

Giani Ram and Others

Vs

Ramjilal and Others

Civil Appeal No. 438 of 1966

(J. C. Shah, A. N. Grover JJ)

11.03.1959

JUDGMENT

SHAH, J. -

1. In 1916 Jawala-a Hindu Jat-governed by the customary law of the Punjab sold to one Shadi, without legal necessity, a fourth share in 891 bighas 3 biswas, which was ancestral in his hands. Giani Ram son of Jwala instituted Suit No. 75 of 1920 in the Court of the Senior Subordinate Judge, Hissar, for a declaration that the sale of ancestral lands of Jwala in favour of Shadi was null and void and was ineffective against his reversionary rights. The suit was decreed by the Senior Subordinate Judge, Hissar. The effect of the declaratory decree was that the alienations could not enure beyond the life time of Jwala.

2. Jwala died on October 16, 1959, leaving his surviving three sons - Giani Ram, Manphool and Chandgi - his wife Rajni, and two daughters Phulwanti and Chhanno. Under the Hindu Succession Act, 1956, which came into force on June 17, 1956, the estate of Jwala devolved upon widow, his sons and his daughters in equal shares. In an action filed by the three sons of Jwala and his daughters in equal shares. In an action filed by the three sons of Jwala, his daughters and widow against the legal representative of Shadi for a decree for possession of the lands alienated by Jwala the Senior Subordinate Judge, Hissar decreed the suit for a half share in the property claimed by the plaintiffs. The learned Judge was of the view that only the sons of Jwala could claim the benefit of the decree in Suit No. 75 of 1920 and since their share in the estate of Jwala was in the aggregate only a half the remaining half having devolved upon the widow and the two daughters, a decree for a half share in the lands alienated could issue against the alieness.

3. In appeal by the plaintiffs to the District Court, Hissar, the decree was modified. The learned District Judge decreed the claim in its entirety, but only in favour of the three sons. In this view the sons were entitled to the ancestral property alienated by Jwala and the widow and the two daughters had no interest therein - the provisions of the Hindu Succession Act notwithstanding. Against that decree a second appeal was preferred by the heirs of Shadi. The High Court of Punjab set aside the decree passed by the District Court and restored the decree of the Trial Court. In the view of the High Court, under the Hindu Succession Act, 1956, the two daughters and widow of Jwala could inherit a share in the estate of Jwala, but since by Section 8 of the Punjab Custom (Power to contest) Act 1 of 1920, only those persons could take the benefit of the declaratory decree obtained by one of the reversioners who could contest the alienation by the vendor, and it was a "settled rule of custom that a female heir cannot contest the sale" by a male owner, a half share in the estate of Jwala which devolved upon the sons could be claimed by them, and the widow and the daughters could not obtain benefit of the decree. The High Court also held that the suit filed by the

widow and the two daughters had been dismissed by the Trial Court and the District Court and as they had not filed an appeal in the High Court or even cross objections, the order of dismissal qua them had become final, and no decree could be passed in their favour for possession of any part of the estate. With special leave the appellants have appealed to this Court.

4. A preliminary objection raised by counsel for the respondents that the suit in its entirety should have been dismissed, because by the enactment of the Hindu Succession Act Jwala was to be deemed a full owner and notwithstanding the decree passed in Suit No. 75 of 1920, his sons had after that Act no subsisting reversionary interest in the property, must stand rejected. The High Court has granted a decree in favour of the three sons for a half share in the property, and the decree is not challenged in an appeal by the respondents cannot now be permitted to challenge that part of the decree. In any event there is nothing in the Hindu Succession Act which retrospectively enlarges the power of a holder of ancestral land or nullifies a decree passed before the Act.

5. The Punjab Customs (Power to Contest) Act 1 of 1920, was enacted to restrict the rights exercisable by members of the family to contest alienations made by a holder of ancestral property. By virtue of Section 6 of the Act no person is entitled to contest an alienation of ancestral immovable property unless he is descended in the male line from the great-great-grandfather of the alioner. Under the customary law in force in the Punjab a declaratory decree obtained by the reversionary heir in an action to set aside the alienation of ancestral property enured in favour of all persons who ultimately took the estate on the death of the alienor for the object of a declaratory suit filed by a reversionary heir impeaching an alienation of ancestral estate was to remove a common apprehended injury, in the interest of the reversioners. The decree did not make the alienation a nullity - it removed the obstacle to the right of the reversioner entitled to succeed when the succession opened. By the decree passed in Suit No. 75 of 1920, filed by Giani Ram it was declared that the alination by Jwala were not binding after his life time, and the property will revert to his estate. It is true that under the customary law the wife and the daughters of a holder of ancestral property could not sue to obtain a declaration that the alienation of ancestral property will not bind the reversioners after the death of the alienor. But a declaratory decree obtained in a suit instituted by a reversioner competent to sue has the effect of restoring the property alienated to the estate of the alienor.

6. The effect of the declaratory decree in Suit No. 75 of 1920, was merely to declare that by the sale interest conveyed in favour of the alienee was to enure during the life time of the alienor. The conclusion is therefore inevitable that the property alienated revered to the estate of Jwala at the point of his death and all persons who would, but for the alienation, have taken the estate will be entitled to inherit the same. If Jwala had died before the Hindu Succession Act, 1956, was enacted the three sons would have taken the estate to the exclusion of the widow and the two daughters. After the enactment of the Hindu Succession Act the estate devolved, by virtue of Section 2 and 4(1) of Hindu Succession Act, 1956, upon the three sons, the widow and the two daughters. We are unable to agree with the High Court that because in the year 1920, the wife and the daughters of Jwala were incompetent to challenge the alienation of ancestral property by Jwala, they could not, after the enactment of the Hindu Succession Act, inherit his estate when succession opened after that Act came into force.

7. The second ground on which the learned Judge has founded his judgment also does not appeal to us. The three sons, the two daughters and the widow of Jwala had filed the suit claiming possession of the entire property from the alienee. That suit was decree by the Trial Court in favour of the sons only to the extent of a half share in the property alienated. The Court held that the widow and the

daughters were not entitled to a share because "only those persons can bring a suit for possession on the death of Jwala who had the right to challenge the alienation made by Jwala". In appeal the District Court granted a decree for possession of the entire property on the view that the alienee had no subsisting interest after the death of Jwala. But District Court granted a decree for possession of the entire property alienated only in favour of the three sons, because in the view of the Court the daughters and the widow of Jwala were not entitled to any share in the property. According to the High Court if the widow and the daughters were entitled to the share in the property they had disentitled themselves to that right, because they had not preferred an appeal or filed cross objections to the decree appealed from. The sons, daughters and widow of Jwala filed a suit for a decree for possession of the entire property and their primary claim was that the alienee had no subsisting interest. The District Court accepted that claim and granted a decree in favour of the three sons for the entire property which was alienated. If the alienees are unable to convince the Court that they had any subsisting interest in the property in dispute after the death of Jwala the Court will be competent to adjust the rights between the sons, the daughters and the widow of Jwala in that property.

8. Order XLI, Rule 33 of the Code of Civil Procedure was enacted to meet a situation of the nature arising in this case. In so far as it is material, the rule provides :

The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection".

The expression "which ought to have been passed", means "which ought in law to have been passed". If the Appellate Court is of the view that any decree which ought in law to have been passed, but was in the fact not passed by the subordinate court, it may pass or make such further or other decree or order as the justice of the case may require.

9. If the claim of the respondents to retain any part of the property after the death of Jwala is negatived, it would, be perpetrating grave injustice to deny to the widow and the two daughters their share in property to which they are in law entitled. In our view, the case was one in which the power under Order XLI, Rule 33, Code of Civil Procedure ought to have been exercised and the claim not only of the three sons but also of the widow and the two daughters ought to have been decreed.

10. The appeal is allowed and the decree passed by the High Court is modified. There will be a decree for possession of the lands in suit in favour of the three sons, the widow and the two daughters of Jwala. The interest of the three sons is one-half in the lands in suit and the interest of the widow and the two daughters is the other half in the lands. The plaintiffs will be entitled to mesne profits from the date of the suit under Order XX, Rule 12, Code of Civil Procedure. The appeal will be allowed with costs throughout.

</html