

SUPREME COURT OF INDIA

Bhagat Singh

Vs.

Jaswant Singh

C.A.No.352 of 1957

(K. Subba Rao and Raghubar Dayal, JJ.)

08.03.1961

JUDGEMENT

RAGHUBAR DAYAL, J.:

1. This appeal, by special leave, is by the defendants against the decree in a suit instituted by the respondent for recovery of possession over certain plots of land. The plaintiff-respondent alleged that the plots were owned and possessed by Kartar Singh who had adopted the respondent about two years before his death. The defendants, it is alleged, got mutation made over the land in suit collusively with the revenue officials and secured possession over them by successfully inducing the tenants to pay rent to them.

2. The defendants accepted the allegation that Karatar Singh owned and possessed the land in suit and further alleged:

"Kartar Singh deceased never adopted the plaintiff as his son; nor is this admitted that the plaintiff was the sister's son of Karatar Singh; nor yet was he ever taken in the lap in the presence of the Baradri; nor were any ceremonies of adoption performed; nor could the plaintiff according to the Riway-i-am of District Jullundur or Riway-i-am if Punjab State be adopted as son; and nor did Karatar Singh deceased ever treat him as his son."

On these pleadings the trial Court framed the following issues:

(i) Was the plaintiff validly adopted by Karatar Singh deceased and when?

(ii) Is the land in suit ancestral qua the plaintiff?

(iii) Relief?

The Senior Sub-Judge dismissed the suit holding that no adoption of the plaintiff had taken place and that even if it had taken place, it was opposed to the general as well as the custom of Jullundur District. He did not decide the second issue in view of his finding on the first issue.

3. On appeal, the District Judge held that the plaintiff had been adopted as a son and appointed as an heir by Kartar Singh. He did not consider it necessary to decide whether the adoption was valid, as the properties left by Karatar Singh were not alleged to be ancestral and consequently the defendants had no right to contest any alienation or any appointment of an heir to such property in

view of the provisions of S. 7 of The Punjab Custom (Power to Contest) Act, 1920 (Punjab Act II of 1920), hereinafter called the Act, which reads:

"Notwithstanding anything to the contrary contained in S. 5, Punjab Laws Act, 1872, no person shall contest any alienation of non-ancestral immoveable property or any appointment of an heir to such property on the ground that such alienation or appointment is contrary to custom."

He accordingly allowed the appeal and decreed the suit for possession.

4. The appellants then went in second appeal to the High Court of Punjab. The appeal was dismissed. It was observed in the judgments:

"The pleadings of the parties are so confused that it is impossible to find out that the defendants were either claiming that they were within five degrees of the common ancestor or that they were claiming that the land was ancestral, and in a case such as this where no specific plea has been taken as to the ancestral nature of the property it cannot be said that that issue arose on the pleadings."

It is against this order that this appeal has been preferred by the defendants.

5. The learned counsel for the appellants has submitted that the contention of the defendants in the written statement to the effect that the plaintiff could not be adopted as son according to the *Riwaj-i-am* of District Jullundur or *Riwaj-i-am* of Punjab State, should be taken to be a plea requisite to meet the requirements of S. 6 of the Act, and especially in view of the facts that the Court framed two issues about the validity of the adoption and about the land in suit being ancestral in the presence of the plaintiff's counsel and that the parties did lead evidence with respect to the custom and with respect to the land in suit being ancestral. He relies on the decision in *Motabhoy Mulla Essabhoy v. Mulji Haridas*, ILR 39 Bom 399: (AIR 1915 PC 2).

6. Section 6 of the Act reads:

"Subject to the provisions contained in S. 4 and notwithstanding anything to the contrary contained in S. 5, Punjab Laws Act, 1872, no person shall contest any alienation of ancestral immoveable property or any appointment of an heir to such property on the ground that such alienation or appointment is contrary to custom unless such person is descended in male lineal descent from the great-great-grand-father of the person making the alienation or appointment."

It is necessary that a person objecting to the validity of the appointment of an heir to the property on the ground of custom must plead and prove that the land in suit is ancestral and that he comes within five degrees of the common ancestor. The mere fact that the defendants contended in the written statement that the plaintiff could not be adopted according to the custom does not tantamount to making the requisite pleas and, therefore, the view taken by both the District Judge and the High Court cannot be said to be wrong. In fact, this view is in accordance with the provisions of R. 1 of O. XIV, C. P. C., and what was held by the Judicial Committee in *Siddik Mahomed Shah v. Mt. Saran*, AIR 1930 PC 57 (1).

7. It may further be observed that the appellants did not, in their written statements, state what the custom was and why the adoption of the plaintiff was against that custom. No issue was framed with respect to the specific custom which could invalidate the adoption of the plaintiff. The mere fact that the issues as framed did involve the consideration of the validity of the adoption and the ancestral nature of the land in suit will not clothe the vague allegation in the written statement with the

definiteness of the requisite pleadings and will not make it incumbent on the parties to lead evidence for or against the existence of a certain custom and the plaintiff's case not coming within it. It is significant that the appellants did not, even on the respondent's taking objections in the memorandum of appeal to the District Judge to the effect that "there being even no allegation in the written statement of the defendants that the suit property was ancestral qua them and there being no finding either that the property was in fact ancestral the trial Court erred in going into the question of the validity of the adoption", apply for an amendment of the pleadings. They could have done so, and if their application had been allowed, the plaintiff would have been able to plead more precisely in reply to the defendants' contention and could have, if necessary, led further evidence in support of his case. It is true that evidence was led by the parties both about the custom and about the ancestral nature of the land in suit. But, in view of the absence of any specific issue about the custom, it is possible that adequate evidence bearing on the question might not have been led

8. The case reported as ILR 39 Bom 399: (AIR 1915 PC 2) (supra) is distinguishable on facts. The Judicial Committee interpreted the defendant's pleading in a form in which it could be legally raised instead of in a form in which the defendant could not have raised it. The necessary facts had been mentioned and evidence had been led with respect to them. It was in this setting that it was observed at p. 408 (of ILR Bom): (at pp. 3-4 of AIR):

"Their Lordships have felt that it would not be satisfactory to decide against the defendant on a view which might have been obviated by a mere amendment of the pleadings, and that in a case where the parties had been allowed to go to proof. They have, therefore, felt themselves entitled to consider the evidence led."

9. The case more to the point is the Privy Council case relied on by the Courts below, viz., AIR 1930 PC 57 (1), where it was held that "where a claim has been never made in the defence presented no amount of evidence can be looked into upon a plea which was never put forward".

10. We, therefore, are of opinion that there is no force, in this appeal. We accordingly dismiss the same with costs.

Appeal dismissed.