Privy Council Appeal No. 46 *of* 1942

Oudh Appeal No. 9 *of* 1940

Thakur Lalta Bakhsh Singh and others – – – *Appellants*

v.

Lala Phool Chand and others – – – – – *Respondents*

FROM

THE CHIEF COURT OF OUDH

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 6TH FEBRUARY, 1945

Present at the Hearing:

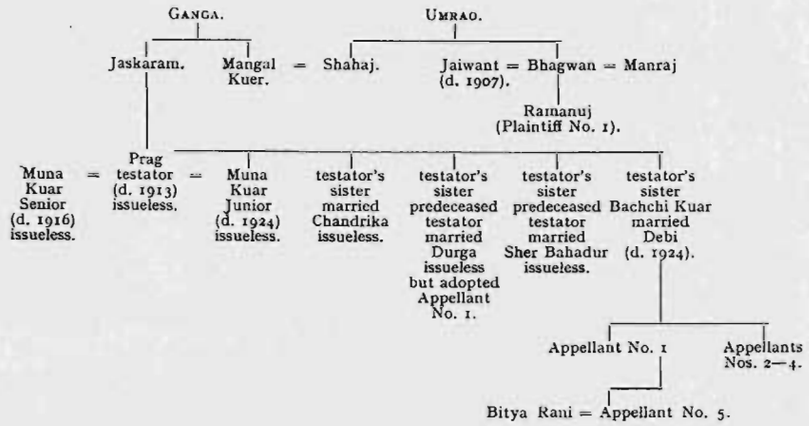
LORD THANKERTON
LORD MACMILLAN
LORD SIMONDS
SIR MADHAVAN NAIR
SIR JOHN BEAUMONT

[*Delivered by* SIR MADHAVAN NAIR]

This is an appeal from a decree of the Chief Court of Oudh dated 12th December, 1939, which modified a decree of the Additional Civil Judge of Bara Banki dated 12th October, 1936, by affirming the said decree on condition of respondents 1 to 3 hereinafter called the respondents (who were plaintiffs 2, 3 and 4 in the suit) paying the appellants (defendants 1 to 5) a sum of Rs.13,592. The said decree awarded the respondents 7/20ths (equivalent to 5 annas 7 1/5 pies) share in the property claimed in the suit.

The suit out of which this appeal arises was originally brought to recover possession of the entire property (16 annas share) mentioned in the plaint; but it came to be confined to a 9 annas share only. Plaintiff No. 1 considering himself entitled to the entire property in suit under a will dated 30th March, 1896, executed by one Prag Baksh Singh (hereinafter called the "testator"), sold a 9 annas share of it to the respondents by means of two successive sale deeds in 1932, and 1933, and another 2 annas out of the remaining 7 annas share to plaintiffs 5 and 6, who afterwards withdrew from the suit by virtue of a compromise with the defendants. Later on, plaintiff No. 1 also withdrew from the suit. Thus out of the 6 plaintiffs, plaintiffs 1, 5 and 6 withdrew, and the suit was continued by the respondents in respect of the 9 annas share in the suit property which they had purchased from plaintiff No. 1. The disputed property was admittedly in the possession of the appellants.

The testator to whom the property in suit belonged died on 20th May, 1913. His relationship with the appellants and plaintiff No. 1 will appear from the following pedigree:—



It will be seen from the pedigree that the testator died issueless but he left two widows—both called Muna Kuar—the senior of whom died on 20th August, 1916, and the junior on 24th April, 1924. The testator left two sisters also, one of whom Bachchi Kuar had 4 sons, appellants Nos. 1 to 4. Appellant No. 5 is the husband of appellant No. 1's deceased daughter. To her appellant No. 1 had given a village out of the property in suit. It is not now in dispute that appellants Nos. 1 to 4 are the sons of the testator's sister who was married to Debi Baksh Singh.

It will be further seen that the testator's father's sister married one Shahaj and that Shahaj had a brother called Bhagwan whose first wife was the mother of plaintiff No. 1. Plaintiff No. 1 thus appears to be no relation of the testator, but it is not now in dispute that the son of the testator's aunt, the wife of Bhagwan Singh, is Ramanuj plaintiff No. 1.

The main questions involved in the appeal relate to the respective rights of the parties to the suit property. As these depend on the construction of the will of the testator it is necessary to reproduce the relevant portions of it which are as follows:—

> Para. 1. That after the death of the executant the wife of the executant shall possess and enjoy the entire aforesaid property without any rights of transfer, e.g. mortgage, sale and gift, etc., up to the time her conduct and character is not contrary to that of kith and kin, i.e. (up to the time) she is not guilty of any immorality.
>
> Para. 2. That if the executant contracts a second marriage in the lifetime of the said wife and has any child male or female from the second wife then the former wife shall be entitled as against the issue from the latter to receive as much Guzara as may suffice for her maintenance.
>
> Para. 3. That in case there is no male and female issue and wife, the wife of Bhagwan Bux Singh, taluqdar Lahar, pergana, Haidergarh, district Barabanki, who is the aunt (father's sister) of the executant and also the wife of Thakur Durga Bux Singh, taluqdar Nilgaon, the wife of Thakur Debi Bux Singh, resident of village Kundi, district Sitapur, and wife of Thakur Sher Bahadur Singh, taluqdar Muhommadpur, pergana Fatehpur, district Barabanki, who are the sisters of me, the executant, shall divide the aforesaid property equally amongst themselves and after them their male and female issue shall be the owners and in case there is no issue, then that female shall continue to enjoy and possess her share till her lifetime and after her demise her husband shall remain in possession and occupation of her property till his lifetime and after him that very share shall be divided equally upon the issue of those ladies out of the aforesaid four ladies who have got issue.
>
> Para. 4. That no other member of my family is entitled to my property, nor has he any claim to it. If there appears any claimant, then his claim as against the aforementioned four ladies shall be void and untenable.

On the testator's death, his two widows entered into possession of the property. When the senior widow died, a dispute arose between the junior widow, and the testator's sister Bachchi Kuar, mother of the appellants Nos. 1 to 4, regarding the rights of the former in the property. At about this time the pressure of mortgage debts contracted by the testator at high rates of interest threatened a disruption of the estate and the question of payment of the debts became urgent. The situation was met by the execution of a family settlement dated 1917, the only importance of which, so far as the present appeal is concerned, is that

under it appellant No. 1, in consideration of being allowed certain properties, took over the liability of paying all the debts due from the estate of the testator. It has now been found that in all a sum of Rs.71,992 was paid by appellant No. 1 to the creditors of the testator and that he spent a further sum of Rs.1,127-6-0, in litigation about the debts, the total sum amounting to Rs.73,119-6-0. This finding, arrived at by the High Court, has not been questioned before the Board. It has also been found that the above payments made by appellant No. 1 were by no means voluntary, but were made by him as having an interest in the property.

The appellants, and the respondents (transferees from plaintiff No. 1), both rest their claim to the property in the suit on the terms of the will. Generally stated, the appellants contended, amongst other grounds which need not be detailed, that plaintiff No. 1 is not entitled to any property under the testator's will, as he is not the son of the testator's aunt, that the right to the property, if he took any under the will, was barred by limitation under article 140 or 141 of the Indian Limitation Act, that the appellant No. 1 had paid up the debts of the testator and had incurred costs in connection with litigation relating to those debts, and that he was entitled to recover the same with interest from persons claiming the property. Article 140 of the Limitation Act prescribes a period of " 12 years " for a suit " for possession of immovable property by a remainder man, a reversioner (other than a landlord) or a devisee ", and the period begins to run from the time " when his estate falls into possession ". Article 141 prescribes a period of 12 years for " a like suit " by a Hindoo or Mohammaden entitled to the possession of immovable property on the death of a Hindoo or Mohammaden " female " and the period begins to run from the time " when the female dies ".

Holding that plaintiff No. 1 is the son of the testator's aunt referred to in the will which finding, as stated already, is not challenged before the Board, the Subordinate Judge came to the conclusion on a construction of the third paragraph of the will that he was entitled to 7/20ths share of the property in the suit and that the suit was not barred by limitation. As regards the debts alleged to have been paid by appellant No. 1, he held that these amounted to Rs.71,992, but that he was not entitled to recover anything from the respondents as the income realised by the appellants who were in possession of the property amounted to Rs.1,00,000. The Subordinate Judge also held that appellant No. 1 was not entitled to any costs of litigation, and interest. In the result, he gave a decree in favour of the respondents for possession of 7/20ths share (equivalent to 5 annas 7 1/5 pies out of 16 annas) in the entire property in suit—though a 9 annas share had been sold to them—along with the mesne profits which were left to be determined later.

Their Lordships may now conveniently refer to the Subordinate Judge's construction of the third paragraph of the will and also to the reasoning on which his finding as to limitation is based. As regards the first, it will be remembered that when the testator died issue-less on 20th May, 1913, he left surviving him two widows, his sister Bachchi Kuar the mother of the appellants, and plaintiff No. 1 the son of Bhagwan and his first wife mentioned in clause 3, as the first of the 4 lady legatees. His other sisters mentioned in the will and their husbands had died issue-less. The construction put upon the third paragraph of the will by the Subordinate Judge has been thus correctly summarised by the High Court. " The Court held that as on the death of Musammat Muna Kuar junior the issue of only two of the four ladies mentioned in the will namely plaintiff No. 1 (son of the wife of Bhagwan Baksh Singh) and defendants 1 to 4 (sons of Bachchi Kuar, sister of Prag Baksh Singh and wife of Debi Baksh Singh) were living, one-fourth of the property would go to the plaintiff No. 1 and another one-fourth to defendants 1 to 4 and that the remaining half of the property would be divided equally among the issues of the wife of Bhagwan Baksh Singh and Musammat Bachchi Kuar under clause 3 of the will, so that plaintiff No. 1 and defendants 1 to 4 would each be entitled to a one-fifth share out of the remaining half. In this way the Court found that the share of plaintiff

No. 1 in the entire property of Durga Baksh Singh was one-fourth plus one-tenth, that is, seven-twentieth ".

On the question of limitation, the Subordinate Judge held that time began to run against the plaintiff only from the death of the junior widow in 1924, and as the suit was brought within 12 years from that date it was not barred by limitation either under article 140 or 141 of the Limitation Act, whichever article applied, over-ruling the appellants' contention that limitation began to run from the death of the senior widow which took place in 1916.

On appeal to the High Court, the learned Judges agreed with the opinion of the Subordinate Judge on the construction of the third clause of the will and with respect to the share of the property that plaintiff No. 1 was entitled to get under it; and also on question of limitation; but differed from him as regards the claims of the appellants to recover from plaintiff No. 1, i.e. his transferees, his share of the debt found binding on the testator's estate discharged by appellant No. 1, and of the litigation expenses incurred by him. As stated already they held that a total Rs.73,119-6-0 had been spent by appellant No. 1 by way of paying the creditors of the testator and meeting the litigation expenses, and that the respondents should bear their portion of this debt. As a result of the finding called for from the lower court it was found that the profits realised by the appellants from the suit property after the death of Muna Kuar junior up to 23rd July, 1913, that is, up to 3 years before the suit, amounted to Rs.34,285-11-5. The learned Judges therefore held that " the plaintiffs' proportionate (7/20ths) share of this liability comes to Rs.25,592 approximately. As their share of the profits is Rs.12,000 there is a balance of Rs.13,592 against them and this they must pay to the defendants before getting possession of the property ". The learned Judges, however, refused to award interest on the amount claimed by them on the ground that " they have been in possession of the property and in receipt of the profits thereof in lieu of that money ". In the result, they modified the decree passed by the Subordinate Judge in favour of the respondents by decreeing them " possession of 7/20ths of the property in suit on condition of their paying Rs.13,592 to the defendants (appellants) ".

In support of this appeal, the learned Counsel for the appellants urged (1) that plaintiff No. 1, from whom the respondents derived their title to the property, took nothing under the testator's will, because the operation of clause 3 of the will was limited to a contingency which never arose in the case; (2) that if plaintiff No. 1 took any interest at all under the will, it became vested in him at the senior widow's death in 1916 and the suit to enforce his claim is now barred; (3) that, since the two sisters of the testator for whom provision had been made in the will, had predeceased him, their portions lapsed and plaintiff No. 1 can have no share in them; (4) (*a*) that appellant No. 1 should have been allowed interest on the sum due to him, and (*b*) that he should not have been made liable to account to the respondents for any of the profits of the property sued for in respect of any period ending 3 years before suit; and (5) that, since plaintiff No. 1 was not able to give the respondents full title to 9 annas share in the suit property, they could claim only damages as provided for in the deed, and that in any event, the respondents could be given a decree only for 9/16ths of the share held to belong to plaintiff No. 1, i.e. 9/16ths of 7 × 20 and not 7/20ths of the suit property, as he sold them only 9 annas out of the 16 annas share of the property.

Their Lordships will now proceed to consider these arguments in order.

As regards ground (1), it may be mentioned that before the Courts in India plaintiff No. 1 was sought to be excluded from sharing the property not on the ground now alleged but on other grounds; however, as the point relates to the construction of the will their Lordships will consider it. It is argued that though the testator had no male or female issue, having regard to the fact that his two wives were living at the time of his death the contingency contemplated for the operation of the third paragraph of

the will, namely, " in case there is no male and female issue and wife " did not arise, and therefore plaintiff No. 1 never took any interest under the will. The argument is ingenious, but their Lordships are unable to accept it. The will is in Urdu and the Subordinate Judge says " the language used is simple and to my mind there is absolutely no ambiguity in the bequest made by Prag. Bakhsh Singh ". The words relied on in the English translation have no technical significance. It is obvious that the will has not been drawn up by any trained conveyancer. As was observed by their Lordships in *Venkata Narasimha Apparow* v. *Parthasarthy Appa Row* (41 I.A.; p. 51), in construing a will, " the primary duty of a Court is to ascertain from the language of the testator what were his intentions " and " in doing so they are entitled and bound to bear in mind other matters than merely the words used ". These other matters would include the " surrounding circumstances ", and their Lordships proceed to say, " that native testators should be ignorant of the legal phrases proper to express their intentions or of the legal steps necessary to carry them into effect is one of the most important of circumstances which the Courts must bear in mind and it is justified in refusing to allow defects in expression in these matters to prevent the carrying out of the testator's true intentions. But these intentions must be ascertained by the proper construction of the words he uses and once ascertained they must not be departed from ". It is also well settled " that rules established in English Courts for construing English documents are not as such applicable to transactions between natives of this country. Rules of Construction are rules designed to assist in ascertaining intention; and the applicability of many such rules depend upon the habits of thought and modes of expression prevalent amongst those to whose language they are applied . . . ". (See *Bhagabati Barmanya* v. *Kalicharan Singh*. 38 I.A.; p. 54.) Applying these principles, the true intention of the testator has to be ascertained from the language used by him in the will.

Except the inference drawn from the words " In case there is no male and female issue and wife " nothing has been suggested as to why the testator should have intended when he made the will that if his wife or wives survived him (there being no male and female issue) the legatees mentioned in paragraph 3 of the will should forfeit their legacies. In the present case, the testator had a wife living when he made the will. In the ordinary course he would be succeeded by his wife and after her death the properties would pass to others according to law, but provision has now been made by the testator as to whom they should pass after her death. This is what has been done in paragraph 3 of the will. It has not been argued that the testator could not validly make the arrangements which he has made, the property being his own. It appears to their Lordships that the intention of the testator which they have to seek is sufficiently clear. He intended that the legatees mentioned in paragraph 3 of the will, who of course would include plaintiff No. 1, should take their legacies when the wife is dead, which means that the bequests made in the clause will not operate as long as the widow (or either of the two widows) lived. Their Lordships see no reason why they should construe the expression " in case . . . no wife " in any sense other than this, namely, that the testator intended in that paragraph that the legacies to the four ladies mentioned in it were to take effect after the wife is no more, that is the wife of the testator should enjoy the property during her lifetime and, after her death, the legatees should take their shares, it being admitted that the testator left no issue male or female. In their Lordships' view this construction would be more consonant with the " habits of thought " in the mind of a Hindu testator, than what has been suggested by the appellants' learned Counsel. A more felicitous expression or a fuller one than the one in question might well have been chosen by the testator to express his intention more clearly, but before the Subordinate Judge, the language of the will, as stated by him, did not create any difficulty, and the point now urged was not taken either before him or before the High Court. As well pointed out by their Lordships in the case mentioned above, " defects in expression should not be allowed to prevent the carrying out of the testator's intentions ". In

this view of the third paragraph of the will, plaintiff No. 1 cannot be excluded from taking the benefits under the will if he is not disentitled in any other way.

It was next urged, that if the plaintiff took any share of the property under the will his claim was barred by limitation. In this connection it is said that the wife referred to in paragraph 3 of the will after whose death the legacies would take effect is the senior wife of the testator and as she died in 1916, more than 12 years before suit, it is barred by limitation either by article 140 or 141. This argument is based on the contention that no provision has been made in the will for the junior widow and the wife in paragraph 3 cannot therefore be the junior wife who admittedly died within 12 years before suit. Both Courts in India have rejected the argument for very good reasons. It is true that no express provision has been made by the testator for the junior widow, but their Lordships feel no doubt that she takes an interest for her life whether by implication under the will as the High Court thought or under the Hindu law, it is not necessary to determine. Their Lordships would only add that so far as the widows themselves were concerned they never seemed to have thought that the testator had not made any provision for the junior widow, for their Lordships find that on the testator's death his two widows entered into equal possession of the property and mutation was made for equal shares. They also find (see the Subordinate Judge's judgment) that on the death of the senior widow of the testator the junior widow remained in possession of the entire property and the Subordinate Judge states his opinion that " this was quite in accordance with the intentions and wishes of the testator as expressed in clause 3 of the will ". The testator having made provision for the junior widow, and she having remained in possession until her death the cause of action for the suit arose only after her death which took place in 1924 and, as the suit was brought in 1933, it is not barred by limitation.

It was next argued, that the shares of the predeceased sisters of the testator have lapsed and should not have been divided amongst the children of the other sisters. The answer to this question would depend upon the correct construction of paragraph 3 of the will. Courts in India have taken the view that the testator under the third paragraph of the will has granted only life estates to the ladies mentioned therein and that on their death he has given their shares to their children, if they have any; and in case there is no issue then to their husbands and after them he has decided that those shares should be divided equally amongst the children of those sisters who have issue. In this view of the will with which their Lordships agree the shares of the predeceased sisters will be divided between the children of the other sisters as held by the courts in India and the question of the lapse of the shares does not arise.

The next argument related to the interest claimed by appellant No. 1 on the money—Rs.13,592—which the High Court has found should be paid by the respondents before they obtain delivery of their share of property decreed in their favour. Since the appellants have already discharged the debt of the testator by making this payment which rightly falls to the share of the respondents, it cannot be seriously contended that interest should not be paid on the same to the appellants. Their Lordships hold that the appellants are entitled to interest on Rs.13,592 which they decide should be at 6 per cent., the usual court rate (from 1st January, 1921, to the beginning of the three years before suit). In connection with this argument, Mr. Pringle, learned junior Counsel for the appellants, desired to advance the view that appellant No. 1 was not liable to account to the respondents for any of the profits of the property sued for in respect of any period ending three years before suit and that the High Court was wrong in holding that he was so liable. This ground was not taken in the appellants' case but was taken only now. Their Lordships are not therefore inclined to allow the learned Counsel to argue this question.

The next argument urged but faintly was that inasmuch as plaintiff No. 1 was not able to give the respondents the full 9 annas share of the property sold to them under the sale deeds they are entitled to claim from the vendor only damages as provided for in the sale deeds. In their

Lordships' view the terms of the deed do not necessarily preclude the respondents from recovering whatever share falls to plaintiff No. 1 even though they are not entitled to get the full 9 annas share. In equity they are entitled to get the smaller share now decreed to them.

The last argument urged was that in any event the respondents are entitled to only 9/16ths of the 7/20ths of the sold property now found to belong to plaintiff No. 1. This argument, urged also before the High Court, was rightly rejected by the learned Judges for the reason that " Sale deed exhibit II clearly shows that Ramanuj Bhan Bakhsh Singh (plaintiff No. 1) sold a 9 annas shares in the entire villages and other properties in dispute and the sale was held by this court to be a sale of the property and not merely of Ramanuj Bhan Bakhsh Singh's right to sue. There is therefore no reason to reduce the property purchased by plaintiffs 2 to 4 (the respondents) to a fraction of what Ramanuj Bhan Bakhsh Singh has been found entitled to. Having purchased a 9 annas share in the property plaintiffs 2 to 4 are in our opinion entitled to the entire 5 annas 7 1/5 pies share that has been found to be the share of Ramanuj Bhan Bakhsh Sing in the property in dispute ". Their Lordships agree with this view.

In the result, the appeal fails except as regards the interest on Rs.13,592 which their Lordships have held that the appellants are entitled to recover from the respondents in addition to Rs.13,592. The decree of the High Court will be modified to this extent. As regards costs, their Lordships think the proper order should be that the appellants should pay the costs incurred by the respondents before the Board reduced by one-tenth of the same; the order as to costs in the Courts below will stand. Their Lordships will humbly advise His Majesty accordingly.

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In the Privy Council

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