Harihar Prasad Singh and Others

Vs

Balmiki Prasad Singh and Others

Civil Appeals Nos. 760-762 of 1967

(A. lagiriswmi, M. H. Beg, V. R. Krishna Iyer JJ)

10.12.1974

JUDGMENT

ALAGIRISWAMI, J. -

1. In the year 1872 one Ramdhan Singh, a Bhumidhar Brahmin, of village Barhiya in Bihar died leaving behind two widows, Mst. Manrup Kumari and Pari Kumari, and about 1700 bighas of land. Manrup Kumari died in 1923 and Pari Kumari in 1933. Even while Pari Kumari was alive her brother Sunder Singh seems to have been managing the estate on her behalf. Shortly before her death he managed to get from her a deed of release in favour of two persons, Gaya Singh and Falgu Singh, alleged to be the sons of Ramdhan Singh's daughter, Jayanti Kumari. In spite of the objections by persons who claimed to be the nearest reversioners of Ramdhan Singh's estate, the lands were recorded in their names in the land revenue proceedings. This led to a number of proceedings both civil and criminal. Ultimately the reversioners, who are now the respondents in these appeals, filed five suits, T. S. Nos. 53 and 61 of 1934 and 20, 29 and 41 of 1935 for possession of estate. In 1936 another suit, T.S. No. 37 of 1936 was filed by the present plaintiffs Nos. 8 to 12, 15, 16 and 18 to 21 and Nunu Babu Singh, uncle of the eleventh plaintiff. In that suit also Gaya Singh and Falgu Singh were defendants. In addition, the plaintiffs in T.S. No. 53 of 1934 and certain others were added as defendants. The plaintiffs in that suit claimed to be the nearest reversioners to the estate of Ramdhan Singh and also that there was a custom prevalent in the family for a long time that more distant heirs than the Shastric heirs of a person also joined the latter in succeeding to the properties left behind by him. They wanted to be held as the nearest reversioners to Ramdhan Singh's estate and thus entitled to the properties left by Pari Kumari. That suit failed. Thereafter, the suit out of which the present appeals arise was filed. In this suit all the plaintiffs in T.S. Nos. 53 and 61 of 1934, and 20, 29 and 41 of 1935 are defendants; so also certain alienees from them. Certain parties who are related to Ramdhan Singh in the same degree as the plaintiffs are also defendants. The plaintiffs in the title suits of 1934 and 1935 are the nearer heirs of Ramdhan Singh and are entitled to succeed to his estate on the ground of propinquity if the ordinary rule of Hindu Law is applied. The plaintiffs in the present suit as well as the defendants who are sailing with them are related to Ramdhan Singh in a distant degree and would not be entitled to succeed to his estate under the ordinary rule of Hindu Law. Their claim is based on the plea of a special custom applying to the family to which the parties belong.

2. According to the plaint the parties are descendants of one Choudhry Mohkam Singh. The plaint was accompanied by a genealogical table which runs into 26 printed pages in the paper book. But during the course of the trial evidence has been let in to prove the genealogy from the days of one Pran Thakur who is said to have migrated to the village Barhiya about five to six hundred years ago from a place called Sandehpur. Though on behalf of the defendants the facts that the original family

had migrated from Sandehpur was not admitted, a point which is of little importance, it seems to have been generally agreed among the parties that the common ancestor was Pran Thakur and the lived five to six hundred years ago. Instances to prove the custom put forward on behalf of the plaintiffs were given not merely from the family of Mohkam Singh but also from various other branches said to be descended from Pran Thakur. The village Barhiya is divided into twelve Tarafs named after twelve of Pran Thakur's descendants. The twelve descendants who names these Tarafs bear were not necessarily at the same degree of descent from Pran Thakur but that again is not of much importance. The parties to this suit belong to Taraf Ram Charan but in the plaint it was not the custom of Taraf Ram Charan that was pleaded but only the custom in the family of Ch. Mohkam Singh, Taraf Ram Charan being a larger group.

3. Fifty-two instances were sought to be proved on behalf of the plaintiffs. The learned Subordinate Judge who tried the suit held forty-three of them proved. The learned Judges of the High Court felt that from a reading of the plaint, evidence in connection with the instances in Ch. Mohkam Singh's family only were admissible and ought to have been gone into. But as it did not appear that the defendants had objected to the adducing of evidence from the other families and Tarafs and the parties perhaps understood the plaint to mean that their common ancestor was Pran Thakur, they did not rest content with examining the instances from Mohkam Singh's family only. Out of the 52 instances only three were from among the descendants of Mohkam Singh. Out of the other 49 instances, nine were from the Taraf Ram Charan, two of which were held by the learned Subordinate Judge as not proved. He, however, held all the three instances from Mohkam Singh's family as proved. The learned Judges of the High Court, however, on an exhaustive review of the evidence held that none of the fifty-two instances had been established satisfactorily by clear and unambiguous evidence so as to be sure of the existence of the custom alleged in the family of Mohkam Singh or amongst the descendants of Pran Thakur.

4. After hearing both the parties on the question of the admissibility of the evidence we have arrived at the conclusion that the only evidence which can be taken into account are the three instances in Mohkam Singh's family. Mohkam Singh himself seems to have been alive over 150 years ago. When oral evidence is sought to be give about what happened some generations ago, it has to be assessed with a great deal of care, which we shall now proceed to do. Before doing so, however, it is necessary to have a clear idea as to what was pleaded. The custom pleaded was put in the following words in paragraph 5 of the plaint :

The 'Kulachar' or ancient family custom or usage with regard to succession which prevails from time immemorial in the family of the plaintiffs and defendants First, Second and Third parties and which has been invariably and strictly followed observed and adhered to by the ancestors of the parties and of which there is a clear consciousness in the family is that when a separated male member of the family dies without any issue, his estate devolves in the first instance on his widow or widows, if there be any, and on the death of the widow or widows as the case may be or on the death of the said separated male members dying without issue and without leaving any widow the estate reverts to the descendants of the father of the said male owner and they take the estate in equal shares per stirpes and not per capita and brothers of the last male owner share the estate equally with the sons and grand-sons of deceased brothers. Similarly, if the last male owner had no brothers and his reversioners are his uncles or cousins the same rule viz., that the uncles or cousins inherit the estate alongwith the descendants of the predeceased uncles or cousins on the death of the widow or widows and if there be no widow immediately on the death of such male owner dying issueless. In other words the rule of Hindu Law viz., that the nearer in degree excludes the more remote is modified by the Kulachar to the extent enumerated above.

It would be noticed that even the question of the father or mother of the deceased succeeding is not mentioned.

5. Now let us see if there is anything in the plaint which had any reference to the descendants of Pran Thakur or his descendants in branches other than that of Ch. Mohkam Singh. Paragraphs 1, 2 and 4 of the plaint are as follows :

> 1. The plaintiffs and the defendants who are Bhumidhar Brahmins by caste belong to the same family and are descended from the same common ancestor. Their relationship will appear from the genealogical table given at the foot of the plaint.
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> 2. The parties to this suit and other Bhumidhar Brahmin residents of village Burhee (excepting those who are descendants in the female line or are recent settlers) belong to the same class of Babhans known as Dighwaits and are descended from the same stock.
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> 3. The Dighwait Babhans who migrated to Burhee were ordinarily governed by the Benares School of Hindu Law but in matters of succession they followed their respective Kulachars or ancient family customs which have been prevailing in their families from time immemorial and which having acquired the force of law modified the general Hindu Law to that extent.

It would be noticed that in paragraph 1 the plaintiffs and defendants are said to belong to the same family and descended from the same common ancestor. As reference is made to the genealogical tree and that starts only from Mohkam Singh, it is obvious that the reference to the common ancestor is reference to Mohkam Singh. From paragraph 4 it is clear that in matters of succession Dighwait Babhans followed their respective ancient family customs showing that each family had its own custom. Immediately follows the statement in paragraph 5 earlier extracted which shows that what the plaintiffs are referring to is the ancient family custom in the family of the plaintiffs and defendants which is the family of Mohkam Singh as already explained. Reference to the male member of the family dying separate and issueless in paragraph 6 can therefore refer only to the family of the plaintiffs and defendants mentioned in paragraph 5. Then follows the statement in paragraph 7 which by reference to the genealogical table appended to the plaint says that the common ancestor of the plaintiffs and defendants was Chowdhry Mohkam Singh. Paragraph 17 again refers to the family custom or usage of all the male descendants of Ch. Mohkam Singh being entitled to inherit the estate. Paragraph 18 refers to one of the five sons of Ch. Mohkam Singh dying issueless and his property being divided equally per stirpes amongst the descendants of the remaining three sons. Paragraph 20 again refers to defendants' second party being descendants of Ch. Mohkam Singh and as such entitled under the Kulachar to inherit some share in the estate of Ramdhan Singh. Even the prayer is for a declaration about the ancient custom, usage or Kulachar in the family of the plaintiffs and defendants. Nowhere is there any reference to Pran Thakur or his descendants or the twelve Tarafs or even Taraf Ram Charan as the one to which the parties belonged. Issue No. 6 in the Suit regarding this question is also as follows :

(6) Is there any Kulachar or ancient family custom in the families of the parties in contravention of the established principle of law of succession as alleged by the plaintiffs in para 5 of the plaint ? If so, is it valid and binding on the parties affecting the succession of the heritage left by Ramdhan Singh deceased ?

There is, therefore, no room at all for any argument that the plaint proceeded on the basis of the custom prevailing among all the descendants of Pran Thakur. It squarely proceeded on the basis of the custom prevailing in the family of Ch. Mohkam Singh. Indeed the learned Advocate for the appellants stressed again and again that the plaint was drafted by a very able advocate and was a very correct one. It is no doubt true that the witnesses for the plaintiffs as well as defendants admit that they are all descended from Pran Thakur. That seems to be the tradition in the village. It is said that there are about two thousand families in that village who claim to be descended from Pran Thakur. Though there is evidence that youngsters in these families are made to learn by heart their genealogy it is probably only to the extent of the names of seven generations which is necessary in the case in the case of religious ceremonies. Nobody could be remembering the genealogy of over twenty generations from the days of Pran Thakur. At the most it is a matter of tradition and hearsay. We are saying nothing about the admissibility or otherwise of hearsay evidence. Suffice it to say that for the purposes of this case the evidence admitted cannot travel beyond the pleadings and therefore has to be confined to the instances in Mohkam Singh's family.

6. Now on whom does the burden rest and what is the scope of the evidence that is admissible ? The earliest decision on the question regarding proof of custom in variance of the general law is found in Ramalakshmi Ammal v. Sivanatha Perumal Sethuraya (14 MIA 570, 585 : (1872-73) IA Sup 1) to the effect :

it is of the essence of special usages modifying the ordinary law of succession that they should be ancient and invariable; and it is further essential that they should be established to be so by clear and unambiguous evidence. It is only by means of such evidence that the courts can be assured of their existence, and that they possess the conditions of antiquity and certainty on which alone their legal title to recognition depends.

This passage was quoted by this Court with approval in its decision in Pushpavathi v. P. Visweswar ((1964) 2 SCR 403 : AIR1964 SC 118) and this Court went on further to observe :

In dealing with a family custom, the same principle will have to be applied, though, of course, in the case of a family custom, instances in support of the custom may not be as many or as frequent as in the case of customs pertaining to a territory or to the community or to the character of any estate. In dealing with family customs, the consensus of opinion amongst the members of the family, the traditional belief entertained by them and acted upon by them, their statements, and their conduct would all be relevant and it is only where the relevant evidence of such a character appears to the Court to be sufficient that a specific family custom pleaded in a particular case would be held to be proved, vide Abdul Hussein Khan v. Bibi Sona (45 IA 10 : AIR 1917 PC 181).

What is important is that the specific family custom pleaded in a particular case should be proved. The specific family custom pleaded in this case is the custom of the 'family' of Mohkam Singh. Even though that 'family' itself consists of numerous families descended from Pran Thakur the custom pleaded was not the custom prevailing in the 'family' of Pran Thakur. As we have already mentioned, the descendants of Pran Thakur seem to consist of at least two thousand families and it is difficult to use the word 'family' in relation to such a large agglomeration of families. We might as well talk of the human family. Be that as it may, there was no mention in the pleadings of the custom prevailing among the descendants of Pran Thakur. Indeed nowhere in the course of earlier litigations or documents, including T.S. No. 37 of 1936, is there a mention of Pran Thakur and his family. Merely because the evidence with regard to the various branches, which are said to be descended from Pran Thakur, was let in, apparently without any objection on the defendants' side,

we are not prepared to assume or hold that such evidence was admissible. The genealogical tree from Pran Thakur to Mohkam Singh is at best of doubtful value even though the tradition among Pran Thakur's descendants may be as put forward in the suit. The earliest document which we have examined, Ext. 23 of the year 1818, shows that even Mohkam Singh had died some year before that and between that date and 1947-1948 when the present case was tried, there have been six generations. From Pran Thakur, who is supposed to have lived about five to six hundred years ago genealogy is given for only six generations that is, till the formation of the twelve tarafs. That seems to have been over 400 years ago. Apart from the value to be attached to, or the reliability of the evidence regarding this genealogy it is difficult to see any relevance of this genealogy as there is a gap between that time and Mohkam Singh's days. The fact that a family belongs to a taraf can have no significance as a taraf is only a portion of the village, and the fact that a taraf is named after a person is no guarantee that all those living in the taraf are his descendants. The evidence put forward, even though accepted on both sides, with regard to persons descended from Pran Thakur must be held at best to be a matter of tradition without much historical value and much less evidentiary value and of very little assistance in deciding the question at issue in this case. Similarly, any oral evidence even if admissible about what happened in other branches of the family descended from Pran Thakur is also not likely to be of much assistance unless they are probabilised by some sort of documentary evidence. We do have some documents at least about Mohkam Singh's family but not about others. After hearing the parties on both sides and after looking into the decisions relied upon by the plaintiffs we indicated to the parties that we consider the evidence about instances other than those belonging to Mohkam Singh's descendants were not admissible and we would not consider the evidence with regard to the other 49 instances. The decisions cited by plaintiffs with regard to the admissibility of evidence in this case in relation to instances of custom in families other than those descended from Mohkam Singh contain certain observations which were relied upon by the plaintiffs. The ratio of those decisions themselves have nothing to do with the question of admissibility. Indeed, it is difficult to see any ratio in those decisions. They were all decisions as to succession which were based upon the conclusions drawn on the basis of the evidence adduced in those cases. The decisions contain mostly discussion on the evidence and any observations made in the course of those discussions should be confined to the circumstances and the evidence in those cases and they cannot provide and guiding principle in appraising the evidence of different facts and circumstances in other cases. Even so we would refer to those observations and show how those observations are relevant to the facts of those cases and can neither serve as a precedent in this case nor can be considered to have laid down any principle of law.

7. In Rajah Rup Singh v. Rani Baisni & Collector of Etawah (11 IA 149 : 7 All 1) it was held on the evidence in the case that the raj in question was an ancient raj and an ancestral estate, and that by virtue of an ancient custom in the family it was impartible. The plaint was to the effect that the ancient usage of raj of Bhara, in common with other families of the Rajahs was that upon the decease of a Rajah his nearest and eldest male heir succeeds him to the exclusion of the other male heirs, and the total exclusion of women. It was contended that a case had occurred in respect of the raj of Ruh Ruh in which a widow had succeeded in preference to a male collateral. Ruh Ruh was said to be one of the five branches of which Bhara was also one. That was how the instance regarding the Ruh Ruh estate was considered. That decision is a far cry from the present one where evidence regarding 2000 families said to be descended from an almost mythical ancestor are sought to be let in without any pleading with regard to it.

8. In Garurudhwaja Parshad Singh v. Saparandhwaja Parshad Singh (27 IA 238 : b 23 All 37) it was held

on the evidence, reversing the judgment of the high court, that the appellants had satisfied the serious burden of proving a special family custom of descent by primogeniture.

The evidence showed that for a period of nearly eighty years from the time of the British occupation of the district in which lay the estate in suit, the enjoyment had been consistent with the alleged custom, and for the earlier and greater part of that term had been inconsistent with any other legal basis. Also, that in two other families in the same district, derived from the same ancestor as the parties to the suit, the alleged custom prevailed.

It was in connection with these facts that it was observed :

A witness may state his opinion as to the existence of a family custom, and give as the grounds thereof information derived from deceased persons. But it must be independent opinion based on hearsay, and not mere repetition of hearsay : see Indian Evidence Act, Section 32, sub-section (5); Sections 49 and 60. Its weight depends on the character of the witness and of the deceased persons.

In that case it appeared from the evidence that the custom of primogeniture prevailed in two other families, derived from a common ancestor and lent strong antecedent probability to the appellant's case. In that very case the Privy Council remarked that "a good deal of the evidence of statements made by deceased persons is of doubtful admissibility", and after referring to the evidence of some of the witnesses the Privy Council said that they would not be disposed to place much reliance upon it standing alone. There is all the difference in the world between two families and two thousand families.

9. In Ahmad Khan v. Channi Bibi (52 IA 379 : AIR 1925 PC 267) it was held that "the custom could properly be proved by general evidence given by members of the family or tribe without proof of special instances". In that case there was a large body of oral evidence establishing the custom, wholly unrebutted by the defendants, who relied exclusively on the district riwaj-i-am, on which neither the High Court nor the Privy Council were prepared to place any reliance. Suffice it to say that the present is not a case where no evidence of specific instances was given but on the other hand evidence was given of a large number of instances most of which were held proved by the learned Trial Judge and held not proved by the learned Judges of the High Court. We are not concerned in this case with the custom prevailing in a particular family or tribe without instances.

10. In Roshan Ali Khan v. Chaudhri Asghar Ali (57 IA 29 : AIR 1930 PC 35) in the case of a dispute in one branch of the two families, one in the male line and the other in the female line, descended from the same person, who had lived so long under the same conditions and have been so closely connected together as to be treated as one community the evidence of the custom observed by one family was held to be of high evidential value as to the custom in the other. Furthermore, there was the wajib-ul-araiz signed by the descendants of both the families which strongly supported the plaintiffs' case. The distinction between the case and the present one is too obvious to need stress.

11. The case in Maharaja Sris Chandra Nandi v. Rakhalananda Thakur (65 CIJ 520 : 41 CWN 1103) was one where the evidence given by the plaintiffs supported a family tradition from generation to generation and which evidence was founded upon information derived from deceased persons and such tradition was also supported by documentary evidence. In that case the proof of the tradition was also to be found in the documents supporting the statements of deceased persons. It is, therefore, not possible to dissociate one aspect of the decision from the other. It is very difficult to

say whether without the documentary evidence the oral evidence regarding proof would have been accepted.

12. In Ajai Verma v. Vijai Kumari (AIR 1939 PC 22 : 179 IC 620 : 41 Bom LR 700) it was said that the proof of actual instances of a family custom excluding daughters from the inheritance was not necessary. For this statement reliance was placed upon the decision in Ahmad Khan v. Channi Bibi (supra) to which we have already referred. It was also stated that the opinions of responsible members of the family as to the existence of such a custom, and the grounds of their opinion, though generally in the nature of a family tradition., were clearly admissible. In that case the custom was also recorded in wajib-ul-arzes of every village owned by a member of the family and they were very numerous. The Privy Council referred to the probative value of these village records which had been recognised over and over again by the Board. Here again it is suffice to say that it is not possible to predict what would have been the decision but for the wajib-ul-arzes.

13. The decision in Musammat Subhani v. Nawab (68 IA 1 : AIR 1941 PC 21) was arrived at after elaborate discussion of the evidence in the case and examining numerous earlier decisions on the point as well as Rattingan's Digest of Civil Law for the Punjab and Wilson's General Code of the Tribal Customs in the Shahpur District of the Punjab. There are some interesting observations therein which show that the statements in the Rattingan's Digest cannot be taken at their face value without reference to the circumstances. The final conclusion of the Privy Council that what must be proved is that the usage has been acted upon in practice for such a long period and with such invariability, as to show that it has, by common consent been submitted to as the established governing rule of the particular district, with the modification that the word 'family' should be substituted for the word 'district' holds good in every case. They also laid down that the initial onus lay on the plaintiffs to prove the special custom and that does not in any way help the plaintiffs.

14. We shall now deal with the three instances relating to Mohkam Singh's family.

15. We should probably preface this discussion by saying that in T.S. No. 37 of 1936 there was a half-hearted attempt to prove the custom and the only instance given was the present instance No. 10. It was held not proved and as quite a few of the present plaintiffs were parties to that suit, the decision therein would be res-judicata as against them. But we prefer to discuss the matter and decide it on its merits because there all the distant reversioners were not parties unlike in this case.

16. Instance No. 10 is regarding succession to the estate of Dip Narain, who died leaving behind his widow Parkalo Kumari, who died in the year 1914. At that time three nephews of Dip Narain, Nirsu - plaintiff No. 8 and Ramnath - plaintiff No. 9, sons of his brother Ganga, as well as Nunubabu the son of his brother Ajodhya were alive. Another son of Ajodhya, named Durga, died leaving a son Radharaman, plaintiff No. 11. Bansi, the third brother of Dip Narain had died as also his son Ramsarup, leaving two sons Sheokumar and Rajeshwari. There is an Ekrarnama Ex. 18 dated March 14, 1916 as a result of which Sheokumar and Rajeshwari got certain properties. It is to be noticed that Nirsu and Ramnath are plaintiffs Nos. 8 and 9 and Rajeshwari is plaintiff No. 10 and Radharaman is plaintiff No. 11 and they themselves did not give evidence to explain the circumstances under which Ex. 18 came into existence. But the most significant fact is that Sheokumar and Rajeshwari first claimed that they had been adopted by Parkalo Kumari and it was thereafter that Ex. 18 came into existence. If Sheokumar and Rajeshwari were sure of the custom, which is now pleaded, they need not have made a claim on the basis of their being adopted sons. They did not claim on the basis of the custom when they filed the petition in the land registration case. Ex. 18 itself mentions that Sheokumar and Rajeshwari filed an application in the land

registration case on the ground that they were adopted sons of Parkalo Kumari and also specifically mentions that they have no interest in title to and concern with the estate left behind by the said mosamat (Parkalo Kumari) nor can they have any. In the face of these two significant facts we do not think that the mere mention of the custom in Ex. 18 establishes the existence of the custom now pleaded. Ex. 18 does not say what the custom was.

17. There was some argument at the bar as to what exactly the original word used was, REWAJ DASTURI or REWAJ-O-DASTURI, whether it was customary usage or custom and usage. Whatever that may be, we are not able to persuade ourselves that if there was such a custom as alleged Sheokumar and Rajeshwari would not have made a claim even in the first event on the basis of the custom. As Rajeshwari and Sheokumar have not given any evidence as to why they gave up the claim on the basis of the adoption and the document itself, though it mentions custom, does not say that they were given some property on the basis of the custom or what the custom was, we would, giving also full effect to the express disclaimer by both of them to any right, hold that Ext. 18 does not help to establish the existence of the custom pleaded. We are, therefore, of the opinion that the learned Judges of the High Court were right in holding that this instance is not established.

18. Instance No. 51 relates to the succession to the estate of Net Singh, one of the sons of Ch. Mohkam Singh. Mohkam Singh had five sons, Bhairo Narain, Kalyan, Naraindutt, Sumer and Net. According to the plaintiffs Net died issueless and his nephews and grand nephews and great-grand nephews inherited his property per stirpes according to custom. The plaintiffs examined PWs 53, 61 and 64 to prove this. The evidence of PW 53 was not accepted by the learned Subordinate Judge. PW 61 said that he heard of this instance from Wilayati Babu 10 or 11 years earlier. This witness was examined in 1948 and his knowledge was not even ante-litem motem. Moreover, the instance took place more than 100 years before he heard of it from Wilayati Babu and we find it difficult to agree with the learned Subordinate Judge that his knowledge is not only based on what he heard from Wilayati Babu but also on his independent opinion about it. The learned Subordinate Judge does not place much reliance on PW 64 who is himself a plaintiff. We are not able to agree with the learned Subordinate Judge that if it can be proved that the families of the five brothers were not joint but were separate the defence case must be thrown out and the plaintiffs' case should be accepted. The matter is not as simple as that. Even if Net and his brothers were separate the question is who was alive when Net died. The learned Subordinate Judge's decision has simply proceeded on the basis of the brothers being separate. Nor is his discussion of the importance of Ext. 23 correct. When it is stated in Ext. 23, a document of the year 1818 which should have been soon after Net's death, that his four brothers got half anna share each out of his two annas share, it of course shows that the brothers were separate but it also shows that the four brothers were alive at the time of Net's death and they got his property. There is no mention here of other brothers or any of them being dead and the nephews or the grand nephews succeeding. We fail to understand how the learned Subordinate Judge accepted the submission on plaintiffs' behalf that the reference to four brothers has been made in the sense of their descendants. One cannot make out a new case that is not found there. Exhibits 7, 9 and 23 all go to prove that the family was divided. But the learned Subordinate Judge has missed the crucial point that Ext. 23, which is the only document which refers to Net dying issueless and his brothers succeeding equally to his property gives not merely the share of the four brothers of Net Singh but also how the descendants of the four brothers divided the property among themselves. We, therefore, agree with the learned Judges of the High Court that when Net Singh died his brothers were alive and they got his share. It does not make any difference to the case whether he died separate or not. It is also seen that in view of the statement in Ext. 23 the learned Counsel appearing for the appellants could not press this instance very much. We, therefore, agree with the learned Judges of the High Court that this instance also cannot be said to have been proved.

19. The third instance is instance No. 23 regarding succession to the estate of Dr. Rameshwar Singh. Plaintiffs' case is that when Rameshwar Singh died about 25 years ago his properties were inherited by his brother, Dhunmun, his nephew Govind and his grand nephew Harbans. PWs 21, 24, 64, 68 and 79 were examined on behalf of the plaintiffs. As against this DW 61, who was examined on behalf of the defendants, said that Rameshwar died in a state of jointness with his brother and nephew, PW 24 said that Rameshwar and his brothers were living in the same house and the descendants of his brothers still live in the same house. It is, therefore, not a clinching piece of evidence. The evidence of PWs 68 and 79 is not of much use as they do not say that they witnessed the division. The learned Subordinate Judge relied on Exts. 43, 28 and 29 series to find in plaintiffs' favour. On the other hand the defendants relied on Ext. U 59, deposition of Harbans Singh, who is plaintiff No. 50 in this case. Ext. 43 shows that Gouri, Dhunmun and Harbans' names were recorded in that document. There was also the name of a stranger to the family recorded in the document. There are three plots in this land more or less of equal area. With regard to one plot it is mentioned that Harbans is in possession and in regard to another plot that it is in possession of Gouri, Dhunmun and Harbans. There is also the word "Shamlat" which indicates that the property was undivided. In any case it is not a clinching piece of evidence.

20. As regards Ext. 28 series the learned Judges of the High Court inspected the counterfoils themselves and found that the book which bore the signatures of defendants is a re-stitched book and therefore held that it lost its sanctity. It was also admitted that the original stitching was broken and a new book was re-stitched and on seeing the condition of the counterfoil book the learned Judges did not place any reliance on the receipts contained in them. We cannot say that the learned Judges were not justified in doing so. As against this there is the deposition of Harbans Singh dated November 16, 1927 (Ext. U 59) in a title suit of 1926. There he said that he, Govind and Hari were joint and all their lands were joint. On behalf of the appellants much reliance was placed upon the further statement that their houses were divided. But curiously though Hari is plaintiff No. 29, Govind's son is plaintiff No. 49 and Harbans is plaintiff No. 50, none of them gave evidence to explain either Ext. U 59 or Ext. 43 or 28 series. We consider that the criticism by the learned Judges of the High Court that the inference drawn by the learned Subordinate Judge that Ext. 43 shows that the statement of Harbans in Ext. U 59 was wrong, is a curious one is correct. Another important fact is that Dhunmun was one of the petitioners in Ext. EE and that he laid a claim to the property of Ramdhan as the next reversioner and not according to the alleged custom. We, therefore, agree with the learned Judges of the High Court that this instance has also not been proved.

21. The significant point in all these three instances is the attitude of the parties concerned. They did not come and give evidence where they would have been the best persons to explain the circumstances relating to those instances even though as many as 81 instances were examined on their behalf. PW 64 was the sole plaintiff to give evidence. Till this case started they have nowhere, literally nowhere, made claim solely on the basis of the custom which they are now putting forward. The documentary evidence which shows the actual attitude of the parties and their consciousness regarding the custom is more important than any oral evidence that might have been given in this case. Considerable stress was laid on behalf of the appellants on the fact that some of the defendants' witnesses had said that some of the witnesses on the plaintiffs' side are respectable persons and they knew the custom better than they themselves knew. But such statements have to be evaluated in the background of the history of this litigation. It is true that the defendants, who are the respondents in this appeal, also put forward some 10 instances to disprove the plaintiffs' case but did not succeed in proving them. But in the first instance it is for the plaintiffs to prove the existence of the custom and if they fail to do so they cannot succeed on the basis that the defendants did not succeed in proving that the custom did not exist. In any case as we have held that instances in families other than those

of Ch. Mohkam Singh are not relevant nothing much depends on it. We shall now discuss the attitude of the parties and their consciousness based on their actions at various stages in the litigation.

22. The earliest of these documents is Ext. EE dated August 25, 1927, an application filed by Dhunmun Singh, father of Hari Singh, plaintiff No. 29 praying that the estate of Ram Dhan Singh may be taken over by the Court of Wards. This was accompanied by genealogy which is found at page 2780 of the paper book. It is admittedly a false genealogy and was apparently prepared in order to show that he was the nearest reversioner to Ram Dhan Singh's estate. If the present case regarding the special custom obtaining in the family were correct this document would certainly have mentioned the custom and Dhunmun would have claimed to be a reversioner on the basis of the custom. That he had to go to the extent of preparing a false genealogy in order to show that he was the nearest reversioner falsifies the present case about the custom. It should also be remembered that according to the case of the plaintiffs Dr. Rameshwar Singh's property had been divided a few years earlier according to custom and Dhunmun was one of the parties involved.

23. The next document is Ext. E/10 dated April 5, 1933. This is deed of surrender by Pari Kumari in favour of Gaya Prasad Singh and Falgu Prasad Singh. This document was attested by plaintiff No. 12; the father of plaintiffs Nos. 13 to 15; Sarobar Saran ancestor of plaintiffs Nos. 16 to 16E; and plaintiffs Nos. 29, 38, 46 and 50 as well as defendants Nos. 4, 11, 26, Jairam father of defendant No. 52 and brother of plaintiffs Nos. 34 and 35, Ramkishori father of defendants Nos. 29 to 31 and Kapildeo father of plaintiffs Nos. 22 to 25. Though attestation by itself does not impute knowledge of the contents of the document to the attestors, it is very difficult to believe that the attestors did not know its contents. There had been a number of litigations, both civil and criminal, with regard to Ramdhan Singh's estate by this time and an attempt had also been made, as shown earlier, to bring it under the Court of Wards. The fact that Sunder Singh, the brother of Pari Kumari was managing her estate has also been mentioned. The whole history of this case shows that this is a highly litigious community and they would certainly not have attested the document without knowing what it was about. If they knew what the document contained they would have at least at once seen that it was against their interest if the custom alleged was true. On the other hand if the custom alleged was not true the present defendants would be the nearest heirs and thus these plaintiffs would not mind if somebody else got the property rather than the present defendants. Indeed they may even be interested in seeing that they also did not get any share out of Ramdhan Singh's estate. It is, however, urged on behalf of the appellants that Bisheshwar Singh, father of defendants Nos. 7 and 8, whose share comes to half among the defendants, was also a party to these proceedings on behalf of Gaya Prasad Singh and Falgu Prasad Singh. But that was because he was closely related to Sunder Singh, his son being married to his daughter and he stood to gain more by Gaya Prasad Singh and Falgu Prasad Singh succeeding than by his own succession.

24. The next document is Ext. C dated May 29, 1933, an objection petition filed by plaintiffs Nos. 8, 10, 11, 16, 18, 19, 20, 21 as well as Prabhu Deo Narain, father of the plaintiffs Nos. 13 to 15 and Nunu Babu Singh uncle of eleventh plaintiff. Along with the objection petition a genealogy was also filed showing Kalyan Singh, son of Ch. Mohkam Singh, as having two sons Dalip and Niren and thus trying to exclude the branch of Sumer and Bhairo Narain, sons of Mohkam Singh, as well as Hamir and Maniar, sons of Narain Datt. Admittedly this genealogy is false. They claimed as near and legal heirs of Babu Ramdhan Singh on the basis of this false genealogy. Even here there was no mention of the custom now put forward. It was not necessary to put forward wrong genealogy in order to claim to be near heirs of Ramdhan Singh if the custom were true.

25. The next document is Ext. 1 dated July 1, 1933, an objection petition filed by Sia Saran Singh, the eleventh defendant. In this document he denied his signature on Ext. E/10, the deed of surrender and alleged fraud on the part of Sunder Singh. Though a custom was put forward in this document it was alleged to be custom in the family, in the village and in the vicinity and significantly enough he has not joined the plaintiffs in this litigation in order to support the case of custom. Another significant fact is that the only plaintiff examined in this case is Chandrika Prasad Singh, the first plaintiff. His brother, Dwarka Prasad Singh, the second plaintiff had given evidence in the land registration case and his deposition is marked as Ext. U/12. There he deposed that if anyone dies issueless the property will be divided according to Khunt (Branch). That is apparently the reason why he was not examined. Another significant fact is that some of the plaintiffs, Ram Khilavan Singh, Ram Kishori Singh, Nunu Babu Singh, plaintiff No. 36, Ram Behari Singh, plaintiff No. 38 and Deonath Singh gave evidence on behalf of Gaya Prasad Singh and Falgu Prasad Singh in the land registration case as it seen from Exts. U/21, U/24, U/52, U/53 and U/54. They did not claim any interest in the estate as they could have if the custom pleaded were true. As we explained earlier they were perhaps more interested in the present defendants not getting any share in Ramdhan Singh's estate as they had no hope of getting any share themselves being distant heirs.

26. In the title suits Nos. 53 and 61 of 1934 and 20, 29 and 41 of 1935 filed by the present defendants evidence was given on behalf of Gaya Prasad Singh and Falgu Prasad Singh by Badri Singh, father of plaintiffs Nos. 5 and 5-A; Sheobhaju Singh, plaintiff No. 3; Jittu Singh, plaintiff No. 7; Ram Pratap, plaintiff No. 27; Janardan Singh plaintiff No. 34; Deonath Singh belonging to the family of plaintiff No. 34; Godavari Singh, defendant No. 44; Singheshwar Singh, plaintiff No. 46; Vidya Singh, plaintiff No. 47 and Ram Behari, plaintiff No. 38 as is shown by Exts. U/2, 7, 8, 9, 13, 35, 26, 38, 56 and 57. None of them dared to come forward and give evidence in the present suit. The criticism which we have made earlier as regards the attitude of the plaintiffs in earlier proceedings applies here also.

27. In title suit No. 37 of 1936 filed by some of the present plaintiffs, to which we have already referred, though they referred to a custom they claimed to be the nearest reversioners according to the Shastras. The genealogy tree filed in that suit showed Dalip Singh as son of Kalyan Singh although he is one of the sons of Narain Datt. It did not refer to the other sons of Mohkam Singh, that is, Summer, Bhairo Narain and Narain Datt. Dalip was also shown as brother of Kiran. In support of their case Ram Nath Prasad Singh, the present plaintiff No. 9, who was plaintiff No. 5 in that suit, was examined. He gave evidence saying that Mohkam had two sons, Net and Kalyan, that Net died issueless and that Sumer, Bhairo Narain and Narain Datt are not sons of Ch. Mohkam. In that very suit Singheshwar Singh, plaintiff No. 46, Ram Kishore father of plaintiff No. 29, Ramkhelavan Singh, thirteenth defendant, Nunu Babu Singh, plaintiff No. 36, Badri Singh, plaintiff No. 5 were examined on behalf of Gaya Prasad Singh and Falgu Prasad Singh as shown by Exts. U/11, 19, 3, 43 and 44. Sheobhaju Singh, the present plaintiff No. 3 whose deposition is marked as Ext. U/7, denied the custom now put forward by the plaintiffs.

28. We should, perhaps, at this stage refer to Ext. 16, deed of sale by Zalim Singh, fourth defendant, in favour of Ram Khilavan, thirteenth defendant; Ext. 16-A, deed of sale by Barho Singh, fifth defendant, to Ram Saran Singh, twelfth defendant; Ext. 16-F, deed of sale by Zalim Singh, the fourth defendant, in favour of Bindo Singh, and Ext. 16-E, a deed of sale by Zalim Singh to Ram Saran, twelfth defendant. These documents were like Ext. 18 relied upon very much by the appellants as showing that as the nearest reversioners they had recognised the right of the more distant reversioners. It should be remembered that these documents are all of the year 1937 when the earlier litigation had not ended. The documents themselves show that the executants were poor

men and they were being financed by the more distant relatives. The documents themselves purport to be out and out sale deeds and in the absence of any relative by the parties to those documents who are parties in this suit but have not given evidence as to why and how those documents were executed or the recitals in those documents were put in we cannot place any reliance upon them as establishing that the documents show a recognition by the near agnates of the rights of distant agnates. They seem to be documents executed because of the financial help received by the executants and partly perhaps to buy up the rich and powerful relatives who might otherwise give trouble. We are not inclined to attach much importance to them as establishing the custom pleaded. Ext. 17-A does not carry the case of the plaintiffs any further.

29. We are, therefore, satisfied that the plaintiffs-appellants have failed to prove the custom pleaded by them. Their attitude throughout is consistent only with their consciousness that they had no right to or any share in Ramdhan Singh's estate. If they had they would have joined the plaintiff__s in title suits Nos. 53 and 61 of 1934 and 20, 29 and 41 of 1935 or filed independent suits themselves at the same time putting forward their claim on the basis of custom. On the other hand they supported the defendants in those suits. It would have occurred to the meanest intelligence that if the defendant in those suits succeeded the present plaintiffs have no chance of getting anything whereas if the plaintiffs in those suits succeeded and if the custom alleged were true, they might also get a share. And these are not ignorant men but confirmed litigants. Not even a plaintiff among the many who were parties to the various documents so far considered has dared to appear as a witness and explain the contents of those documents which are certainly not consistent with the custom pleaded. Even T.S. No. 37 of 1936 was an half-hearted attempt by the present plaintiffs and that was filed only after the success of T.S. Nos. 53 and 61 of 1934 and 20, 29 and 41 of 1935. They have been more consistently siding with Gaya Prasad Singh and Falgu Prasad Singh because they knew that they had no rights and there was no custom and they had nothing to lose if the present defendantrespondents lost in that litigation. On the earlier occasions whenever they tried to put forward a claim it was on the basis of being near reversioners and sometimes on the basis of false genealogy than on the basis of custom. It is easy enough to get any number of persons to give oral evidence about what happened many many years ago. It is difficult to disprove them. At best it will be a case of hard swearing on either side. We would rather place reliance on the documents and the attitude of the parties as shown by them. One has only to read the evidence PW 64, the star witness on the side of the plaintiffs. The man seems to have an almost computer like memory but we find it difficult to believe him when he says that he kept quite because he was promised a share after the title suits filed in 1934 and 1935 succeed. One man may have kept quite but not a host of people on such a promise. Even if promises were made they would have insisted on something being given in writing. In a highly litigious village like this people are not likely to keep quite depending upon oral assurance where valuable properties are involved. They would not support the case of impostors like Falgu Prasad Singh and Gaya Prasad Singh if they themselves had hopes of getting any share. It can only be on the basis of the custom which is now being put forward that they could have got a share. IT is a baseless claim and the plaintiffs have failed to prove the custom pleaded by them.

30. Before we conclude we must refer to the preliminary objection raised on behalf of the respondents that the appeals should be dismissed and the contention on behalf of the appellants that the appeals before the High Court in this case should have been dismissed and consequently the present appeals should be allowed simply on that ground. The objection on behalf of the respondents is based on the following facts : Plaintiff No. 29, Hari Singh son of Dhunmun Singh died in 1953. His widow Manmohini and son Raktoo Singh, appellant No. 88, were substituted in his place on August 12, 1953. With the coming into force of the Hindu succession act the share of the widow in her husband's estate became a full estate. Manmohini died on November 1, 1967

leaving behind her daughter Ghia Devi and son Raktoo Singh was the only heir of Manmohini and he was already on record it was not necessary to add Manmohini's legal representatives and her name may be struck off. They did not want to proceed with the application for adding legal representatives. The Registrar also has recorded that the an application was not pressed. On April 27, 1968 the respondents made an application stating that the appeal had abated as Manmohini's daughter Ghia Devi had not been added as a party. On July 30, 1968 a fresh application was filed for adding Ghia Devi as a legal representative and praying that the abatement may be set aside. This application was dismissed on August 30, 1968. The order on that application was :

Delay in making the application for bringing on record Mst. Ghia Devi not condoned. The application for bringing her on record is dismissed on the ground of delay. The question as to the effect of this order will be considered at the time of the final hearing of the appeals.

The contention is that as Ghia Devi was not added as a legal representative after her mother Manmohini's death the appeal had abated as far as Manmohini Devi as concerned and as the decree is one and indivisible the whole appeal had abated. This contention was sought to be sustained on the basis of the decisions of this Court in State of Punjab v. Nathu Ram ((1962) 2 SCR 636 : AIR 1962 SC 89) and Rameshwar Prasad v. Shyam Beharilal Jagannath ((1964) 3 SCR 549 : AIR 1963 SC 1901). As against this, reliance is placed on behalf of the appellants on the decisions of Daya Ram v. Shyam Sundari ((1965) 1 SCR 231 : AIR 1965 SC 1049), Dolai Molliko v. K. C. Patnaik (1966 Supp SCR 22 : AIR 1967 SC 49), Ratan Lal v. Lal Man Das ((1970) 1 SCR 296 : (1969) 2 SCC 70) and Mahabir Prasad v. Jage Ram ((1971) 3 SCR 301 : (1971) 1 SCC 265). We consider that there is no substance in the preliminary objection raised on behalf of the respondents and it should be rejected. As was pointed out by this Court in Daya Ram v. Shyam Sundari in Ram Sarup v. Munshi ((1963) 3 SCR 858 : AIR 1963 SC 553) one of the appellants had died pending the appeal and his legal representatives were not brought on record. As the decree was a joint one and as part of the decree had become final by reason of the abatement it was held that the entire appeal must be held to have abated. The State of Punjab v. Nathu Ram was a case where a joint decree had been passed in favour of two individuals and that was challenged in the appeal before the High Court. It was common ground that the appeal against of the joint decree holders had abated owing to one of his legal representatives having been impleaded within the time limited by law and there being none on record to represent his estate. In such a case the only question that could arise would be whether the abatement which ex concessis took place as regards one of the respondents should be confined to the share of the deceased respondent as against who the appeal has abated, or whether it would result in the abatement of the entire appeal. This would depend on the nature of the decree and the nature of the interest of the deceased in the property. If the decree is joint and indivisible the abatement would be total. That was precisely the question which was raised in Nathu Ram's case and the decision in Ram Sarup v. Munshi is also an illustration of the same principle.

31. In Rameshwar Prasad v. Shyam Beharilal Jagannath (supra) nine persons including K instituted a suit for ejectment and recovery of rent against two defendants and obtained a decree. During the pendency of the second appeal in the High Court K died. His legal representatives not having been added the appeal abated as far as he was concerned. When the appeal came up for hearing the respondents took a preliminary objection that the entire appeal had abated. The appellants claimed that the appeal was maintainable on the ground that the surviving appellants could have filed the appeal against the entire decree in view of the provisions of Order 41, Rule 4 of the Code of Civil Procedure and that they were, therefore, competent to continue the appeal even after the death of K and the abatement of the appeal so far as he was concerned. It was held that the provisions of Order 41, Rule 4 of the Code of Civil Procedure were not applicable, since the second appeal was filed by

all the plaintiffs and the surviving appellants could not be said to have filed the appeal as representing K. It was further held that an appellate Court had no power to proceed with the appeal and to reverse and vary the decree in favour of all the plaintiffs or defendants under Order 41, Rule 4 when the decree proceeded on a ground common to all the plaintiffs or defendants, if all the plaintiffs or the defendants appealed from the decree and any of them died and the appeal abated so far as he was concerned under Order 22, Rule 3. It was also held that the provisions of Order 41, Rule 33 were not applicable. The contention that all the appellants belonged to a joint Hindu family was rejected in that case. It was also held that Order 41, Rule 4 applies to the stage when an appeal is filed but that once an appeal has been filed by all the plaintiffs the provisions of Order 41, Rule 4 became unavailable. It was also held that if some party dies during the pendency of the appeal his legal representatives have to be brought on the record within the period of limitation, and if that is not done, the appeal by the deceased appellant abates and does not proceed any further. In so holding this Court over-ruled the view taken by the Bombay, Calcutta and Madras High Courts in Shripad Balwant v. Nagu Kusheba (ILR 1943 Bonm 143), Satulal Bhattachariya v. Asiruddin Shaikh (ILR 61 Cal 879 : 1934 Cal 703) and Somasundaram Chettiar v. Vaithilinga Mudaliar (ILR 40 Mad846 : 41 IC 547) respectively which had held that if all the plaintiffs or the defendants appeal from the decree and any of them dies the appellate Court can proceed with the appeal and reverse or vary the decree in favour of all the plaintiffs or defendants under Order 41, Rule 4 when the decree proceeds on a ground common to all the plaintiffs or defendants.

32. The important point to note about this litigation is that each of the reversioners is entitled to his own specific share. He could have sued for his own share and got a decree for his share. That is why five title suits Nos. 53 and 61 of 1934 and 20, 29, and 41 of 1935 were filed in respect of the same estate. In the present case also the suit in the first instance was filed by the first and second plaintiffs for their one-twelfth share. Thereafter many of the other reversioners who were originally added as defendants were transposed as plaintiffs. Though the decree of the trial Court was one, three appeals Nos. 326, 332 and 333 of 1948 were filed by three sets of parties. Therefore, if one of the plaintiffs dies and his legal representatives are not brought on record the suit or the appeal might abate as far as he is concerned but not as regards the other plaintiffs or the appellants. Furthermore, the principle that applies to this case is whether the estate of the deceased appellant or respondent is represented. This is not a case where no legal representative of Manmohini was on record. Order 22, Rule 4 of the Civil Procedure Code reads :

> 4. (1) Where . . . a sole defendant or sole surviving defendant dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.
>
> 4. (3) Where within the time limited by law no application is made under sub-rule (1), the suit shall abate as against the deceased defendant.

As pointed out by this Court in Daya Ram v. Shyam Sundari (supra), the almost universal consensus of opinion of all the High Courts is that where a plaintiff or an appellant after diligent and bona fide enquiry ascertains who the legal representatives of a deceased defendant or respondent are and brings them on record within the time limited by law, there is no abatement of the suit or appeal, that the impleaded legal representatives sufficiently represent the estate of the deceased and the decision obtained with them on record will bind not merely those impleaded but the entire estate including those not brought on record.

33. It was observed by the Madras High Court in Kadir v. Muthukrishna Ayyar (ILR 26 Mad 230 : 12 MLJ 368) :

In our opinion a person whom the plaintiff alleges to be the legal representative of the deceased defendant and whose name the Court enters on the record in the place of such defendant sufficiently represents the estate of the deceased for the purpose of the suit and in the absence of any fraud or collusion the decree passed in such suit will bind such estate . . . . If this were not the law, it would, in no few cases, be practically impossible to secure a complete representation of a party dying pending a suit and it would be specially so in the case of a Muhammadan party and there can be no hardship in a provision of law by which a party dying during the pendency of a suit, is fully represented for the purpose of the suit, but only for that purpose, by a person whose name is entered on the record in place of the deceased party under Sections 365, 367 and 368 of the Civil procedure Code, thought such person may be only one of several legal representatives or may not be the true legal representative.

After referring to this statement of the law this Court in Daya Ram v. Shyam Sundari (supra) went on to remark :

In a case where the person brought on record is a legal representative we consider that it would be consonant with justice and principle that in the absence of fraud or collusion the bringing on record of such a legal representative is sufficient to prevent the suit or the appeal from abating.

In Dolai Molliko v. K. C. Patnaik (supra) on the death of one of the plaintiffs-appellants in an appeal pending before the Subordinate Judge his widow and the major son were substituted on record as heirs. It was later discovered that the deceased had left some other heirs besides the two. The respondents raised an objection that as some of the heirs of the deceased had been left out and there could be no question of want of knowledge of the existence of these heirs on the part of the widow and the major son who had applied for being brought on record, the appeal abated. It would be noticed that the position is exactly the same here. This Court held :

The estate of the deceased was fully represented by the heirs who had been brought on the record and these heirs represented the absent heirs also, who would be equally bound by the result.

It was observed :

Even where the plaintiff or the appellant has died and all his heirs have not been brought on the record because of oversight or because of some doubt as to who are his heirs, the suit or the appeal, as the case may be, does not abate and the heirs brought on the record fully represent the estate unless there is fraud or collusion or there are other circumstances which indicate that there had not been a fair or real trial or that against the absent heir there was a special case which was not and could not be tried in the proceedings.

After referring to the decisions in N. K. Mohd. Sulaiman Sahib v. N. C. Mohd. Ismail Saheb ((1966) 1 SCR 937 : AIR 1966 SC 792) and Daya Ram v. Shyam Sundari the Court went on to observe :

It will be noticed that there is one difference between the present case and the two cases on which reliance has been placed on behalf of the appellants. This is not a case where a plaintiff or an appellant applies for bringing the heirs of the deceased defendant or respondent on the record; this is a case where one of the appellants died and his heirs have to be brought on record. In such a case

there is no question of any diligent or bona fide enquiry for the deceased appellant's heirs must be known to the heirs who applied for being brought on the record. Even so we are of opinion that unless there is fraud or collusion or there are other circumstances which indicate that there has not been a fair or real trial or that against the absent heir there was a special case which was not and could not be tried in the proceeding, there is no reason why the heirs who have applied for being brought on record should not be held to represent the entire estate including the interests of the heirs not brought on the record. This is not to say that where heirs of an appellant are to be brought on record all of them should not be brought on record and any of them should be deliberately left out. But if by oversight or on account of some doubt as to who are the heirs, any heir of a deceased appellant is left out that in itself would be no reason for holding that the entire estate of the deceased is not represented unless circumstances like fraud or collusion to which we have referred above exist.

In the present case there is no question of any fraud or collusion; nor is there anything to show that there had not been a fair or real trial, nor can it be said that against the absent heir there was a special case which was not and could not be tried in the proceeding in his absence.

It must be made clear that the fraud or collusion mentioned must be a fraud or collusion between the appellant on the one hand and the representative of the deceased respondent who is brought on record on the other and vice versa. In the present case failure to bring Ghia Devi, daughter of Manmohini, on record cannot be said to be a fraud on the part of her brother Raktoo Singh in collusion with the respondents nor can he deprive Ghia Devi of her rights by not impleading her as the legal representative of their deceased mother. The fraud contemplated is a fraud or collusion between the parties on record to the detriment of the legal representative who has not been brought on record.

34. In Ratan Lal v. Lal Man Das (supra) the respondent obtained a joint decree against the appellant and his partner M. Against the decree, the appellant alone appealed to the High Court. M was impleaded as the second respondent in the appeal. The notice of appeal sent to M was returned unserved. The High Court dismissed the appeal. This Court held :

The appeal could not be dismissed on the ground that M was not served with the notice of appeal, nor, in view of the provisions of Order 41, Rule 4, could the High Court dismiss the appeal on the ground that there was a possibility of two conflicting decrees.

and pointed out :

The object of the rule is to enable one of the parties to a suit to obtain relief in appeal when the decree appealed from proceeds on a ground common to him and others. The Court in such an appeal may reverse or vary the decree in favour of all the parties who are in the same interest as the appellant.

This Court referred to the decision in Karam Singh Sobti v. Shri Pratap Chand ((1964) 4 SCRn 647 : AIR 1964 SC 1305) where it was observed :

The suit had been filed both against the tenant and the sub-tenant, being respectively the Association and the appellant. One decree had been passed by the trial Judge against both. The appellant had his own right to appeal from that decree. That right could not be affected by the Association's decision not to file an appeal. There was one decree and, therefore, the appellant was entitled to have it set

aside even though thereby the Association would also be free from the decree. He could say that decree was wrong and should be set aside as it was passed on the erroneous finding that the respondent had not acquiesced in the subletting by the Association to him. He could challenge that decree on any ground available. The lower appellate Court was, therefore, quite competent in the appeal by the appellant from the joint decree in ejectment against him and the Association, to give him whatever relief he was found entitled to, even though the Association had filed no appeal.

In Mahabir Prasad v. Jage Ram (supra) it was held :

Where in a proceeding a party dies and one of the legal representatives is already on the record in another capacity, it is only necessary that he should be described by an appropriate application made in that behalf that he is also on the record, as an heir and legal representative. Even if there are other heirs and legal representatives and no application for impleading them is made within the period of limitation prescribed by the Limitation Act the proceedings will not abate.

That meets the point raised by the respondents exactly. The principle is of representation of the estate of the deceased which need not be by all the legal representatives of the deceased. The preliminary objection is, therefore, overruled.

35. The above discussion also meets the plea raised on behalf of the appellants. As we have already mentioned, against the decree of the Sub-Judge First Appeals Nos. 326, 332 and 333 of 1948 were filed before the High Court. In appeal No. 326 Nirsu Prasad Singh was made a party but not in appeals Nos. 332 and 333. The parties seem to have been so confused that only in F.A. No. 332 of 1948 an application was made to implead Nirsu Prasad Singh as a party on the ground that he was not impleaded as a respondent by mistake. This was dismissed by the High Court on March 1, 1951. Nobody seems to have noticed that Nirsu Prasad Singh had not been made a party in F.A. No. 333 of 1948 also. This was noticed by the learned Judges of the High Court at the conclusion of the hearing of the appeals before it. The appeal was, therefore, listed for being mentioned and the learned Judges brought this fact to the notice of the parties and the appellants in F.A. No. 333 thereafter put in an application under Order 41, Rule 20 and Section 151 of the Code of Civil Procedure for adding the name of Nirsu Prasad Singh as a party. We will quote the learned Judges on this point :

Although left to ourselves, we would have allowed this application and added Nirsu Prasad Singh as a party in the appeal even at that late stage but we did not think it advisable to adopt this course in view of the order dated March 1, 1951 passed in F.A. 332/48 and we, therefore, rejected this application by our order No. 145 dated April 22, 1959 passed in F.A. 333/48. The position, therefore, is that Nirsu Prasad Singh, plaintiff No. 8 is not a party respondent in two of the appeals but he is a party in one of the three. I may note that both parties agreed before us that the appellants in F.A. 332/48 and F.A. 333/48 have been impleaded as respondents in F.A. 326/48. Therefore, even if we dismiss these two appeals on the ground of this highly technical objection, it is possible to give relief to the appellants of these two appeals in F.A. 326/48 under Order 41 Rule 33 of the Code of Civil Procedure. Since plaintiff No. 8 is a party respondent in F.A. 326/48 along with all others plaintiffs, there will be no conflict of decree and the result of our allowing F.A. 326/48, which has got to be allowed in view of my findings above, would be to set aside the entire decree in favour of the plaintiffs-respondents and that can be done even at the instance of some of the contesting defendants. I am, therefore, of the view that First Appeals 332 and 333 of 1948 also cannot and should not fail on this technical preliminary ground.

We think that the conclusion of the learned Judges of the High Court was right. Against the same decree passed by the learned Subordinate Judge there were three appeals. In one appeal, that is F.A. 326 of 1948, Nirsu Prasad Singh was impleaded as a party but not in the other two appeals. F.A. 326 of 1948 was filed only by some of the defendants in the suit. It was, therefore, possible by the application of the provisions of Order 41, Rule 4 and Rule 33 to have allowed the appeal in full and given relief not merely to the appellants in F.A. 326 but also to the appellants in F. As. 332 and 333 assuming that they had not filed these appeals. The utmost that can be said is that the effect of the failure to implead Nirsu Prasad Singh as a respondent in F. As. 332 and 333 is that those two appeals will have to fail but that does not mean that F.A. 326 has also to fail. It is not even a case where the appellants in F. As. 332 and 333 had not taken the trouble of filing an appeal and therefore it can be said that they should not be given the benefit of the appeal filed by the appellants in F.A. 326. They had filed appeals in order to establish their rights. It was by an oversight in filing those appeals that they had failed to implead Nirsu Prasad Singh as a party. To such a case Order 41, Rule 33 clearly applies.

36. The cases where the provisions of Order 41, Rule 33 can be applied have, if we may say so, been set out correctly after a very full discussion by a Bench of the High Court of Madras in its decision in Krishna Reddy v. Ramireddi Speaking through Venkatarama Aiyar, J. as he then was, the Court observed :

Though Order 41, Rule 33 confers wide and unlimited jurisdiction on courts to pass a decree in favour of a party who has not preferred any appeal, there are, however, certain well defined principles in accordance with which that jurisdiction should be exercised. Normally, a party who is aggrieved by a decree should, if he seeks to escape from its operation, appeal against it within the time allowed after complying with the requirements of law. Where he fails to do so, no relief should ordinarily be given to him under Order 41, Rule 33.

But there are well recognised exceptions to this rule. One is where as a result of interference in favour of the appellant it becomes necessary to readjust the rights of other parties. A second class of cases based on the same principle is where the question is one of settling mutual rights and obligations between the same parties. A third class of cases is when the relief prayed for is single and indivisible but is claimed against a number of defendants. In such cases, if the suit is decreed and there is an appeal only by some of the defendants and if the relief is granted only to the appellants there is the possibility that there might come into operation at the same time and with reference to the same subject-matter two decrees which are inconsistent and contradictory. This, however, is not an exhaustive enumeration of the class of cases in which courts could interfere under Order 41, Rule 33. Such an enumeration would neither be possible nor even desirable.

Considering the question on principle, when a decree is in substance a combination of several decrees against several defendants, there is no reason why an appeal presented by one of the defendants in respect of his interest should ensure for the benefit of the other defendants with reference to their interests.

Thus where a reversioner files a suit to recover possession of his share of many items of properties which are held by different defendants under different alienations, some of which might be valid and others not, there is no community of interest between them. The plaintiff could have filed a separate suit in respect of each item and impleaded as defendants therein only the alienee interested in that item. In that event, if all the suits were decreed but an appeal were to be preferred against the decree in only one of them and that appeal is allowed, that would not operate as reversal of the

decrees in the other suits; not would there be any power in the Court to set aside those decrees under Order 41 Rule 33. It would not make any difference when the plaintiff has, for convenience, combined several suits into one.

As we have already pointed out in this case each one of the plaintiffs could have filed a suit for his share of Ramdhan Singh's estate. The fact that all the reversioners joined together as plaintiffs and filed one suit does not mean that if for one reason or other the suit of one of them fails or abates the suit of the others fails or abates. The decree is in substance the combination of several decrees in favour of several plaintiffs. If in an appeal against the decree one of the plaintiffs is not added as a respondent it only means that the decree in his favour cannot be set aside or modified even if the appeal succeeds against other plaintiffs in respect of their interest. There would in that case be no conflict between the decrees as the decree is a combination of many decrees. In other words the result of the failure to add Nirsu Prasad Singh as a respondent in F.A. 332 and F.A. 333 would be that the decree granted in his favour by the Subordinate Judge would stand but not the decrees granted in favour of the other plaintiffs. They can be reversed in those appeals. There was no such difficulty in F.A. 326 and in that appeal the decree granted in favour of Nirsu Prasad Singh as well as in favour of other plaintiffs could have been reversed. This is not a case where a party who is aggrieved by a decree fails to file an appeal within the time allowed by law and should not, therefore, be granted relief under Order 41, rule 33.

37. We do not think that the decision relied upon by the appellants in Jhinghan Singh v. Singheshwar Singh (C.A. Nos. 114-122 of 1958, decided on April 20, 1965) helps the appellants. In that case Singheshwar Singh was one of the appellants in C.A. Nos. 114 and 115 and respondent in the other appeals. Kaushal Kishore Prasad Singh was one of the appellants in C.A. Nos. 116 and 117 and a respondent in the other appeals. Both of them died and the pending appeals abated against them. The contesting respondents took the preliminary objection that all the appeals had become defective for non-joinder of the legal representatives of Singheshwar Singh and Kaushal Kishore Prasad Singh and this objection was accepted. The decision proceeded on the basis that the plaints in the several suits raised a dispute between a body of landholders claiming khas possession of the lands and a number of persons claiming to be occupancy tenants thereof, that in substance, the plaintiffs asked for an adjudication that the lands were bakasht and the first party defendants were not occupancy tenants and to such suits all the land holders were necessary parties. It was therefore held that as in the appeals before this Court the landholders claimed the same relief which they sought in the trial Court and in those appeals also Singheshwar Singh and Kaushal Kishore Prasad Singh were necessary parties, in the absence of their legal representative the appeals were not maintainable. It would be seen that the two appellants whose legal representatives were not added as parties were parties in all the four suits and in all the four appeals and the question was a common question to which all the land holders were necessary parties. As we have explained earlier that is not the position here.

38. The decision in Kishan Singh v. Nidhan Singh (C.A. No.563 of 1962, decided on December 14, 1964) and the statement of law laid down by this Court therein in the following terms :

Mr. Bishan Narain points out that in substance, the presents suit is between the landholders on the one hand and those who claimed to be occupancy tenants on the other. It is true that the plaint alleges that the occupancy rights were extinguished on the death of the last occupancy tenant Narain Singh, but that had been denied by the appellants, and in fact, round this dispute the whole controversy centres in the present suit. There is no doubt that the allegations made in the plaint clearly show that the dispute is between the landholders the persons who claim to be occupancy

tenants, and so, it is plain that in such a dispute the whole interest of the landholders and the whole interest of the tenants must be adequately represented. The tenancy rights which the appellants claim are no doubt based on the presumption under Section 5 (2) of the Tenancy Act. But the relationship in respect of which the said presumption would arise is a relationship of landlord and tenant, and this relationship in the very nature of things is one and indivisible. Therefore, when a claim is made to evict the persons who allege that they are tenants, the whole of the landlord's interest must be before the Court.

was cited with approval in Jhinghan Singh v. Singheshwar Singh (supra). It does not, therefore, stand on any different footing.

39. We hold, therefore, that the learned Judges of the High Court were correct in holding that at least F.A. 326 had not abated because of the failure to implead Nirsu Prasad Singh as a respondent in F. As. 332 and 333 and it was open to the Court in F.A. 326 in exercise of its power under Order 41, Rule 33 to give all the appellants therein, that is, the respondents in the appeals before this Court, the relief that the appellants is, therefore, overruled.

40. In the result the appeals are dismissed with costs, one set hearing fee.

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