Gopal Singh and Others

Vs

Ujagar Singh and Others

Civil Appeal No. 174 of 1952

(B.K. Mukherjea, Vivian Bose, Ghulam Hasan, T.L. Venkatarama Ayyar JJ)

02.04.1954

JUDGMENT

BOSE J. -

The plaintiffs appeal. They claim to be the presumptive reversioners to one Harnam Singh who owned the property in dispute. On 2nd November, 1944, after Harnam Singh's death, his daughter Mst. Biro, the second defendant, gifted the plaint properties to her sons who have been grouped together as the first defendant. The plaintiffs contend that the property is ancestral and that the daughter got only a life estate, so they sue for a declaration that the gift will not affect their reversionary rights.

The defendants rely on custom. They state that, according to the customary law which governs the parties, collaterals beyond the fifth degree are not heirs in the presence of a daughter and her line. The plaintiffs, they say, are collaterals of the seventh degree, therefore they cannot displace the daughter. They also state that the property was not ancestral and so the plaintiffs cannot challenge the daughter's alienation. The third line of defence related to a portion of the property which is not in dispute before us.

The property in suit consisted of three items :

(1) 253 bighas of Khas land;

(2) a half share in 3 bighas 19 biswas; and

(3) a share in certain shamlat property.

The defendants say that Harnam Singh gifted 123 bighas of the Khas land to the second defendant : that the gift was absolute and so the plaintiffs cannot get that portion of the property in any event.

The trial Judge held, on the admission of the plaintiff's counsel, that the land in dispute was non-ancestral and that the daughter's sons would succeed after her to the exclusion of the plaintiffs, therefore the gift by her to her sons amounted to an acceleration of the estate. The learned Judge dismissed the plaintiffs' suit.

On appeal to the lower appellate Court, the finding that the property was non-ancestral was upheld as the plaintiffs' learned counsel in that Court did not contest the finding of the first Court on this point. As regards the acceleration, the learned Judge though it necessary to examine a point which the plaintiffs had raised in the trial Court but which was ignored there, namely that a house was not

included in the gift. Therefore it was argued that as the whole of the estate was not passed on to the next heir there was no acceleration. The learned Judge took evidence on this point and held that the house was not included and so found against the defendants. Accordingly he decreed the plaintiff's claim for this part of the estate.

In the High Court the learned Judges upheld the concurrent finding about the non-ancestral nature of the property. Before them also the point was conceded by the plaintiffs' counsel. They also held that the house was not included in the gift but held that it was such a small part of the estate that the daughter's retention of it could not indicate an intention on her part not to efface herself from the estate. They also held in the plaintiffs' favour that they were collaterals in the fifth degree and not the seventh but held that as the property was non-ancestral the daughter's sons were the nearest heirs, so the gift accelerated the estate and vested it in the donees despite the exclusion of the house. Accordingly, they reversed the decree of the lower appellate Court and restored that of the learned trial Judge.

Before us, the plaintiffs' learned counsel tried to reopen the concurrent finding of the three Courts about the non-ancestral nature of the property but we did not allow him to do so. The question is a mixed question of law and fact and the admission involved both. We were not shown how the facts admitted could be disentangled from the law so that we could determine whether the conclusion of law drawn from the admitted facts was wrong. The learned trial Judge said that the admission was made because of a previous decision in a former suit between the same parties or their predecessors. Harnam Singh had mortgaged a part of his estate and placed the mortgagees in possession. When he died some of his collaterals took possession of the unencumbered portion of the estate. The daughter Mst. Biro therefore instituted two suits, one for possession against the collaterals including the present plaintiffs or their predecessors, and the other for a declaration against the mortgagees in possession. In this she also joined the same set of collaterals. Mst. Biro succeeded on the ground that the property was non-ancestral. These findings are obviously res judicata and if the plaintiffs' learned counsel had not conceded the point the question would at once have been raised and the previous judgments, which were exhibited (Exhibits DD and DF) would have concluded the matter. But as the point was conceded in all three Courts it was not necessary for the defendants to fall back on the previous decisions. It must therefore be accepted here that the whole of the land in dispute was non-ancestral.

That brings us to the question of heirship. Paragraph 23(2) of Rattigan's Digest to Customary Law says that -

> "In regard to the acquired property of her father, the daughter is preferred to the collaterals."

That is not disputed but what the plaintiffs contend is that she only succeeds as a limited heir and that after her the reversion will go to the father's heirs in the usual way. But that is not the Punjab custom among the tribe to which the parties belong, namely agricultural Jats. Rattigan quotes the following passage from page 61 of Roe and Rattigan's Tribal Law of the Punjab at page 411 of the 13th edition of his Digest :

> "Where a succession of a married daughter is allowed, the general principle is that the she succeeds not as an ordinary heir, but merely as the means of passing on

> the property to another male, whose descent from her father in the female line is allowed under exceptional circumstances to count as if it were descent in the male line. She will indeed continue to hold the land in her own name, even after the birth of sons and their attaining majority, for her won life but she has no more power over it than a widow would have. If she has sons, the estate will of course descend to them and their lineal male issue, in the usual way. But if she has no sons, or if their male issue fail, the land will revert, except in some special instances where her husband is allowed to hold for his life, to her father's agnates, just as it would have done if no exception to the general rule of agnatic succession had ever been in her favour."

This is supported by at least two decisions from the Punjab. In Lehna v. Mst. Thakri (32 Punjab Record 1895) two learned Judges of the Punjab Chief Court (the third dissenting) said in the course of a Full Bench decision that even in the case of ancestral property the daughter's sons and their descendants would exclude collaterals of the father. In a more recent case (1953) the Punjab High Court held in Lal Singh v. Roor Singh (55 Punjab Law Reporter 168 at 172) that in the case of non-ancestral property the daughters are preferred to collaterals.

We were told that this rule only applies when the daughter succeeds and has no application when she predeceases her father. We say nothing about this because the case before us is one in which the daughter did succeed and all the authorities produced before us indicate that in that event her sons will exclude the collaterals. We were not shown any decision which has taken a contrary view. We are only concerned with non-ancestral property here and express no opinion about what would happen in the case of ancestral property, though the observations of two the learned Judges in the Full Bench of the Punjab Chief Court to which we have referred carry the rule over to ancestral property as well.

The learned counsel for the plaintiffs relies on paragraph 64 of Rattigan's Digest where it is stated that except in two cases which do not apply here, no female in possession of property from, among others, her father can permanently alienate it. But we are not concerned with an alienation here. The gift to the sons may or may not be good after Mst. Biro's death as a gift. The question is whether there was an acceleration. If there was, the from it took would not matter.

We turn, next, to the question of surrender and the only question there is whether the retention by Mst. Biro of the house would prevent an acceleration of the estate. The extent of the property covered by the gift is over 235 bighas. She had an absolute right to gift 123 bighas of this and so the only portion to which the doctrine of surrender would apply would be the remaining 130 odd bighas. But the fact that she gave away all her property to her sons, bar this house, including property to which she had an absolute right, is relevant to show that her intention was to efface herself completely. Now as regards this house, Garja Singh (P.W. 1) gives us this description of it :

> "The distance between the door of the Sabbat and that of Darwaja is only about two karams." (eleven feet). "Opposite to Darwaja there is one Jhallani the door of which opens into the Sabbat and not in the courtyard. Except Darwaja, Sabbat and Jhallani there is no other roofed portion in their house. There is only one compound for the cattle."

In this tiny dwelling live not only Mst. Biro but also her three sons. It forms, as the High Court held, a very small part of the whole property. The retention of this, particularly in these circumstances when the sons already live there with her, would not invalidate the surrender. The law about this has

been correctly set out in Mulla's Hindu Law, 11th edition, page 217, in the following terms :

> "But the omission, due to ignorance or to oversight, of a small portion of the whole property does not affect the validity of the surrender when it is otherwise bona fide."

The present case is, in our opinion, covered by that rule. We agree with the High Court that the gift operated to accelerate the succession. That being the case, the plaintiffs are no longer the reversioners even if they would otherwise have been entitled to succeed on failure of the daughter's sons and their line. We need not decide whether the plaintiffs, as collaterals in the fifth degree, would be heirs at all.

The appeal fails and is dismissed with costs.

Appeal dismissed.

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