PRIVY COUNCIL

Seth Lakhmi Chand

Vs.

Mt. Anandi

Privy Council Appeal No. 5 of 1925
(Viscount Dunedin, Lord Blanesburgh CJ., Sir John Edge and Mr. Ameer Ali JJ.)

15.03.1926

JUDGMENT

SIR JOHN EDGE J.

1. This is an appeal from a decree, dated the 21st November 1922, of the High Court at Allahabad, which confirmed a decree, dated the 18th July 1919, of the Subordinate Judge of Meerut by which the suit had been dismissed. The suit had been instituted in the Court of the Subordinate Judge on the 5th June, 1918, and by the plaint in it the three following declarations were claimed :

> (a) The Will, dated 5th of June, 1915, and registered on the 9th of June.1915, executed by the plaintiff and Baldeo Sahai, deceased, on account of its being against the rules of succession under the Hindu Law, is absolutely invalid and null and void, and it has no effect upon the right of survivorship of the plaintiff in respect of the estate, business, the zamindari, landed and house properties, bonds, mortgage deeds, promissory notes, money-lending business with asams on account-books, parole debts, cash, gold and silver ornaments, conveyance, householeld and estate goods and articles of convenience and comfort, etc., of all kinds, belonging to the joint Hindu family.
> (b)Defendant No. 1 now has and Defendants Nos. 2 to 5 will in future have no right of any kind in respect of the estate, business and zamindari properties, etc., given in relief A.
> (c)The plaintiff is the owner in possession of the entire estate, business and zamindari proper ties, etc., given in relief A.

2. The document in respect of which the declarations are claimed is described in the plaint as a joint Will of Baldeo Sahai and the plaintiff, Seth Lakhmi Chand, and is in

the written statement of Mt. Anandi, the first and principal defendant, described as an iqrarnama, that is an agreement.

3. The parties to the document in question were and the parties to the suit are Hindus, by caste Brahman Bohra, subject to the law of the Mitakshara of the school of Benares. The document in question was written by one Ram Chandar Sahai of Khatauli on stamped paper which had been purchased by Baldeo Sahai on the 5th June, 1915, and was signed and executed on the same day by Baldeo Sahai and his younger brother Lakhmi Chand, the plaintiff, in the presence of five men who signed the document as witnesses. It was presented for registration on the 8th June, 1915, at the office of the Sub-Registrar of Jansath, in the district of Muzaffarnagar, by Lakhmi Chand, who, having admitted in the presence of the Sub-Registrar the execution and completion of the document, it was registered on the 9th June 1915, by the Sub-Registrar.

4. Baldeo Sahai died on the 10th June 1915. He had had by a first wife, who had died before the 5th June 1915, a daughter, who was then dead and had left three minor sons who were living on the 5th June 1915, and are the Defendants 3, 4 and 5. Baldeo Sahai left surviving him his second wife, Mt. Anandi, who is the Defendant 1, and an unmarried daughter, who is Defendant 2. Baldeo Sahai had no son or other descendant of him. Lakhmi Chand had, on the 5th June 1915, five daughters living, but no on. *Baldeo Sahai and Lakhmi Chand* were on the 5th June 1915, and until the death of Lakhmi Chand on the 10th June 1915, the sole co-sharers in a joint Hindu family. Baldeo Sahai was then over 40 years of age. (Here a copy of the Will was set out.) It has been held by the Subordinate Judge and by the High Court in appeal that the document in question was a valid Will of the two brothers. Whether it could operate as such will be presently considered.

5. It is now desirable to consider what was the position on the 5th June 1915, before the document in question was executed. The property to which the suit relates was of considerable value ; it was valued for the purpose of jurisdiction, as appears by the plaint, at Rs. 1,00,000 (one lac). Baldeo Sahai was seriously ill and was not expected to recover. If he died as a member of the joint family his widow would be entitled to maintenance only, and the joint family property would vest in Lakhmi Chand by survivor ship. If it could lawfully be agreed that the widow, Mt. Anandi, should on the death of Baldeo Sahai have and enjoy an interest in a moiety of the joint property equivalent to that of the widow of a sonless and separated Hindu, she would on the death of Baldeo Sahai be entitled for life as such widow to a moiety of all the profits

of the immovable property, and to a moiety of all the profits of the movable property, which belonged to the joint family. On the 5th June 1915, Baldeo Sahai could have separated from Lakhmi Chand by one word and would have been entitled to a partition of all the joint family, and if he had separated his widow, Mt. Anandi, would on his death be entitled for her life as the widow of a sonless and separated Hindu to a Hindu widow's interest in the property, and on her death the property in which she would have a Hindu widow's interest would go to the person entitled to it on her death, who would not necessarily be Lakhmi Chand, or a descendant of him. There was some evidence that before the 5th June 1915, Baldeo Sahai was making preparation for a partition, but that need not now be considered ; for, as the fact was, Baldeo Sahai and Lakhmi Chand did not separate but remained joint until Baldeo Sahai died on the 10th June 1915. But that the risk of a partition might at any moment occur and was in the contemplation of Baldeo Sahai and Lakhmi Chand when they executed the document of the 5th June 1915, is apparent from a perusal of that document.

6. It is admitted in the plaint that Baldeo Sahai fell seriously ill and desired "that after his death the name of his widow Defendant No. 1, should be entered in respect of his share in the joint property, and that after the death of the said widow his share in the property should devolve upon his daughter and daughter's sons," and that a document to effect that object should be executed, and that the plaintiff and Baldeo Sahai jointly executed the document in question " by way of a will." Baldeo Sahai could, from a legal point of view, have no interest in the joint property after he died. His interest in the joint property terminated with his life. What was meant by " his share in the joint property was a moiety of the joint property " which he would have had on a partition. After Baldeo Sahai's death Lakhmi Chand entered the name of Mt. Anandi in the revenue papers in respect of a moiety of the zamindari property.

7. The document in question could not, however, operate as a will. In *Vital, Buttin v. Yamenamma 8 M. H. C. 6* the High Court at Madras held that a Will by a member of a joint Hindu family of his co-sharer's interest was not a valid devise. In *Lakshman Dada Naik v. Ramchandra Dada, Naik* the Board, referring to that case stated that :-

> Its, the High Court's, reasons for making dis tinction between a gift and a devise are that the co-parcener's power of alienation is founded on his right to a partition : that that right dies with him ; and that, the title of his co-sharers by survivorship vesting in them at the moment of his death, there remains nothing upon which the Will can operate.

8. It was held by the Board in *Brijraj Singh v. Sheodan Singh* arrangement

contemporaneously made and acted upon by all the parties. In the present case their Lordships hold that the document of the 5th June 1915, is good evidence of a mutual agreement by Baldeo Sahai and Lakhmi Chand. What interest Mt. Anandi took under that mutual agreement is the only question which their Lordships need consider.

9. It is well established law that a co-sharer in a Mitakshara joint family, without having obtained partition can with the consent of all his co-sharers mortgage or charge the share to which he would be entitled on a partition of the joint family property, but the consent of all the co-sharers must be obtained, and, as pointed out by Sir John Wallis C. J., in *Sub-barama Reddi v. Ramamma* a father who is a co-sharer with a minor son cannot give such a consent for his minor son.

10. Their Lordships have come to the conclusion that the right of a co-sharer in a Mitakshara joint family property, who has obtained the consent of his co-sharers to charge his undivided share for his own separate purposes has long been recognised.

11. In 1869 in *Sadabhart Prasad Sahu v. Foolbash Koer* which related to a Hindu joint family governed by the law of the Mitakshara, Sir Barnes Peacock, C. J., in delivering the judgment of a Full Bench of the Calcutta High Court consisting of himself and, Kemp, L. S. Jackson, Macpherson and Glover, JJ., held that a member of a joint Hindu family had no authority, without the consent of his co-sharers to mortgage his undivided share in a portion of the joint property, in order to raise money on his account and not for the benefit of the joint family. That implies that with the consent of all his co-sharers a member of a Hindu joint family can grant for his own purposes a valid mortgage of so much of the joint family property as would not exceed his share on partition. That principle that a member of a joint Hindu family can, with the consent of his co-sharers, charge for his own purposes the share in the joint family property which would come to him on a partition has been recognised by the Board in *Baijnath Prasad Singh v. Tej Bali Singh* and cannot now be questioned as a principle of Hindu law. It appears to their Lordships that the same principle of the effect of the consent by the co-sharer applies in the present case and that Baldeo Sahai and Lakhmi Chand were competent to agree and did agree that Mt. Anandi should, on the death of Baldeo Singh, have and enjoy for her life an interest in a moiety of the joint property equivalent to the interest which the widow of a sonless and separated Hindu widow would have in her deceased husband's estate and that the interest which she obtained by the mutual agreement of Baldeo Sahai and Lakhmi Chand should continue for her benefit for her life, notwithstanding the birth, if it should happen, of "male issue" to Lakhmi Chand.

12. Their Lordships will humbly advise His Majesty that plaintiff is not entitled to any of the declarations claimed in the plaint, that the appeal should be dis missed with costs, and that the right of the person or persons who may claim to succeed the defendant Mt. Anandi on her death must be determined, if dis puted, when the occasion arises, and not in this suit.

Appeal dismissed.

Cases Referred.

[1915] 22 C. L. J. 380 [1921] 45 Bom. 718 : 48 I. A. 181 (P. C.).

[1920] 43 Mad. 824 : 12 L. W. 249 : (1920) M. W. N. 529,

[1869] 3 B. L. R. 31 : 12 W. R. 1 (F. B.),

[1921] 43 All 228 : 48 I. A. 195 (P. C.),