

PRIVY COUNCIL

Banwari Lal

Vs.

Mahesh and others

P.C.A.No. 88 of 1917

(Lords Atkinson, CJ, Phillimore, Sir John Edge and Mr. Ameer Ali. JJ)

16.7.1918

JUDGMENT

Lord Phillimore J.

1. The appellant is the plaintiff in this action, which was brought by him on the 2nd of January, 1913, against the present respondents and others to recover certain shares in the village of Ferozapore which had been conveyed by his father to Kali Prasad, the ancestor of the present respondents, defendants Eos. 1 to 24, by three deeds of sale, dated the 20th April, 1889, the 6th January, 1892, and the 13th April, 1894.
2. By the first a 2-anna share was conveyed for Rs. 4,000; by the second a 1-anna share for Rs. 2,000; and by the third a like share for a like amount.
3. The defence was that as to the first sale it could not be attacked by the plaintiff, as he, according to his own case, was not born at the time, and his father was the sole proprietor, not being joint in family, and could deal with the estate as he thought fit; that as to all of the sales there was necessity for them, and that the money was not raised for immoral purposes. Further there was a plea of the statute of limitation.
4. The point as to this plea turns upon these facts. The period for attacking such a sale in ordinary cases is fixed by article 126 of the Indian Limitation Act at twelve years. But by section 7 -

"If a person entitled to institute a suit or make an application be, at the time from which the period of limitation is to be reckoned, a minor, or insane, or an idiot, he may institute the suit or make the application within the same period after the disability has ceased as would otherwise have been allowed from the time prescribed therefor in the third column of the second schedule hereto

annexed."

5. The time prescribed is three years. The plaintiff's case is that he was born on the 4th of January, 1892. He would come of age at 18, and then he would have three years, which would take him to the 4th of January, 1913. The case for the defendants was that the plaintiff was at least 28.

6. The Subordinate Judge decided for the plaintiff on all points. He held that there was no necessity for any of the sales; that the money raised by them was used for immoral purposes; that, as regards the first sale, the plaintiff could attack it though he was not born at the time, because his father was not separate in family but joint with his own brother and apparently other relatives, and because "the alienation made by one member of the co-parcenary body can be objected to by another member born subsequently." He found that the plaintiff was born on the 6th January, 1892, and had, therefore, instituted his suit in time to save the statute of limitation.

7. On appeal the Judges of the Court of the Judicial Commissioner of Oudh took a different view. The Judges found that the plaintiff's father was separate in family at the time when the first sale was made, which rendered it unnecessary to decide upon the proposition of law upon which the Subordinate Judge had acted. As to the second and third sales, they were of opinion that certain sums, to wit, Rs. 1,622 of the moneys received on the second sale, and Rs. 153-12-0 of the moneys received on the third sale, were applied in payment of antecedent debts, and that to this extent the sales could be supported but to no greater extent. They found, however, that the plaintiff had not established "that he attained majority within three years before suit" and, therefore, they dismissed his suit. Hence this appeal.

8. Their Lordships will deal first with the point as to the plaintiff's age. As the appeal was heard *ex parte*, the evidence on this matter was reviewed at the Bar with minuteness and care. There were three witnesses whom the Subordinate Judge saw and upon whose evidence he relied. The first was Shiva Lal. He was the family priest. He said that on the day of the plaintiff's birth he was in the village and that he made notes of the birth of the children of his disciples, and he produced a manuscript almanac with the entry of the birth of the plaintiff on the 4th January, 1892. Points are made against this evidence, first, that he was a resident of Bindraban and not of Ferozepore, but it is established, and indeed it is for one reason part of the defendant's case, that the plaintiff's family were by origin of Bindraban, and, secondly, that he did not produce a horoscope. It will be seen, however, that the third witness did produce one.

9. The second witness was Girdhari Lal; he was a first cousin, and says he was in the village at the time of the birth, and he fixes the date as being the 4th January, 1892, that on which his grandmother died and upon which he annually performs certain religious rites. He says that he and his mother were the only relatives in his house at the time, and that he went away next day with his mother to his grandmother's funeral.

10. The Judges of the Court of Appeal thought that he was - in saying that he was the only male of the house present - contradicted by another witness, Baldeo, who said that he was called by the father to the house on the day after the birth, and also thought that it would be improbable that Girdhari Lal and his mother would in the circumstances go away to his grand-mother's funeral; but there is no necessary inconsistency between the two witnesses, as the father may well have returned on the next day, and this may also explain why Girdhari Lal went away to the grandmother's funeral.

11. Baldeo, the third witness, is a Pandit. He produced an almanack and horoscope. Objection was taken to this document on the ground that it was not entered in the list of documents as required by order VII, rule 14, and it was rejected by the Subordinate Judge. This was an error. The document was not one to be relied upon as a probative document in itself, but it was a record made by the witness at the time to which he was entitled to refer for the purpose of refreshing his memory. In any case the criticism of the Judges of the Court of Appeal, that there was no horoscope was not well-founded. Baldeo also deposed to the 4th January, 1892, as the date.

12. Then there was a fourth witness, Kali Din, to whose evidence on this point no reference was made in the judgments of either Court, possibly because his principal evidence was with regard to the immoral consideration for one of the deeds of sale. But his evidence on this other point seems to have been believed, and he says that the plaintiff was born three days before the execution of the deed of sale of the 6th January, 1892, which would be the 3rd January, or only one day different from that deposed to by the other witnesses.

13. The only evidence offered on this head by the respondents is that of the principal defendant, Mahesh. He said that the plaintiff was 26 or 27 when the last deed, that of the 13th April, 1894, was executed. This was an extravagant statement. Then he reflected and said, that the plaintiff was 6 or 7, which would make the plaintiff born somewhere about 1887 and make him 24 or 25 the date of the institution of the suit, the case as made by the defendant's pleader being that he was at least 28.

14. The plaintiff also produced three doctors of repute who examined the plaintiff, one on the 9th March, 1913, and the other two on the 15th May, 1913, and thought that then he was about 21. They admitted, as might be expected, that they could not speak positively to a year or so; but as between the two cases, their evidence is of value as showing that the age attributed by the defendants to the plaintiff would not be medically probable.

15. Comment was made in the judgment of the Court of appeal on the fact that the plaintiff did not produce his father or mother; but the father who was made a defendant in the suit, and whose acts and character were impugned, was a witness rather to be called for the defendants than for the plaintiff; and no question seems to have been raised at the trial as to the absence of the mother. If any point had been made about her absence it is quite possible that an explanation might have been offered.

16. There remained one further matter upon which the Judges of the Court of Appeal commented unfavourably. The case for the plaintiff, as stated in his plaint and made by his witnesses, was that he was born on the 4th January; but his statement on oath, made at the time of the settlement of the issues, was that he was born on the 6th. Either date is equally good for his case. He could not himself know on which day he was born, and if he made some error or misstatement to this very trifling extent, it would not destroy his case. It is possible as it was suggested at the Bar, that he might usually reckon according to Hindu chronology, and may have made some mistake in transferring this into an English date.

17. Upon the whole their Lordships see no reason for differing from the finding of the Subordinate Judge in the matter and they are of opinion that the plaintiff brought his suit in time.

18. As to the first sale deed, the finding in the Court of Appeal that the plaintiff's father was separate in fact at the time of its execution and could dispose of his property as he pleased, has not been successfully impeached and this deed must anyhow stand. and as to the second and third sales their Lordships upon consideration are not disposed to disturb the findings of the Court of Appeal. The plaintiff can therefore only get these deeds set aside upon the terms of repaying the several sums which were applied to pay antecedent debts.

19. It will be the principal only of these sums that the plaintiff will have to pay as the defendants have been in possession of the estate.

20. The Subordinate Judge made a decree in favour of the plaintiff for *mesne profits*, and rightly from his point of view, because the deeds were to be unconditionally set aside. But inasmuch as in the view of the Court of Appeal, which their Lordships accept, they are only to be set aside upon payment of certain sums, the defendants must be deemed to be lawfully in possession until they are set aside, and are, therefore, not accountable for *mesne profits*.

21. Their Lordships will, therefore, humbly advise His Majesty that this appeal should be allowed, that the decree of the Court of the Judicial Commissioner of Oudh should be reversed, and that the plaintiff should have a decree setting aside the second sale and giving him possession of the 1-anna share in the village Ferozepore, which passed by that sale upon payment of Rs. 1,622; and setting aside the third sale and giving him possession of the 1-anna share which passed by it on payment of Rs. 153-12-0, and that the plaintiff should have the costs in both Courts below and of this appeal.

Appeal allowed.