Privy Council Appeal No. 109 *of* 1933

Musammat Biro - - - - - - - *Appellant*

v.

Atma Ram and others - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT LAHORE

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 1st FEBRUARY, 1937.

Present at the Hearing:

LORD ROCHE.
SIR SHADI LAL.
SIR GEORGE RANKIN.

[*Delivered by* SIR SHADI LAL.]

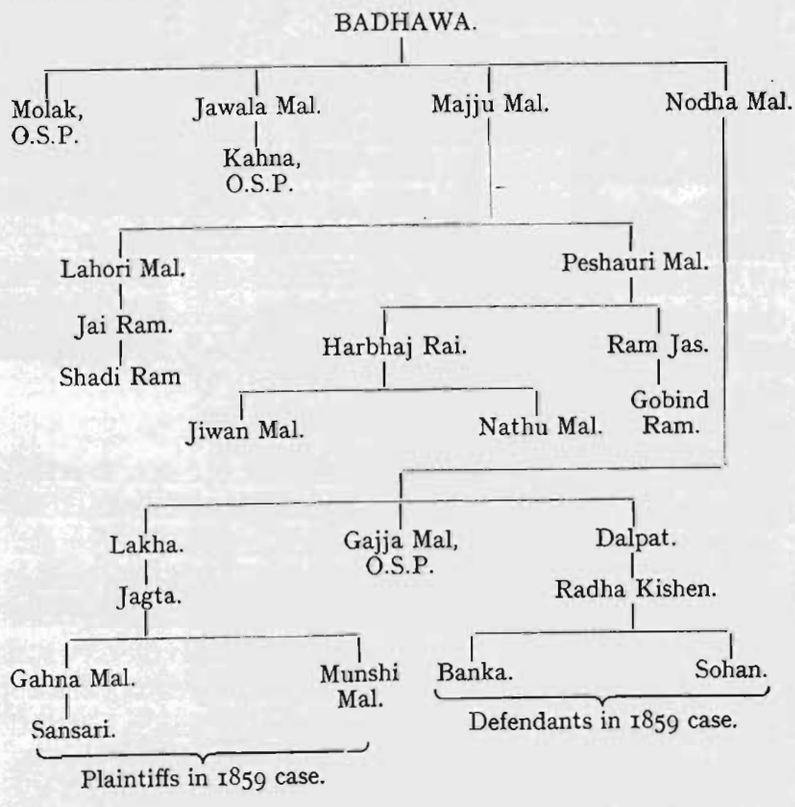
On the 20th September, 1900, one Harbans Lal, a Khatri of Ludhiana in the province of the Punjab, died leaving him surviving a widow, Musammat Bir Wanti *alias* Musammat Biro, and a daughter, Musammat Ishri, by a predeceased wife. The widow took possession of the whole of his estate, which consisted not only of moveables, but also of agricultural land and house property. In July, 1920, she made a will, by which, after declaring that she had previously gifted certain immoveable properties to her relative, Bhagat Ram, she gave various properties to charities. The dispute in the suit, which has led to this appeal, is confined to the gift made to Bhagat Ram, the validity of which is contested by the plaintiffs, who claim to be the collaterals of Musammat Biro's husband, Harbans Lal. They challenge her authority to make the transfer, and ask for a declaration that it should not adversely affect their right to succeed to the estate after her death.

The Trial Judge held that the plaintiffs had not proved their relationship with Harbans Lal, and he dismissed their suit, not only on that ground, but also on the ground that, under her husband's will, the widow was the absolute owner of the estate, and was entitled to make the gift in question. On appeal, the High Court at Lahore dissented from his judgment, and granted a decree in favour of the plaintiffs. From that decree Musammat Biro has brought the present appeal which has been heard *ex parte*.

Before pronouncing upon the main questions urged on behalf of the appellant, their Lordships desire to clear the ground by disposing of a matter which does not appear to have been raised in the Courts below. It is argued that, while in paragraphs 4 and 9 of their plaint the plaintiffs sought to impeach the oral gift alleged to have been made by Musammat Biro "about two or three years" before the institution of the suit, the judgment of the High Court deals

with the gift mentioned by her in her will. A perusal of the will, which was relied upon by the alienee himself in support of the gift, however, shows that it recites and confirms the oral gift relating to a moiety of a residential house, which alone belonged to Harbans Lal; and it is the gift of that property only which has been declared to be inoperative as against the plaintiffs. It cannot, therefore, be said that the judgment of the High Court is at variance with the claim made in the plaint.

Coming now to the question of the relationship of the plaintiffs with Harbans Lal, their Lordships concur with the High Court that the plaintiffs have succeeded in proving that they are descendants in the male line of one Mauja Mal *alias* Majju Mal who was a paternal ancestor of Harbans Lal. To discharge the onus, which undoubtedly rested upon them, they propounded a pedigree table which shows that they are the great-grandsons of one Peshauri Mal, and that Harbans Lal was the great-grandson of Peshauri Mal's brother Lahori Mal. Now, as stated by the learned Judges of the High Court, the parties were agreed that Peshauri Mal and Lahori Mal were the ancestors of the plaintiffs and Harbans Lal respectively as shown in the pedigree table, but it was denied by the defendants that these two persons were the sons of Mauja Mal. The dispute was thus narrowed down to the simple issue of whether Mauja Mal was the father of Peshauri Mal and Lahori Mal, and this fact is amply proved by the statement which was made by one Munshi Mal in 1859. It appears that in that year he and his nephew Sansari brought a suit against their cousins Banka and Sohan for the recovery of their share of the estates left by Molak and Kahna. In order to prove that the then plaintiffs were collaterals of the two persons whose estates were the subject matter of that suit, Munshi Mal deposed to a long pedigree table, which, with the omission of unnecessary names, is as follows:—



This pedigree shows that Peshauri Mal and Lahori Mal were the sons of Majju Mal, which is otherwise spelt as Mauja Mal. Munshi Mal had died long before the institution of the present suit, and it was, therefore, impossible to have his direct testimony. But the statement made by him in 1859 is admissible under section 32 of the Indian Evidence Act, which sets out various exceptions to the general rule excluding hearsay. One of the exceptions, as enacted by sub-section 5 of that section, provides that a statement relating to the existence of a relationship, made orally or in writing by a person who is dead, is admissible in evidence, if the person making the statement had special means of knowledge as to that relationship, and the statement was made by him before the question in dispute was raised. It is not disputed that Munshi Mal, as a member of the family, had special means of knowing the relationship stated by him, and that the statement was made by him before the present dispute arose. Both the conditions prescribed by the law have, therefore, been satisfied.

It is, however, argued that for determining the issue of relationship, which arose in that case, it was not necessary to mention Majju Mal or his descendants; and that the statement of Munshi Mal, so far as it related to Majju Mal's branch, was irrelevant to that issue, and is, therefore, inadmissible in the present case. There is no warrant for this contention. The language of sub-section 5 requires only that the statement tendered in evidence must be one made by a person having special means of knowing the relationship to which it relates, and that it must have been made *ante litem motam*. These are the only pre-requisites to the admission of the statement, and it is nowhere laid down that a third condition should be fulfilled, namely, that the statement should be relevant to the matter in issue in respect of which it was made. It is to be observed that the legislature does not say that the statement should have been made in a judicial case, where alone the question of relevance can arise. The language, unrestricted as it is by any such condition, embraces every statement as to relationship made *ante litem motam* by a person having special means of knowledge of it; and it is immaterial whether it was made in a judicial proceeding or otherwise. It is clear that for an extra-judicial statement there can be no issue with reference to which the question of relevancy may be determined. Neither the language of the statute, nor any principle of law, can be invoked to sustain the contention raised by the appellant.

Their Lordships are of opinion that the statement of Munshi Mal as to the descendants of Majju Mal, satisfying, as it does, both the conditions required by the law, was rightly received in evidence; and there is no valid reason for doubting the accuracy of the declaration that Peshauri Mal, the ancestor of the plaintiffs, was a brother of Lahori Mal who was admittedly the great-grandfather of Harbans Lal. The plaintiffs have, therefore, proved that they are

reversioners of Harbans Lal, and as such they are entitled to contest the gift made by his widow, whose power of alienation was limited by the Hindu law.

But the appellant seeks to defeat their claim on the ground that she was empowered by her husband to dispose of the property without any restriction, and that the gift in question, having been made in the exercise of that power, cannot be challenged. In support of this contention she has propounded a will which purports to have been written by Harbans Lal in his own handwriting. The plaintiffs impeach the genuineness of the will, and the question is whether she has succeeded in proving its execution by Harbans Lal.

Now, the document is written in Urdu characters, of which Harbans Lal was, according to the plaintiffs, wholly ignorant. It is not denied that he used to write his account books only in Lunda characters, and there is no document admitted, or proved, to have been written by him in Urdu script, with which the disputed handwriting could be compared. The appellant, however, places her reliance upon the evidence of the witnesses who claim to have attested the will, but the learned Judges of the High Court have fully discussed that evidence and found it to be " interested, contradictory, discrepant and insufficient to prove the due execution of the will." It is true that the Trial Judge expressed his opinion in favour of the execution of the will, but he had not heard the evidence of all the witnesses examined by the parties. Nor did he give sufficient weight to the circumstances which militate against its genuineness.

Before examining the provisions of the will, their Lordships observe that, if Harbans Lal had died intestate, the whole of his estate would, under the Hindu law by which he was governed, have devolved upon his widow with a right of alienation only for the purposes of necessity recognised by that law. On her death the estate would descend to his daughter with the same restricted right of alienation, and in the event of the latter's death her children would inherit it, male children taking the estate as absolute owners.

How does the will dispose of the estate? Mussammat Ishri, who was the only child of the testator, was, according to this document, to get at her marriage only a house and a shop, but even this property was given to her only for life, and was to revert to his estate on her dying unmarried or without leaving male issue. The bulk of the estate was to vest in his widow and three other women, namely, his mother, his step-mother and his paternal aunt. It is clear that under the Hindu law these three women were not entitled to any portion of the estate, but could claim only maintenance. But the will makes them joint owners equally with the widow. None of the devisees could get the estate partitioned or alienate it even for necessity. It was, however, provided that the lady, who survived the other

three devisees, would become the absolute owner of the estate. It is to be borne in mind that the widow of the testator would not get her husband's estate, if she predeceased any of her co-devisees.

In view of this strange provision, and considering the niggardly manner in which the daughter, who should have been the proper object of her father's bounty, was treated, their Lordships think that the will was an inofficious testament. The inclusion of the three ladies, who had no claim whatever upon his charity, among the devisees with rights, equal to those of his own widow, undoubtedly gave the testament the advantage of verisimilitude; but it would not inflict any injury upon her, if it came into existence after the deaths of those ladies. It is most unlikely that a person having a wife and a minor unmarried daughter, who should be the objects of his affection, would make a will which would practically disinherit them.

That the testament is unnatural and runs counter to the ordinary sentiments of persons, having a status in society similar to that of Harbans Lal, cannot be seriously disputed. But this is not the only circumstance which tells against its genuineness. The will purports to have been executed on 24th August, 1900, and the testator died within a month of that date. But it is strange that it was not produced until 1922, after the commencement of the present litigation. During this long period of 22 years, which intervened, there were occasions when the widow or her advisers could have produced the document, if it had been in existence; but they did not do so. In July, 1920, she herself made a will, which confirmed the oral gift to Bhagat Ram and gave other properties to educational institutions. How does she describe in it the nature of the estate held by her and her power of disposing of it? It is significant that she does not say that she had received the estate under her husband's will, but merely mentions the fact that she was holding it "in the capacity of heir" of her husband. Now, this description, which is usually employed to denote the estate which a Hindu widow gets upon her husband's dying intestate, does not convey any idea of her having received the estate under her husband's will. If that will had been the foundation of her title, she would have made a prominent mention of it in this document, which was executed by her in relation to the property inherited by her from her husband.

Moreover, the will in dispute conferred upon her an absolute estate, and that provision would furnish an irresistible authority for making the gift to Bhagat Ram and for other dispositions. There would, in that case, be no necessity for suggesting in her will various reasons, which are ordinarily mentioned to justify an alienation by a Hindu widow of the estate held by her on the usual widow's tenure. It cannot be believed that, if she was, at that time, armed with absolute power granted by her husband, she would refrain from citing it as the source of her authority.

Her failure to mention the will in question on a critical occasion is incapable of explanation on any other reasonable hypothesis than that it did not exist at that time. This circumstance, re-inforced, as it is, by the unnatural character of the dispositions contained in it, as explained above, warrants the conclusion that the appellant has failed to prove that the alleged will was made by Harbans Lal. Their Lordships consider it unnecessary to refer to other evidence, which, in their opinion, supports the same conclusion. They will, therefore, humbly advise His Majesty that the judgment of the High Court should be affirmed, and the appeal be dismissed. They will, however, make no order as to the costs, as there is no appearance before them by, or on behalf of, the respondents.

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In the Privy Council.

MUSAMMAT BIRO

v.

ATMA RAM AND OTHERS

DELIVERED BY SIR SHADI LAL

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