Privy Council Appeal No. 13 *of* 1945

Munnalal, minor, and others - - - - - *Appellants*

v.

Mst. Kashibai and others - - - - - - *Respondents*

Dr. Raghunathsingh *alias* **Nagulal** - - - - *Appellant*

v.

Mst. Kashibai and others - - - - - *Respondents*

Consolidated Appeals

FROM

THE HIGH COURT OF JUDICATURE AT NAGPUR

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 29TH JULY, 1946

Present at the Hearing:

LORD SIMONDS

MR. M. R. JAYAKAR

SIR JOHN BEAUMONT

[*Delivered by* SIR JOHN BEAUMONT]

This is a consolidated appeal by special leave from two judgments and two decrees dated the 16th December, 1937, and 22nd December, 1937, respectively of the High Court of Judicature at Nagpur, which reversed two judgments and two decrees dated the 21st June, 1934, and the 15th June, 1934, respectively of the Court of the Subordinate Judge, First Class, Khandwa.

The two appeals which are consolidated arise out of two suits in ejectment. The suit to which the first appeal relates was brought by the appellants, or their predecessors in title, claiming possession of a house and certain land in a town and the house thereon. In the suit to which the second appeal relates the appellant claimed possession of three *muafi* fields. The Subordinate Judge decreed both suits but, on appeal, the High Court dismissed them.

The title of the plaintiffs in both suits is traced from one, Balwant Singh, who died in the year 1907. The respondents claim through one, Bahadur Singh, the younger brother of the father of Balwant Singh. In the first appeal it is not disputed that Bahadur Singh was the owner of the property in suit and had power to dispose of it by will, the only question being whether he effectively did so.

Bahadur Singh died on the 13th April, 1890, having made a will dated 30th March, 1890, under which he bequeathed his property to his daughter Jankibai, and her minor son, Narain. He left no son or descendant of a son.

The learned Subordinate Judge held that the burden rested upon respondents 1 and 2, who were the daughters of Jankibai (the other respondents claiming through them) to prove the will of Bahadur, and that, whilst he could presume under section 90 of the Evidence Act that the will had been properly executed and attested, he could not, under that

section, presume that the testator, when he made his will, was of sound disposing mind. He accordingly held the will not proved. In appeal the High Court held that the presumption which could be drawn under section 90 extended to testamentary capacity and held the will proved.

Section 90 of the Evidence Act is in the following terms:—" Where any document, purporting or proved to be thirty years old, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the signature and every other part of such document, which purports to be in the handwriting of any particular person, is in that person's handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested."

The terms of section 114 must also be noted:—

> " The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case."

The will of Bahadur was more than thirty years old and was produced from proper custody, and both the lower Courts rightly held that the actual execution and attestation of the will could be presumed under section 90; they differed on the question whether the presumption extended to the testamentary capacity of the testator. A party setting up a will is required to prove that the testator was of sound disposing mind when he made his will but, in the absence of any evidence as to the state of the testator's mind, proof that he had executed a will rational in character in the presence of witnesses must lead to a presumption that he was of sound mind, and understood what he was about. This presumption can be justified under the express provisions of section 90, since a will cannot be said to be " duly " executed by a person who was not competent to execute it; and the presumption can be fortified under the more general provisions of section 114, since it is likely that a man who performs a solemn and rational act in the presence of witnesses is sane and understands what he is about. There was no evidence whatever that Bahadur was not in a perfectly normal state. Their Lordships feel no doubt that on this point the decision of the High Court was right, and that the will must be presumed to have been duly executed. The view taken by the learned Subordinate Judge would render it impossible, in most cases, to prove ancient wills. This disposes of the first appeal.

The second appeal stands on a different footing because it was the plaintiff's case that Bahadur had no interest in the property in suit which could be disposed of by his will. The High Court do not seem to have appreciated the nature of the second suit. Their judgment is contained in the following single sentence: " Counsel for respondents admitting that, in view of the findings in First Appeal No. 128 of 1934 (being an appeal in a suit the evidence and findings in which do by agreement control this connected case) his suit is barred by time, the appeal succeeds and the suit will be dismissed with half costs throughout." This admission of Counsel presupposes that the High Court considered that the property in suit passed under the will of Bahadur once such will was held to be proved; but the right of Bahadur to dispose of the property in suit had been elaborately discussed in the Judgment of the Subordinate Judge, who held that Bahadur had no interest in the property which he could dispose of by will. Neither his reasons nor the documents on which he relied, are noticed by the High Court. The respondents have not appeared on this appeal, and their Lordships find themselves in the unfortunate position of having to decide the appeal, in which the record is very heavy, not only without the assistance of any argument on behalf of the respondents, but also without the advantage of knowing what view the High Court took of the evidence in the case.

The appellant in the second appeal, as already mentioned, claims under Balwant and the learned Subordinate Judge held his title to be proved, and their Lordships accept this finding. It appears that Balwant

formerly held the office of Kanungo in the District of Nimar, and also that, in or about the year 1864, a settlement was made by the British Government with the Zamindars of the district under which this and other hereditary offices were abolished, and compensation was granted to the holders. On the 18th December, 1865, Balwant was given a sanad (Ex. P.28) by which he was granted certain lands with full power of alienation, subject to the payment to Government annually of Rs. 59 as quit-rent. It is admitted that this grant included the three fields, the subject-matter of the second suit. The father of Bahadur, and after his death, Bahadur, who represented the younger branch of the family, undoubtedly had some interest in the property in suit, and the difficulty is to determine the nature of that interest, there having been, apparently, no written grant. On the occasion of this Zamindari settlement, Captain H. Mackenzie made a report to Government, which is extensively quoted in the judgment of the learned Subordinate Judge. The report included tabular statements giving the names of the parties to whom grants had been made, and Captain Mackenzie pointed out that, in some cases, not only heads of families with whom the settlement had been made, but junior members of the family, received grants as co-sharers. In paragraph 43 of this report, which is quoted in paragraph 11 of the judgment of the learned Judge, Captain Mackenzie pointed out that a distinction had been drawn between those who were really shareholders and those who were in receipt of a maintenance from shareholders as near relations having claims upon them, and that " these receipts of maintenance, of course, lapse and require renewal and generally modification at the death of each recipient. Their assignment depends either upon the will of the share-holder or perhaps upon the judgment of a Civil Court; and it is therefore not necessary to show them in the statement." The name of Bahadur does not appear in the tabular statements, and from this the learned Subordinate Judge concluded that he was entitled to nothing more than a maintenance grant.

It appears that in the year 1877 Bahadur applied to the Revenue Authority to be entered as proprietor of one of the fields in suit in place of Balwant (Ex. P.5) but was told to file a suit in the Civil Court, which he did not do.

In 1890, on the death of Bahadur, his daughter Jankibai made an application to the Revenue Authorities which is Ex. P.2 claiming that the land in question had been in the possession of her father, Bahadur, and that he had executed a will in her favour under which she was in possession, and praying that her name, and that of her son, might be substituted in the records for that of Bahadur. To that application Balwant put in an answer which is Ex. P.4 in which he stated that the land in question pertained to " Jamindari rights " and the " Sanad " thereof was in his name and that, under such circumstances, and according to the family custom of the Jamindars, Bahadur dying without any male issue, the application of Jankibai for mutation in her name should be rejected. It is clear that Balwant's case was that the right of maintenance possessed by Bahadur did not pass to Jankibai. The Revenue Authorities considered the matter and on the 2nd May, 1891, the Deputy Commissioner passed an Order rejecting Jankibai's application. The Order contained this sentence:—" It is no doubt satisfactorily established that at a family arrangement Bahadur Singh was in or prior to 1860 granted certain fields to be held by him and his heirs as a maintenance ". The appellant relies on this statement as showing that Jankibai was entitled to succeed as her father's heir so that her possession was lawful during her lifetime but, as already pointed out, this was not Balwant's case. In appeal from the Order of the Deputy Commissioner, the Commissioner by an Order dated 1st June, 1891, agreed with the view of the Deputy Commissioner that Jankibai was not entitled to be entered as proprietor on the muafi register, but acceded to Jankibai's request that she should be entered as occupier in the Jamabandis in lieu of Bahadur.

In pursuance of the Order of the Commissioner, the name of Narain was entered as occupier until his death which occurred in 1903, and thereafter the name of Jankibai was entered until her death in 1919, and after that

the names of her daughters were entered. It is not necessary to refer in detail to the Jamabandis; they all show Balwant (or his successors) as proprietor. In the record for the year 1917/18 which is the last record before the death of Jankibai she was shown as the occupier at an occupancy rent of Rs.89. This rent is evidently part of the assessment made by Government; there is no suggestion that any rent was ever paid to Balwant or his successors which could be relied on as evidence of the relationship of landlord and tenant.

This suit was filed on the 28th October, 1931, twelve years all but a day after the death of Jankibai. The case of the plaintiff was that on the death of Bahadur Jankibai as his heir was entitled to possession under the maintenance grant to him, that her right ceased on her death, and thereafter the respondents who were not the heirs of Bahadur were in wrongful possession for a period of one day less than twelve years. The appellant relies mainly on the Jamabandis (which are prima facie evidence of the truth of their contents under Section 80 of the Central Provinces Land Revenue Code) as showing that he and his predecessors were the proprietors and that Jankibai was only an occupier. But the Jamabandis do not show the character in which Jankibai was occupying. The appellant relies on the general principle that a Court will always attribute possession to a lawful title where that is possible. But the only title which would account for the possession from 1890 down to the date of suit is that claimed by the respondents, namely, that Jankibai became absolute owner of the property under the will of her father; on the appellant's case possession was admittedly wrongful after the death of Jankibai.

Their Lordships however think that there is no room for drawing any presumption in this case since the circumstances under which the possession was assumed are known. Jankibai, on the death of her father, took possession under a claim of title derived under her father's will. She failed to satisfy the Revenue Authorities as to her title, but they accepted the fact that she was in possession and entered her name as occupier. There is nothing to show that she ever withdrew her claim to title under the will of Bahadur and that claim was plainly adverse to the title of Balwant. If, after the death of Bahadur, the rights of the parties had been determined in a Civil Suit, it might have been held that Bahadur possessed an interest, whether as co-sharer or occupancy tenant, which he could dispose of by will; or it might have been held, as the appellant contends that it would have been, that Jankibar succeeded as heir to her father for the limited interest of a female; but as Bahadur's interest was not the subject of any written grant it is obvious that Jankibai might have failed to prove that she had inherited any interest in the property, in which case her possession would have been unlawful from its inception. It is useless to speculate on what might have been the result of litigation which neither party ventured to embark upon. The essential fact is that Jankibai and her successors remained in possession of the property for some 40 years prior to the institution of the suit, and that they took possession under a claim of right adverse to the title of the appellant. In their Lordships' opinion, in these circumstances, the claim in the second suit is barred under Section 144 of the Limitation Act. Their Lordships have not forgotten that at the trial the plaintiff called two witnesses who asserted that Balwant, on grounds of compassion, had authorised Jankibai to remain in possession. This evidence, which seems inconsistent with the plaintiff's case that Jankibai was entitled to succeed as heir of her father, was accepted by the learned Subordinate Judge but rejected by the High Court in their Judgment in the first appeal. Their Lordships are not prepared to accept this testimony of the grant of a verbal licence to explain 40 years' possession.

For these reasons, Their Lordships will humbly advise His Majesty that both appeals be dismissed. The only respondents who have appeared are Babu Rajaram and Gyanchand, respondents 3 and 4 in the first appeal, and the appellants must pay their costs.

(51704) Wt. 8013—5 180 8/46 D.L. G. 338

In the Privy Council

MUNNALAL, MINOR, AND OTHERS

v.

MST. KASHIBAI AND OTHERS

DR. RAGHUNATHSINGH *ALIAS* NAGULAL

v.

MST. KASHIBAI AND OTHERS

CONSOLIDATED APPEALS

DELIVERED BY SIR JOHN BEAUMONT

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