Privy Council Appeal No. 7 of 1947

Imam Din - - - - - - - - - - *Appellant*

v.

Mst. Said Bibi (since deceased) 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 13TH OCTOBER, 1948

Present at the Hearing :

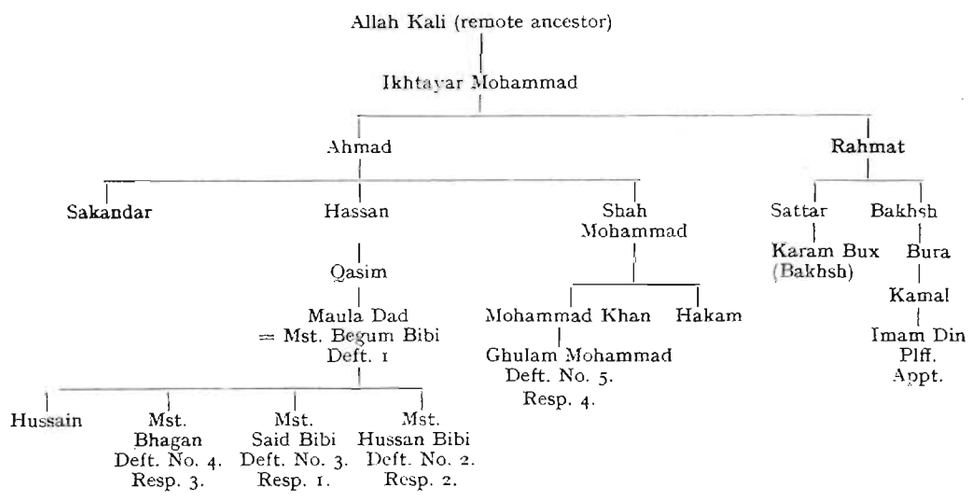
LORD DU PARCQ
LORD NORMAND
SIR JOHN BEAUMONT

[*Delivered by* SIR JOHN BEAUMONT]

This is an appeal from a judgment and decree of the High Court of Judicature, Lahore, dated the 30th January, 1936, which reversed a judgment and decree of the Court of the District Judge, Lyallpur, dated the 19th June, 1935, which modified a judgment and decree of the Court of the Subordinate Judge Sheikhupura, dated the 20th June, 1934.

In the suit, commenced in January, 1933, out of which this appeal arises the present appellant, who was the plaintiff and will generally be so referred to, prayed for a declaratory decree to the effect that the alienation by gift in respect of land measuring 1744 kanals and 12 marlas entered in the khewat therein mentioned situate in the area of Khanpur Nabipur, effected by Mst. Bibi the original 1st defendant in favour of her three daughters defendants Nos. 2, 3 and 4, and Ghulam Mohammad defendant No. 5 and the alienation of his fourth share by defendant No. 5 in favour of Mohammad Hussain defendant No. 6 were ineffective null and void as against the reversionary rights of the plaintiff after the death of Mst. Bibi.

The relationship of the parties appears from the following pedigree:



The parties are Jat Viraks and are governed by the general customary law of the Punjab. It is conceded on behalf of the respondents that the customs by which the parties are governed would preclude the alienation of ancestral property otherwise than for necessity or with the requisite consents. It appears from the above pedigree, and the fact was not disputed, that the common ancestor of the parties was Ikhtayar Mohammad, and accordingly, in order to establish that the land in suit is ancestral as between the plaintiff and the defendants, it must be shown that it was inherited from Ikhtayar Mohammad. It also appears from the above pedigree that Ghulam Mohammad is a nearer reversioner to Mst. Bibi than the plaintiff.

The property in suit formerly belonged to Maula Dad, and on his death it passed to his son Hussain. On the latter's death without leaving male issue it passed to his mother, Mst. Bibi.

On the 29th April, 1927, Mst. Bibi made gifts of three-quarters of the lands in suit to her three daughters, defendants Nos. 2, 3 and 4, and of one-quarter to Ghulam Mohammad, defendant No. 5. The latter made a gift of his quarter of the said lands to Mohammad Hussain, defendant No. 6, on the 29th June, 1927. It is these alienations which are challenged in the suit.

The real question which arises for decision in this appeal is whether the land in suit is ancestral land. It was argued by Mr. Parikh on behalf of the appellant that even if the land was non-ancestral it was not competent for Mst. Bibi as a female to alienate it, but in the events which have happened this point is no longer open to the appellant. Mst. Bibi died in the year 1935 and was survived by Ghulam Mohammad, and as against him the appellant has no rights. On the footing that the land was non-ancestral the plaintiff's suit in its inception was purely speculative, and in the light of subsequent events the speculation has failed.

At the trial the Subordinate Judge held that the land was not ancestral, but that the plaintiff was entitled to a declaration that the gift by Mst. Bibi of three-quarters of the lands in favour of her three daughters was ineffectual against the reversionary rights of the plaintiff after the death of Mst. Bibi, but he dismissed the suit in respect of the quarter share given to Ghulam Mohammad. In appeal the District Judge ordered a remand for further enquiry as to the ancestral character of the land in suit. On remand the case came before a Subordinate Judge, other than the Trial Judge, who heard further evidence. He was of opinion that the evidence had not proved that the lands in suit were ancestral qua the plaintiff, and he so reported to the District Judge.

On the adjourned hearing of the appeal the District Judge disagreed with the view of the two Subordinate Judges, holding that the whole of the land, with the exception of some 17 kanals, was ancestral. He therefore allowed the appeal and made a declaration to the effect that the property in suit with the exception of the said 17 kanals would not in any way stand affected by the gift made by Ghulam or by the gift made by Mst. Bibi.

The case was then taken in second appeal to the High Court, Lahore. The court allowed the appeal and dismissed the plaintiff's suit holding that the lands in suit had not been proved to be ancestral. The learned judges of the High Court considered that the consolidation of holdings in the village of Nabipur which had taken place in the year 1913-14, made it impossible to identify any of the fields held by Mst. Bibi or her husband before that date. They further thought that the finding by the District Judge that the 17 kanals were non-ancestral, combined with the impossibility of identifying such kanals, was fatal to the claim that the land in suit was ancestral.

Their Lordships are in agreement with the conclusion reached by the High Court, but are not prepared to accept the whole of the reasoning on which it was based. Prima facie the killabandi or reallotment which

took place in 1913-14 would not affect the character of the land dealt with. Land taken in exchange for ancestral land would itself be ancestral. On the second point which impressed the Judges of the High Court their Lordships think that if the plaintiff proved that the great bulk of the land was ancestral, his failure to prove this in relation to a small part (less than 1 per cent.) would not involve that the whole land must be treated as non-ancestral.

The decision of the High Court can however be supported on wider grounds. The onus of proving that lands are ancestral rests upon him who so claims. *Atar Singh* v. *Thakar Singh* 35 I.A. 206. *Musammat Subhani* v. *Nawab* 68 I.A. 1. In the latter case their Lordships pointed out that to establish the ancestral character of land it is not sufficient to show that the name of the common ancestor from whom the parties are descended was mentioned in the revenue pedigree. It should also be proved that the descendants of that common ancestor held the land in ancestral shares, and that the land occupied, at the time of the dispute, by the proprietors thereof had devolved upon them by inheritance.

The revenue records available started in the year 1856 when the grandsons of the common ancestor Ikhtayar were shown as the owners in possession of land in the village of Nabipur. The learned District Judge attached great importance to two pieces of evidence in support of his view that the land was ancestral. First, that in the revenue records for the year 1865 the descendants of the two sons of Ikhtayar, Ahmad and Rahmat, are both shown as owning 374 kanals of land in the village of Nabipur, and secondly, that, from the history of the village prepared at the settlement of 1867-68, it appears that the village of Nabipur had been founded about 30 years before by certain inhabitants of the village of Khanpur merely, it is suggested, by changing the position of their residence in the latter village, and that the village of Khanpur was associated with the name of Allah Kali who seems to have been the great grandfather of Ikhtayar. So far as the first point is concerned the significance of the two branches of the family each holding 374 kanals in 1865 is considerably impaired by the fact that in the settlement of 1856 the shares of the two branches of the family were only about 102 kanals each. The learned District Judge ruled out the settlement of 1856 on the ground that it carried no presumption of truth. Their Lordships do not know what was in the mind of the learned judge. There is always a presumption in favour of the correctness of official acts. It has been the practice in India to give statutory effect in the various provincial Land Revenue Codes to this presumption in relation to revenue records, but their Lordships have not been referred to any statute which affects the settlement of 1865, but not that of 1856. With regard to the history of the village of Nabipur their Lordships think it by no means clear that the foundation of the village involved no more than a shifting of some inhabitants from one part of the village of Khanpur to another, since separate revenue is said to have been paid for the village of Nabipur. But in any case, as already pointed out, the ancestral character of land is not established solely by showing a common ancestor of the parties in the revenue pedigree, and the association of the name of Ahmad Kali with the village of Khanpur is not of much significance. The revenue records between the years 1867 and 1892 have been destroyed, but there are records after the latter date. It is not necessary to analyse them in detail. This was done by the courts in India, and has been repeated by counsel before the Board. It is sufficient to say that in 1892 the share of the descendants of Ahmad had been reduced from 374 kanals to 338 kanals, and that of the descendants of Rahmat had been increased to 380 kanals (see Exhibit S.K.B.); whilst at the date of the suit the share of Mst. Bibi in the lands to which the action relates was 1,744 kanals. Their Lordships have been given no explanation which accounts for this increase.

In the result there is no evidence that the common ancestor of the parties or his sons ever owned any part of the lands in suit. The most that can be said is that his grandsons owned a small portion of the land in shares consistent with a title by descent. This falls far short of the

standard of proof laid down by the Board in suit *Subhani* v. *Nawab* 68 I.A.1, and does not establish that the land in suit is ancestral property so far as regards the plaintiff.

Mr. Parikh for the appellant argued as a preliminary point that the finding by the District Judge that the land was ancestral was a finding of fact, and that by virtue of section 41 of the Punjab Courts Act, 1918, which is similar to section 100 of the Code of Civil Procedure, no appeal lay from that finding. There is no force in this contention. In the first place the learned District Judge committed an error of law in disregarding the settlement of 1856, and in the second place a finding as to the ancestral character of land which is based upon the perusal, construction, and piecing together of a large number of revenue records cannot be regarded as a finding of fact.

For these reasons their Lordships will humbly advise His Majesty that this appeal be dismissed. The appellants must pay the costs.

(69616) Wt. 8062—31 180 10/48 D.L.

In the Privy Council

IMAM DIN

v.

MST. SAID BIBI (SINCE DECEASED)
AND OTHERS

DELIVERED BY SIR JOHN BEAUMONT

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