was a very old man and, towards the end of his life, almost imbecile. There is nothing definite to show that he had any motive to destroy the will

or was mentally competent to do so. On the other hand, the circumstances favour the view the Chief Court has taken that the will was either mislaid or stolen.

13. As regards the contention that the shares of Shera, Ram Sukh, and Bhinja should be excluded from the decree in favour of the plaintiffs, their Lordships will first deal with Shera's share. It is urged that inasmuch as Shera had put in a petition in the Chief Court to withdraw his application for revision in the arbitration matter which was formally granted on the 3rd April 1906, he must be taken as *estopped* from questioning the defendants' right so far as his particular share is concerned. In other words, that he must lose his share, if he is otherwise entitled to it, by the simple fact of having withdrawn or tried to withdraw his application for revision. Their Lordships think, this contention is clearly not well founded. On the same day on which the order was made on Shera's petition, viz., the 3rd of April, the Chief Court set aside in toto "the reference to arbitration and subsequent proceedings as altogether bad." The parties were thus relegated to their original rights; Shera is now plaintiff, and entitled, like the others, to his share.

14. The effect of the order in the mutation proceedings was to place the representatives of Chetan and Tulsa in possession of two-eighths or one-fourth share of the property, and the suit is to recover from them this share; but Ram Sukh and Bhinja, who are entitled, under the will of 1898, to one-sixth and one-twelfth respectively under the second will disclaim all benefit thereunder. They are apparently in possession under the Revenue Court's order of one-eighth and one-sixteenth respectively. The one-fourth share claimed by the plaintiffs, for which the Chief Court has made a decree in their favour, includes the excess share of Ram Sukh and Bhinja, which amounts to one-twenty-fourth and one-forty-eighth respectively, in the aggregate one-sixteenth. The plaintiffs are clearly not entitled to a decree for their shares. The decree of the Chief Court must, therefore, be modified to that extent. In other words, the decree will be for three-sixteenths instead of one-fourth and their Lordships will humbly advise His Majesty accordingly.

15. Having regard to the general result of the appeal, their Lordships think the ends of justice will be met by ordering each party to bear their own costs.

Decree modified.

Cases Referred.

1. [1836] 1 Moo.P.C.299 : 43 R.R. 83