SUPREME COURT OF INDIA

Kura

Vs.

Jag Ram

C.A.No.1 of 1953

(B. K. Mukherjea, Vivian Bose and N. H. Bhagwati, JJ.)

14.10.1953

JUDGEMENT

BOSE, J.:

1. This is a suit brought by a son to set aside an alienation made by his father more than thirty-nine years before the suit. The alienation was on 5-9-1907 and the suit was filed on 26-11-1946.

2. The alienor is Harnama. He died leaving two sons Kura and Sawan. Kura is the plaintiff. Sawan was joined as a pro-forma defendant but was transposed as a plaintiff in the first appellate court and was given a decree there along with his brother Kura. This decree was set aside by the Union High Court at Patiala. The plaintiffs appeal.

3. Before we go further we may say at once that it was conceded that Sawan who was transposed as a plaintiff can in no event be given a decree. Any rights he had in this property are long time barred and they cannot revive simply because his brother, who was under a personal disability, was enabled to sue after the normal period of limitation had expired. The plaintiff Kura was on military service and as such obtained an extended period of limitation. That is not disputed. But the privileged is a personal one and his brother cannot take advantage of it. Therefore, the suit must fail against Sawan's half share in any event. In view of this, it will be convenient to refer to Kura as the plaintiff and ignore Sawan's transposition.

4. The plaintiffs case is that property in suit was his father's ancestral property and that it was alienated without legal necessity. The Hindu law does not apply and under the customary law which applies in this case the plaintiff can only succeed if he can prove that the property was ancestral.

5. The first court held that there was nothing to show that the property in suit was ancestral. It therefore dismissed the plaintiffs suit. In appeal the learned District Judge reversed the first court's finding regarding the nature of the property. He held it was ancestral and so he transposed Sawan as a plaintiff and gave both the brothers a decree for the entire property in suit.

6. On second appeal the Union High Court at Patiala reversed the appellate court's decree and, agreeing with the first court regarding the nature of the property, dismissed the plaintiff's suit. As S. 100, Civil P. C. does not apply the High Court was entitled to go into the facts in second appeal. The learned Judges did not decide the question of legal necessity which was also raised nor did they decide whether the plaintiff was in existence at the time of the alienation in suit.

7. The only proof the plaintiff has produced to show that the property was ancestral is the following: First, there is a Kafat Delhi, Ex. PB, prepared at the Settlement of 1904-06. This document traces the history of the village from what it calls "ancient times" and carries us back well beyond 1803-04. But at the date the document was drawn up, namely some time in the year 1904-06 all the members of the plaintiffs branch of the family, except the plaintiff himself, were dead.

8. The village in which the plaint lands are situate is now known as Kukar Majra. In the "ancient times' spoken of in this document, another village known as Balaspur existed near the site of the present village. But Balaspur became uninhabited and the area around it fell waste. Some time after two families settled on this land and reclaimed it. One of these families (called family No. 2 in the document) was the plaintiffs. It was then headed by Sahib Rai who is shown in the family tree set out in Ex.-PC which is also one of the settlement papers of those years (1904-06).The other family called family No. 1 was headed by one Dianat Rai with whom we are not concerned. Not long after, they were joined by families 3 to 7 and later an 8th family also came on the scene.

9. Some time previous to 1803-04 these families divided the village they had thus founded into two Pattis, Dhariwal and Ujjala. According to Ex. PB the division was half and half. The plaintiffs family obtained a share in Dhariwal but what the extent of that share was when the village was divided we do not know. All we know is that about the year 1803-04 this new village now consisting of two Pattis was divided up between these eight families. We also know that the name given to the new village was Kukar Majra.

10. The plaint lands consist of 54 bighas 11 biswas and are situate in the village Kukar Majra. There is no direct evidence to show that they are situate in the Dhariwal Patti but that was the assumption on which the case was argued and we will assume for the purposes of this case that that is so. Therefore, all that this document shows is that one of the plaintiffs ancestors, five generations back, helped to found the village Kukar Majra and that he had a share in the Dhariwal Patti and presumably had some land in it. What the extent of his share was we do not know from this document nor do we know what lands Sahib Rai held nor their extent.

11. The next document, Ex. PC, speaks from the year 1904-06 (more than hundred years later). It sets out Sahib Rai's pedigree and gives us the position of his descendants in the years 1904-06. From the pedigree we find that Sahib Rai had four sons (1) Marika, (2) Amar Singh, (3) Sardoola and (4) Kaur Singh. We also find that the descendants of these four sons owned 2/3 of the Patti Dhariwal between them in those years.

12. Amar Singh appears to have died without issue and it seems that he had a share while alive because the document tells us that his share did not descend in the ordinary way (1/3 to each of the other three branches of the family) but that it was divided half and half between Sardoola and Kaur. The third brother Marika got nothing.

13. The document then goes on to set out the shares of each branch in this Patti (Dhariwal) and the extent of the land possessed by each. They are as follows:

	Share in the Patti Dhariwal	Extent of Land
1st Branches (Marika's)	1/6	121 bighas 17 biswas

(The plaintiff's father Harnama was the only member of that branch then alive.)

2nd Branch (Sarjoola's) 1/8+1/8=1/4 101 bighas 9 biswas

99 ... 15 biswas

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201 bighas 4 biswas

3rd Branch (Kanur Singh's) 1/24+1/12+1/8=1/4 35 bighas 1 biswas

68 ... 13 ...

107 ...

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210 bighas 14 biswas

Amar Singh's branch, as we have already said, was by then extinct. The total land appertaining to the 2/3 share thus comes to 533 bighas 15 biswas.

14. This is all the evidence on this point and both sides seek to draw opposite conclusions from it. The plaintiff puts his case thus. He says that these documents show (1) that his ancestor Sahib Rai founded the village and later, when it was divided into Pattis, was given a share in the Dhariwal Patti: (2) that the years 1904-06 the plaintiffs family is shown to have had a 2/3 share between them in this Patti with 533 bighas 15 biswas appertaining to it. Therefore, this 2/3 share and the land must have descended from Sahib Rai. Consequently the 1/6 share which the plaintiff's father had in 1904-06 must be a part of the 533 bighas 15 biswas; and (3) that the 54 bighas 11 biswas which were alienated must be part of the 121 bighas 17 biswas. Therefore, the property which was alienated was ancestral in Harnama's hands.

15. The plaintiff reinforces his contention regarding the descent of the 2/3 share by pointing out that Amar Singh is shown to have had a share, so the plaintiff could only have obtained 1/6 in the whole Patti (that is 1/4 of 2/3) if the entire 2/3 had come from Sahib Rai. The shares later found in the other two branches confirm this because Amar Singh's 1/6 share went to the other two branches to the exclusion of the plaintiff's and thus augmented their shares by 1/12 each and thus increased their shares form 1/6 to 1/4 which is exactly the state of things disclosed in 1904-06.

16. The defendant contests this and says there is a big assumption at each step. In the first place, no one knows the extent of Sahib Rai's share and simply because the family as a whole is found to have possessed a 2/3 share in 1904-06 it does not follow that that was the extent of Sahib Rai's share a

hundred years earlier and that there were no subsequent acquisitions. Secondly, the mere fact that a family is found to have 533 bighas 15 biswas in 1904-06 is no guarantee that their remote ancestor had exactly the same lands a hundred years earlier and that none of it is a later acquisition.

17. The defendant reinforces his arguments by showing from these documents that the property has not descended as it would have had it been ancestral property coming down from Sahib Rai. It is true the plaintiffs father had 1/6 which would have been his share if Amar Singh's died branch was still in existence but as Amar Singh without issue the plaintiffs father should have obtained a 1/3 in Amar Singh's 1/6. Instead of that the plaintiffs branch got nothing and Amar Singh 1/6 was divided up half and half between the other two branches bringing their shares up to 1/4 each (that is 1/6 plus 1/12).

18. Next the defendant draws attention to the disparity in the extent of their holdings. The family as a whole had 533 bighas 15 biswas. If the whole of this came down room Sahib Rai the plaintiffs 1/4 share in it would have been 133 bighas 9 biswas. That is to say, the plaintiffs father has 11 bighas 12 biswas less than he should.

19. The other two branches should each have 3/8 of the 533 bighas 15 biwas (that is, 1/4 of their own plus 1/8 from Amar Singh). This comes to 200 bighas 4 biswas. Instead, they are found to have 201 bighas 4 biswas and 210 bighas 14 biswas respectively.

20. Now it is true that if we accept the premises on which the plaintiffs arguments are founded, namely that Sahib Rai had a 2/3 share in the Dhariwal Patti and that the lands now in the possession of the family appertained to that 2/3 share and were held by Sahib Rai, then the disparity which now appears could be explained on the basis of inequality in the quality of the land and so forth because the differences are not glaring once it is accepted that. Amar Singh's share was by mutual consent divided up among the other two branches of the family. But we agree with the High Court that there is no justification for such assumptions.

21. In the first place, there were eight families in this village. If Sahib Rai was given a 2/3 share in half the village, that is 1/3 in the whole, his share would appear to be disproportionate. Of course that could have been the case. He could have been given such a disproportionately large share for a number of reasons but we are not justified in assuming that that did in fact occur.

22. In the next place, the Kafait Dehi (Ex. PB) states that

"Under the aforementioned circumstances the pattidari form of the village 'is imperfect'."

Then a note adds-

"But in the scheme of collecting 'Bachh' the form of the village has been held to be one of 'Bhaia Chara' and the share of tenure as entered in the pedigree table 'represents now only the shares in shamlat".

We were told in argument that Bhaia Chara means that the village is not held in shares but that each person is considered to be the owner of whatever land he happens to have in his possession. The note shows that the shares shown in Ex. PC only relate to the portion held jointly and have no relation to the other lands exclusively occupied by them.

In the circumstances we cannot assume that the lands now found in the family's possession were the

very lands held by Sahib Rai by simply correlating them to the shares shown against each branch in the shamlat lands, and as the extent of the lands is in fact unequal when correlated to these shares no presumption in favour of its ancestral character can be drawn. It is impossible to conclude with any reasonable degree of certainty that there was no change in the course of a hundred years and that portions of the land shown to have been in the plaintiffs possession in 1904-06 were not subsequent acquisitions made by Harnama himself. The documents Exs. PC and PM do not, in our opinion, carry the case any further one way or the other.

23. The burden of proof is on the plaintiff and their Lordships of the Privy Council have twice held that in the Punjab

"to establish the ancestral character of land it is not sufficient to show that the name of the common ancestor from whom the parties are descended was mentioned in the revenue pedigree. It should also be proved that descendants of the common ancestor held the land in ancestral shares and that the land occupied, at the time of the dispute, by the proprietors thereof had devolved upon them by inheritance." --- Mt. Subani v. Nawab', AIR 1941 PC 21 at p. 23 (A); --- 'Imam Din v. Said Bibi', AIR 1949 PC 87 at p. 89 (B).

We agree with the High Court that the plaintiff has not succeeded in discharging the burden so laid down.

24.The appeal fails and is dismissed with costs.

Appeal dismissed.

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