LAHORE HIGH COURT

Saif-ul-Rahman

Vs

Mohammad All Khan

(Tek Chand and Agha Haidar, JJ.)

16.05.1927

JUDGMENT

Tek Chand, J.

1. The relationship of the parties will appear from the following

2. The property in dispute is situate in two villages Rahon and Bharata Khurd, both in the Jullundur District. The last holder of the property was one Badar Bakhsh who died sonless many years ago leaving him surviving a widow, Mt. Aziman, and a daughter Mt. Janat. On his death the mutation of his entire estate was effected in favor of Mt. Aziman who took possession on the usual widow's life-estate. On 21st May 1910, Aziman gifted 928 kanals 6 marks of land in Rahon to the plaintiffs Saif-ul-Rahman and Aziz-ul-Rahman, who are the sons of her daughter Mt. Jannat. In the same year Mt. Aziman sold 55 kanals out of the remaining land in Rahon to Jang Baz Khan and Abdul Rahman.

3. The present defendants, who are the collaterals of Badar Bakhsh in the fourth degree, instituted two suits to contest the gift and the sale respectively. In the suit relating to the gift the daughter's sons were impleaded as defendants, while in the other suit in which the sale was contested the vendees were the sole defendants, the daughter's sons not being

4. The collaterals' suit to contest the gift by the widow in favour of the daughter's sons relating to the Rahon land was finally decided by Mr. Lumsden, Divisional Judge, Jullundur, on 25th June 1913, who held that according to the custom prevailing among the parties the collaterals were preferential heirs qua the ancestral land, but the daughter's sons had a superior right to succeed qua the non-ancestral land. He carefully examined the history of the various plots comprised in the gift and came to the conclusion that 272 kanals 16 marlas were ancestral and the remaining 655 kanals 10 marlas

5. The widow Mt. Aziman died in 1921, and on her death the collaterals took possession of the

whole of the land in mauza Bharta Khurd and also of the lands in Rahon for which they had obtained a declaratory decree in 1911 and 1913.

6. On 1st March 1924, the present suit was instituted by Saif-ul-Rahman and Aziz-ul-Rahman, the daughter's sons of Mt. Aziman and Badar Bakhsh for possession of (a) the whole of the land in Bharta Khurd belonging to Badar Bakhsh which on his death was held by his widow Mt. Aziman and (b)'55 kanals of land in mauza Rahon which had been sold by Mt. Aziman to Jang Baz Khan and Abdul Rahman, and with regard to which, as already stated, a decree on compromise had been passed in favour of the collaterals. The plaintiffs claimed that both these lands were nonancestral of Badar Bakhsh qua the defendants and that according to the custom prevailing in the tribe of the parties the daughters and their sons had a preferential right to succeed to such property as against the collaterals.

7. The plaintiffs also claimed a declaration with regard to Khasra No. 2669. but there is now no controversy relating to this plot and I shall not deal with it in this judgment. It may also be noted that the present suit is not concerned with 272 kanals 16 marlas out of the gifted land for which a declaratory decree had been passed in favor of the collaterals in 1913.

8. The defense put forward by the collaterals was that the whole of the Bharta Khurd land, as also the 55 kanals at Rahon was ancestral. With regard to the latter land it was further pleaded, that even if it be held to be nonancestral the plaintiffs have locus standi to sue, as the defendants, collaterals had obtained it under a compromise decree passed against the vendees.

9. There is now no contention between the parties as to the rule of custom governing succession, all concerned being agreed that the daughters had a prior right to succeed to the nonancestral property and the collaterals to the ancestral property.

10. The learned Subordinate Judge traced the history of such plot of land and held that the Bharta Khurd land in suit comprised 5 out of 72 shares which represented the total area held by the common ancestor of the parties in that village. Out of these 5 shares he held that 3 were ancestral and 2i were non-ancestral. As to the 55 kanals in Rahon he found that only one-fourth of it was ancestral, and the remaining three-fourths was nonancestral. He further overruled the defendants' plea that the compromise decree of 1911 was a bar to the maintainability of the suit with regard to the Rahon land. A decree was accordingly passed in favor of the plaintiffs for 2 5 of the land in Bharta Khurd and for three-fourths of 55 kanals in Rahon.

11. Both parties appealed to the learned District Judge, who in a judgment, the reasoning of which I confess I am unable to understand, held that the whole of the Bharta land was ancestral. As 'regards the Rahon land he did not think it necessary to decide whether the whole or any part of it was ancestral as he thought that the plaintiff had no locus standi to sue by reason of the principles underlying Punjab Act 1, 1920, and the rule laid down in *Partapi v. Hazard, Singh*[1],

On these findings he dismissed the plaintiffs' suit in to.

12. The plaintiffs have preferred a second appeal to this Court and we have heard Mr. Badri Das in support of the appeal, while Mr. Zafar-ullah-Khan has addressed us on

[1][1916] 33 P.R. 1916

behalf of the respondents. As to the Bharta;Khurd land Mr. Badri Das has conceded that 3 shares out of the 5 in dispute have descended from Ghulam-Mohi-ud-Din to Badar Bakhsh in the male line of succession and, therefore, it must be held to be ancestral qua the plaintiffs. On this admission the plaintiffs have obviously no claim with regard to these 3 shares. As to the remaining 2 shares, it has been found that they were originally held by Ghulam-Mohi-ud-Din from whom they descended to Muhammad Bakhsh, and on Muhammad Bakhsh's line becoming extinct, devolved on one of his collaterals Qutab-ud-Din. Subsequently Qutab-ud-Din gifted these 2 shares to Wazir Khan, the father of Badar Bakhsh. The question to be decided is whether this land, which was at one time held by the common ancestor Ghulam Mohi-ud-Din and which had under the ordinary rules of succession descended to one of his male lineal descendants, Qutab-ud-Din, retained its ancestral character after Qutab-ud-Din had gifted it to one of his collaterals, Wazir Khan. There is no doubt that if Wazir Khan had obtained this land by succession it would have been ancestral. But here the ordinary course of inheritance was diverted by the gift by Qutab-ud-Din to Wazir Khan, who was not his heir at the time He was one of his distant collaterals and the gift by Qutab-ud-Din to him was admittedly not made by way of surrender of his estate or acceleration of succession but was a gift pure and simple. In my opinion the mere fact that the donee was one of the large number of collaterals makes no difference whatever. It will be seen from the pedigree table that Qutab-ud-Din's immediate heirs were his uncle Samme Khan and his first cousin Chuhar Khan, and on Samme Khan's and Chunhar. Khan's lines becoming extinct his estate would have been divided equally among the descendants of Bube Khan, Muhammad Bakhsh and Karim Bakhsh. Wazir Khan was a remote heir of Qutab-ud-Din, and even if he was' to succeed at all to Qutab-ud-Din's property he would have got only a small portion of his estate. It cannot, therefore, be said that a gift made in these circumstances partook of the nature of an acceleration of succession or was made by reason merely of the done's connexion with the common ancestor. In any case the onus of proving these facts lay upon the collaterals, who have failed to place any materials on the record from which a contrary conclusion might be drawn.

13. It is now firmly established that land ceases to be ancestral if it comes into the hands of an owner otherwise than by descent or by reason merely of his connexion with the common ancestor: see *Sri Ram v. Ramji 'Das*[2], which has been followed in *Gurdit v. Mt. Ishar Kuar*[3] *Munsha Singh v. Uttam Singh*[4], *Phui v. Devatia*[5], *Nagina Singh v. Jiwan Singh*[6], and *Ghania v. Phuman Singh, A.I.R. 1925 Lah. 245*. Applying the test that has been laid down in these rulings this land must be held to be nonancestral. Mt. Zafar Ullah Khan relies strongly on *Imam Din v. Ram Battan*[7] in which a Division Bench of this Court held that property which is ancestral does not cease to be so merely because the owner acquired it not by descent but by gift from a

collateral, where the reason of the gift was the donee's connexion with the common ancestor of himself and the donor. The judgment as printed in Indian Cases does not set out the history of the land in any great detail and it is not possible to say definitely on what facts that decision was given. We sent for the High Court record relating to that case and examined the judgments of the two lower Courts, but nothing was revealed which could give us an indication as to the

[2] [1909] 59 P.R. 1909 [4] A.I.R. 1922 Lah. 65 [6] A.I.R. 1925 Lah. 87
[3] A.I.R. 1922 Lah. 392 [5] A.I.R. 1923 Lah. 210 [7] [1920] 62 I.C. 855

circumstances under which the gift has been made, except that it appeared that the donor there was sonless and the donee was his brother, who would have in the ordinary course succeeded to the former on his death. If this was so the case was clearly one of acceleration of succession and in those circumstances it was rightly held that the gift would not alter the character of the land which would still continue to be ancestral. The facts in the present case, however, are as pointed out already, entirely different. I, therefore, hold that the learned trial Judge was correct in holding that the whole of the land in Bharta Khurd was non-ancestral to which the, plaintiffs had a right to succeed in preference to the defendants. It may be mentioned that the learned District Judge sought to base his decision on *Maya Das v. Gurdit Singh*[8], but both counsel are agreed that that ruling has not got the remotest bearing on the point for determination in the case. I would, therefore, set aside the finding of the learned District Judge relating to the Bharta Khurd land and restore that of the learned Subordinate Judge.

14. As to the 55 kanals of Rahon land the learned Subordinate Judge found that one-fourth of it was ancestral and three-fourths non-ancestral. The learned District Judge has given no finding on this point. Both Mr. Badri Das and Mr. Zafar Ullah Khan, after examining the record, are agreed that this finding of the Subordinate Judge is in accord with the facts on the record. Mr. Zafar Ullah Khan, however, argues that the plaintiffs are not entitled to be heard in second appeal in support of their claim relating to this land, as the learned District Judge has thrown out their claim on a question of custom, and as no certificate has been filed with the memorandum of appeal, this Court is precluded from adjudicating upon it. It appears, however from the pleadings of the parties and the issues as framed, as well as from the evidence led at the trial that no question of custom was raised by either party that might have had any bearing on the claim relating to this land. The learned District Judge in rejecting this part of the plaintiffs' claim purports to follow *Partapi v. Hazard Singh*[9], from which ruling he infers that the plaintiffs, who are the daughter's sons of Mt. Aziman had no right to contest the sale effected by her. He also thought that the decree which the collaterals had obtained in 1911 would enure for the benefit of those persons only who have a right to sue under Punjab Act 1 of 1920, the plaintiffs have no locus standi to sue.

15. With regard to the first of these grounds I may say at once that neither party had during the trial suggested that in the tribe to which the parties belong daughters or their sons have no right to contest an alienation by the widow of the last male holder with regard to the property which she had got from her husband. No evidence was led on the point nor any finding given by the trial Judge. The learned District Judge, was therefore not justified in importing it, into the decision of

the case. If the question had been raised at the proper stage and if a decision on it had been necessary for the purposes of this case, it would not have been difficult for the plaintiffs to prove that they had a locus standi to contest Mt. Aziman's alienation. It is only sufficient to point out that *Mt. Partapi v. Hazara Singh*[10], is no longer regarded as laying down a rule of general application. Subsequent decisions of this Court, the most important of which are *Gobinda v. Nandu*[11], and *Dayal Kaur v. Mahtab Kaur*[12], have taken a contrary

[8][1912] 146 P.W.R. 1912 [10][1916] 33 P.R. 1916 [12] A.I.R. 1921 Lah. 168

[9][1916] 33 P.R. 1916 [11] A.I.R. 1922 Lah. 217

view of the locus standi of a female to contest an alienation by another female. Further this question is of no importance whatever in this litigation as the present is not a suit to contest an alienation by a widow. It is a suit to succeed to the property of the last male holder on the death of his widow by persons who are admittedly his next heirs and, therefore, the rule in Mt. Partapi's case has no bearing on it.

16. Nor can I see the force of the argument based upon Punjab Act 1 of 1920. That Act prescribes the period of limitation for suits by a certain class of collaterals to contest alienations of ancestral land. In the present case no question of limitation is involved nor is the suit one to contest an alienation of ancestral land. There can be no doubt that the decree passed in 1911 setting aside the sale in 191.1 enures for the benefit of those persons, who were entitled to succeed at the time when succession opened out in 1921. The plaintiffs are admittedly the heirs of Badar Bakhsh qua his non-ancestral land and are entitled to succeed to it.

17. For these reasons the learned District Judge's finding cannot be supported. As the decision proceeded on a point, which was neither in the pleading nor put in issue and a decision on which was not really required for the decision of the case it was not necessary for the plaintiffs to file certificate under Section 41(1)(3), Punjab Courts Act, with their memorandum of second appeal. I would, therefore, overrule the objection raised by Mr. Zafar Ullah Khan against the competency of the appeal. Mr. Zafar Ullah Khan has frankly conceded that he is unable to support the plea raised by the defendants in their written statements that the compromise decree of 1911 barred the plaintiffs' claim to this land. I have already held that three-fourths of the land is ancestral, The plaintiffs are therefore, entitled to succeed with regard to the three-fourths of 55 kanals of land in Rahon.

18. For the foregoing reasons I would accept this appeal, set aside the judgment and the decree of the lower appellate Court and restore that of the trial Court. As the plaintiffs have substantially succeeded they will get their costs in all Courts.

Agha Haidar, J.

19. I agree

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