Shyam Lal vs Ranbir Singh on 4 August, 1950

Equivalent citations: AIR1951ALL386, AIR 1951 ALLAHABAD 386

JUDGMENT

Mustaq Ahmad, J.

1.The first is a plaintiff's and the other a defendant's appeal against a decree of the Civil Judge of Jhansi in a suit for possession and mesne profits in respect of a complete village and a complete mahal in each of two other villages. The plaintiff set forth a pedigree in the plaint, the correctness of which is now admitted by the defendant. Referring to that pedigree we find that Suraj Prasad was the maternal ancestor of the plaintiff who died in 1898. After him his son Ram Charan Lal died in 1901 and then died Ram Charan Lal's son, Budh Singh, in 1924, leaving a widow Mt. Kashmiri. Ram Charan Lal's brother, Kanhaiya Lal, died in 1930, and after him, the said Mt. Kashmiri on 27-8-1911.

2. The plaintiff, as would be seen, is a son of the sister of Ram Charan Lal and Kanhaiya Lal, sons of Suraj Prasad, the ancestor aforesaid.

3. The plaintiff's case was that Kanhaiya Lal and Ram Charan, the two brothers, were separate from each other, that he was entitled to the half share of Ram Charan after the death of Mt. Kashmiri in whom the property had vested on the death of Budh Singh, her husband, Eon of Ram Charan Lal. His case further was that he was entitled also to the other half share which belonged to Kanhaiya Lal, as the will executed by the latter in favour of Mt. Kashmiri was not valid. So far as this one half share was concerned, there was no mention made is the plaint of any other basis on which the claim was founded. The defendant contested the suit mainly on the ground that Ram Charan and Kanhaiya Lal were joint, the latter being the surviving member of the joint family. He further pleaded that the will executed by Kanhaiya Lal was valid and that it had conferred an absolute title on Mt. Kashmiri who, in her turn, had bequeathed the property to the defendant, More than a year after the suit had been filed and about five months the defence had been filed, the defendant by an amendment of his written statement also pleaded that he was "the nearest reversioner to Kanhaiya Lal and Budh Singh, and even if the plaintiff is considered in the opinion of the Court to he Bandhu he has no right as against this defendant."

It may be noted that the will executed by Kanhaiya Lal was dated 2-3-1925, comprising the entire family property and that the same had been dealt with by Kashmiri under a will of her own dated 5-8-1910.

4. It will be seen at once that the question of the status of the family had a direct bearing on the fate of the suit. If Ram Charan Lal and his brother Kanhaiya Lal had been joint, the latter would certainly be the surviving member of the joint family, and therefore the exclusive owner of the entire family property. In that case he would be entitled to alienate the whole of that property, as he

actually did in this case by a will to Mt. Kashmiri, so that, if this lady was found to have genuinely executed a valid will in favour of the defendant, the title acquired by him (the defendant) would not be open to any challenge whatsoever. On the other hand, if the said brothers were separate from each other, Kanhaiya Lal had no right to deal with the one half share of his brother Ram Charan Lal, and to that extent the will executed by him in favour of Mt. Kashmiri and that executed by Mt Kashmiri in favour of the defendant would be ipso facto void, and the plaintiff would be entitled to a decree in respect of that half share at least straightway. This is precisely the view which the Court below took, and, holding further that the defendant had not proved himself to be the next reversioner of Kanhaiya Lal and Budh Singh, it decreed the suit for the one half share owned by Ram Charan Lal as a separated brother. It dismissed the suit in respect of the remaining half on the ground that Mt. Kashmiri who had acquired that share from Kanhaiya Lal under the will of 2-3-1925 had validly bequeathed that share to the defendant by her will of 5-8-1910. The claim for mesne profits was altogether dismissed for want of proof and non-payment of court-fee.

5. The two questions urged, in the main, by the learned counsel for the defendant-appellant who opened the arguments in this Court were : (1) whether the finding of the Court below with regard to the jointness or separation of Ram Charan Lal and his brother Kanhaiya Lal was correct : and (a) whether in the absence of any evidence that the plaintiff was the nearest reversionary heir to Budh Singh, he was entitled to any decree at all. We propose to deal with those points seriatim.

6. Mr. Prem Mohan Lal Verma, counsel for the defendant-appellant, referred us at the outset to para. 2 of the plaint and pointed out that the plaintiff's case was that a separation between the brothers Ram Charan Lal and Kanhaiya Lal had taken place after the death of Suraj Prasad in 1898. He then argued that, in the evidence the plaintiff had put the period of such separation in the year 1901 or 1902. We may say at once that the words "after the death of Suraj Prasad in 1898" were generic enough to cover the period mentioned in the evidence of the plaintiff as to the actual period of the separation between the two brothers and that there was really no disparity on the point between the plaint and the evidence before the Court. Learned counsel then proceeded to attack the criticism of the Court below with regard to the evidence on which its finding in favour of separation was based. The greater part of that evidence consisted of documents which the learned Civil Judge classified under various heads, dealing with it in great detail. We may just indicate the nature of the classification of those documents in order to suggest the evidentiary value which they carried in corroboration of the finding recorded by the Court below. They consisted of (1) letters of Ram Charan Lal and Kanhaiya Lal addressed to the plaintiff's grandfather Chhedi Lal, (2) extracts from Khatauni Jama-bandis showing separation in sir and khudkasht lands, and (3) documents showing separate suits having been filed by the brothers against tenants.

7. Referring to the letters first of all, the learned Judge pointed out that they embodied clear and conclusive indications of an intention on the part of writer to effect a separation as soon as an opportunity came, and this because of the pecuniary condition of the family necessitating a partition, so that the business held by the brothers might be carried on in a more satisfactory manner. We need not reproduce the contents of the letters themselves as we are in complete agreement with the learned Judge of the Court below that they did carry such an indication.

8. Coming to the entries in the revenue records, the learned Judge pointed out that the brothers Ram Charan Lal and Kanhaiya Lal held separate khatas of sir and khudkasht lands, this being consistent only with the family being a separate and not a joint family.

9. The learned Judge then came to the documents showing the filing of separate suit in the name of a particular brother against tenants and pointed out that there was no reason why, if there was jointness between them, such suits could not be filed in their joint names. Dealing with the documents generally the Court referred to Kanhaiya Lal's will dated 2-3-1925 in which Kanhaiya Lal had not described himself as having lived jointly with, Budh Singh but that he had got his name mutated against " the assets of Budh Singh". This expression could really have no meaning, unless Kanhaiya Lal realised and was honest enough to admit that the share held by Budh Singh was a separate entity and that he was right in referring to the same as "the assets of Budh Singh". The learned Judge also referred to the oral evidence of the parties, but neither learned counsel for the defendant-appellant expressed any keenness in criticising his reaction to the evidence nor are we inclined to disagree with the learned Judge as regards the value of that evidence. Some argument was addressed to us with regard to the nature and value of the entries in the bahi khathas filed by the defendant, and it was stated that items of expenditure appertaining to both the brothers, Ram Charan and Kanhaiya Lal, were found entered in these documents and that this proved the family to have been only a joint family. The learned Judge of the Court below was not inclined to accept this contention, particularly for two reasons : (1) that the bahi khatas were confined only to the years 1921 to 1924, and (a) that the bahis were not regular nor accompanied by khatas. He further observed that the defendant, and before him his father, having been the mukhtarams of the family, if there had been any such entries as really showed jointness in the family, he would have certainly been able to produce them in Court, and that very fact that such entries had not been brought to light, gave rise to the suspicion that they would have gone against the defendant if he had really cared to file them. Lastly, the learned Judge held that the bahis had been seriously tampered with, either by the defendant or some one else for his benefit. Having heard learned counsel in regard to these entries, we do not feel satisfied that we shall be justified in accepting these documents as in the least proving the family to have been a joint family after the commencement of the present century. In view of all these considerations, we find ourselves in full agreement with the Court below in holding that there was a separation between the brothers, Ram Charan Lal and Kanhaiya Lal, and that the latter was, therefore, not entitled to deal with the entire property, as he actually had done by his will of 2-3-1925, as if he was the sole owner thereof.

10. Coming now to the second question argued by the defendant-appellant, namely that, in the absence of evidence that the plaintiff was the nearest reversioner of the last male-holder, he was not entitled to any decree at all. We may mention at once that the plaintiff, as already stated, had set forth a certain pedigree in the plaint which, as it stood, really showed him to be the next reversioner to Budh Singh and Kanhaiya Lal after the death of Mi Kashmiri. The defendant in his turn, did not deny this pedigree except that about five months after filing his written statement he showed himself as a cousin of the late husband of Mt. Kashmiri; that is to say his case then came to be that he was the nearest sapinda to both these men and that, as such, he was entitled to the entire property to the exclusion of the plaintiff. There was no suggestion at any stage of the trial in the Court below that, beside the plaintiff or the defendant, there was any other intermediary person in

whom the title to the property as a reversioner could vest. In the actual state of the pleadings, the controversy resolved itself into the simple question whether the defendant was or was not the nearest heir to Budh Singh. This, indeed, was also the form of the issue framed, Issue No. 5. While it suggested no doubt that, if the defendant was proved to be reversioner to Kanhaiya Lal and Budha Singh, he find he alone would be entitled to the entire property; but it also meant that, if such a position was not made out, nothing remained to oust the plaintiff who would automatically be accepted as the only person entitled to that property. Now the defendant's counsel did not in fact challenge the finding of the Court below that his client had not proved himself to be the reversionary heir to Budh Singh or Kanhaiya Lal. We have already point-ed out that it was a long time after the plaint and the written statement had been filed that the defendant set up such a claim, in proof of which he was not able to file any documents but relied solely on the testimony of certain witnesses whom the learned Civil Judge was not inclined to believe. As a matter of fact Janki Prasad defendant's witness, admitted that "Shyam Lal (defendant) and Chhotey Lal (his brother) are the only males alive in that family". Indeed, no argument was addressed to us in derogation of the finding of the learned Judge on this point, and we have now to assume that the defendant is a complete stranger to the family of Kanhaiya Lal. The plaintiff being the father's sister's son of Budh Singh would be his heir as Atma. Bandhu after the death of his widow Mt. Kashmiri, and therefore entitled to his half share in the property, there being no suggestion, as we have also noted, by the defendant that there was any nearer heir living to Budh Singh, and the defendant's position as a cousin of Budh Singh having already been negatived by the Court below, and that finding not being challenged in this appeal. We have therefore no alternative but to hold in agreement with the Court below that he was entitled to claim the said half share as Budh Singh's heir.

11. No other point having been raised by the learned counsel for the defendant-appellant, we see no reason to disturb the decree of the Court below in respect of the share for which the plaintiff's claim was allowed, and we would accordingly dismiss this appeal (F. A. No. 440 of 1944) with costs.

12. Taking now the plaintiff's appeal (F. A. No. 406 of 1944) the only point argued by the learned counsel for the appellant was with regard to the validity of the will alleged to have been made by Mt. Kashmiri on 5-8-1940. A number of points have been raised in negation of the genuineness of that document, and we propose to deal with them individually after referring to certain general aspects bearing on the question of the validity of the same.

13. Mt. Kashmiri admittedly had become a widow as far back as 1924, when her husband Budh Singh died. Since then she had remained a widow in the prime of her life, until she died on 27-8-1941, being then aged only about 35 years. She held a substantial property, which as a lady, she could not obviously easily manage. She had, therefore, to seek the aid of another, and none could suggest himself to her mind for the purpose more readily than the defendant himself, who and whose father had already served the family including the lady as mukhtarams for a number of years. Kanhaiya Lal, we know, had died in 1930, so that, for a long number of years, the defendant and his father had been associated with the family as being in effective management of its property and affairs as trusted servants. For all this time Mt. Kashmiri having lived as a widow, she must have reposed implicit confidence in the defendant, it not being suggested that she had any other person, a relation or not, to afford her assistance. In July 1940, it appears, the woman fell ill. There is some

controversy with regard to the nature of that illness. In the endorsement made by the Sub-Registrar on the back of the disputed will the illness mentioned is only a boil in the armpit; in the evidence there is a reference to some other ailment peculiar to females. Be that as it may, one may assume that Mt. Kashmiri at that period of time was keeping indifferent health and required medical attention. It appears that she went, or was rather taken, to Orai, over so miles from her village Bhedpura. We take it, and indeed it is admitted, that there is a dispensary also at Konch, a few milts away from Bhedpura. We know it for a fact there is a Sub-Registrar's office also at that place. Nonetheless, the more distant place, Orai, was chosen as the appropriate centre where the lady was to be put for her treatment. There is no explanation why this place was chosen for the purpose in preference to a nearer locality, where also she could hive been treated for her ailment. Remembering that her trip to Orai and her sojourn there for about two months at least had all been arranged for by a person no other than the defendant, her mukhtaram, no other relation or friend being mentioned in the evidence to have also attended her at the time, the situation assumes a highly fateful aspect qua the genuineness of the will alleged to have been executed by the lady during that interval. The significance o£ the environments is which she must have then been is further enhanced by the fact that, as admitted by the defendant himself, "there was no other relation of Mt. Kashmiri at Orai at the time from whom she could take advice" and "no person from her parent's family was called for the occasion". Man Singh, defendant's witness, also admitted that "Shyam-Lal (defendant) was present when the draft was being prepared by the scribe" and that then "there was no other woman with Mt. Kashmir!".

14. [His Lordship then referred to a postcard on record and holding that it added to the suspicion ranging round the execution of the will, proceeded thus:] We thus get a case in which the defendant being the only helper and companion of Mt. Kashmiri at the time and being also her mukhtaram, in the absence of any other relation or adviser attending on her in her illness and with none to advise her on the desirability of such a proceeding, gets her to execute a document, in his own favour in respect of a very substantial property, although, according to the finding of the Court below, the plaintiff in the present case, as an heir to bar husband, could be a much more appropriate object of her bounty. The situation is all the more aggravated when this is found to have been done far away from her home and ad a period when she was afflicted with illness lasting for several weeks, if not months. To our minds all the elements, this being a palpable case, of undue influence, compulsion or fraud are present here.

15. Learned counsel for the defendant argued that Mt. Kashmiri had not been proved to be a "purdanashin" lady as claimed by the plaintiff. In proving the execution of a document by such a lady this word is not to be taken in its strict literal sense. It only means a woman who by habit or family usage does not come out in the open to conduct her affairs. In the present case, however, we need not carry this point any further, as the circumstances already noted by us made it highly imperative that the defendant proved the will to be the expression of a genuine and voluntary desire on the part of the lady to bequeath her property in his favour. Their Lordships of the Privy Council in Sarat Kumari Bibi v. Sakhi Chand, A. I. R. (16) 1929 P. C. 45: (8 Pat. 382) held :

> "When the writer of a will has taken a very active pact in the preparation of the will under which ho gets a substantial advantage, the propounders of the will must prove

> that the testator was aware of the contents of the will. It is not correct to say that benefit must be a pecuniary benefit, a legacy, for instance, more or less of a substantial nature."

The following dictum of Lindley L. J. in Tyrrell v. Painton, (1894) 70 L. T. 453 ; (1894 P. 151) was quoted with approval :

> "The rule in Barry v. Batlin, (1838) 2 Moore P. C. 480: (46 R.R. 123), Futton v. Andrew,(1875) 7 H L 448: (23 W. R. 566) and Brown v. Fisher, (l891) 63 L. T. 465 is not, in my opinion, confined to the single case in which a will is prepared by or on the instructions of the parson taking large benefits under it, but extends to all cases in which circumstances exist which excite the suspicion of the Court, and wherever such circumstances exist, and whatever their nature may be, it is for those who propound the will to remove such suspicions and to prove affirmatively that the testator knew and approved of the contents of the document, and it is only where this is done that the onus is thrown on those who oppose the will to prove fraud or undue influence, or whatever else they rely on to displace the case made for proving the-will."

Again in Vellaswamy Servai & Co. v. Sivaraman Servai, A. I. R. (17) 1930 P. C. 24 : (8 Bang. 179), the same rule was affirmed by their Lordships in the following words :

> "Where the propounder of a will is the principal beneficiary under it and has taken a leading part in giving instructions for the execution of the will and procuring its registration and execution, the circumstances are such as would excite the suspicion of any probate Court and require it to examine the evidence in support of the will with great vigilance and scrutiny. The propounder is not entitled to probate unless the evidence removes such suspicion and clearly proves that the testator approved of the will."

On the same principle, of course, is founded the rule in Section 16, Contract Act, which also casts the burden of proving the genuineness of a transaction of the person occupying a position from which he could dominate the will of the party executing the document.

16. It is not necessary to go into any further details to expose the actual situation in which Mt. Kashmiri stood with reference to the defendant at the time she is alleged to have executed her will of 3-8-1940. In our view the present was a typical case in which the defendant took the fullest advantage of that situation and managed to get a disposition of a very large property in his favour from an ailing widow.

17. Much argument was addressed at the bar with regard to the genuineness or otherwise of the signature purporting to be of Mt. Kashmiri on the will. (His Lordship considered the evidence relating to the signature and other oral evidence in the case and proceeded as follows) :

18. The witnesses being residents of far off villages, the scribe, and the apparently most respectable attesting witness, Beni Madho Tewari, an M. L. C. having not been produced, there being admittedly none else there to advise Mt. Kashmiri, the entire performance being staged by the defendant alone and this for his own benefit and further there being no other documentary or expert evidence of the genuineness of the signature on the will, we are not inclined to consider the testimony of these witnesses as in the least satisfactory. In the circumstances, we hold, in disagreement with the Court below, that the signature on the will was not proved to be of Mt. Kashmiri.

19. There was also some argument with regard to the inadequacy of the evidence of attestation. This depends on the value of the evidence given by the above four witnesses we have already rejected, and we need say nothing further on the point.

20. Learned counsel for the plaintiff-appellant strenuously argued that the will set up by the defendant did not purport to be in his favour as a persona, designate but only as occupying a certain relationship, that of a cousin of the testator's late husband, While reading the language of the document we are struck by no less than three close references to the defendant as the executant's "dewar". This repeated reference to a particular relationship between the defendant and Mt. Kashmiri leaves no doubt in the mind that she was anxious to emphasise the same as the real cause and motive of the disposition of her property. It is not possible to avoid this impression on a bate reading of the document, and one would be justified in feeling that the bequest was made, if it was made at all, to the defendant in his capacity as holding that relationship. Indeed, Man Singh, defendant's witness, stated that Mt. Kashmiri had told him once or twice before to execute a will to the defendant as he had ''served her much" and as he "was her dewar". Therefore not only Mt. Kashmiri in her will, according to the defendant, but also the defendant himself in his evidence gave prominence to the fact that the will in his favour had been made specifically for the reason that he was the testator's dewar', that being the actual motive of the bequest. The Court below found this relationship, which itself had been pat into the pleadings at a very late stage, to be a mere fiction, and the fast that no arguments were addressed to us against that finding is a safe measure of its correctness. Therefore the entire basis for Mt. Kashmiri having desired to bequeath her property to the defendant is negatived, with the result that nothing remains to account for her intention to make a disposition in the defendant's favour, certainly to the detriment of the real heir to her late husband. Their Lordships of the Judicial Committee in Fanindra, Deb v. Rajeshwar Das, 11 Cal. 463 : (12 I. A. 72 P. C.) pointed out that:

> "Upon the true construction of an Angikar Patro whereby an estate was given to the donee in virtue of his being adopted son of the donee the gift did not take effect, inasmuch as the adoption was invalid."

and "the distinction between what is description only and what is the reason or motive for a gift or bequest may often be fine : but it must be drawn from a consideration of the language and the surrounding circumstances."

21. This rule precisely applies here also, and we must, therefore, hold that this is a further ground, and an independent one, for holding the will of 3-8-1940 to be invalid. We, therefore, hold that this

will was not proved by the defendant to have been validly executed by Mt. Kashmiri.

22. In his reply, the learned counsel for the defendant argued that the plaintiff had not claimed in the plaint the half share of Kanhaiya Lal, which ultimately became the stridhan of Mt. Kashmiri as the latter's heir, and that no such ground having even been subsequently added in the plaint, he was not entitled to any decree in respect of that share. Assuming that Kanhaiya Lal had made a valid will, and no argument was addressed at the bar to the contrary, and assuming also that the will had conferred an absolute title on Mt. Kashmiri, nothing to the contrary being argued on this point either, the property, no doubt, vested in the lady and she left the same on her death as a stridhan property. The two questions that arise here are : (1) whether, in the present-state of his pleadings, the plaintiff could be awarded a decree in respect of that property and (2) whether, even if the nature of the pleadings did not create a bar in his way, the plaintiff could be regarded as an hair to that property. We have already pointed out, when deciding the other appeal, that there was no suggestion of any one, other than the plaintiff or the defendant, being the reversionary heir to Kanhaiya Lal or Budh Singh and that, after the defendant's claim as a raversioner had been negatived, none remained except the plaintiff who could lay such a claim. On the unchallenged finding of the Court below there was none such, and the plaintiff was the sole individual who could be the next reversioner to both these persons. This being so, once the plaintiff had disclosed his family pedigree rightly, the only question remaining was whether in law he could be awarded a decree in respect of the half share of Kanhaiya Lal, in case Mi Kashmiri's will was not found to be genuine. The property belonging to Kanhaiya Lal and eventually vesting under his will in Mt. Kashmiri as her stridhan property would on her death be descendible on her late husband's heirs in the absence of any descendants down to a certain degree. There can be no doubt, as already pointed out in the other appeal, that the plaintiff was an heir to Budh Singh, husband of this lady, as an Atma Bandhu. Therefore, nothing remained to deprive him of that property as such an heir on the death of Mt. Kashmiri on 27-8-1941. In the case of Indarpal Singh v. Mt. Humangi Devi, A. I. R. (36) 1949 ALL. 663, it was held on the authority of a previous decision of this Court in Lachmi Narain v. Daropadi, F. A. No. 108 of 1940, dated 12-1-1944 that property left by an issueless Hindu female as her stridhan would, under the Mitakshara law, devolve on her husband, and if he is dead, on his heirs, as if it had belonged to the husband himself. Man Singh, plaintiff's witness, clearly stated that, barring the defendant, Mt. Kashmiri had left no other heir. He, of course, meant that the defendant being a cousin of her late husband none other was her heir. This having been negatived, the plaintiff alone would be her heir, being an Atma Bandhu of her late husband Budh Singh. In view of these considerations, we have come to the conclusion that the Court below was not right in dismissing the plaintiff's suit in regard to the half share of Kanhaiya Lal, and we would, therefore, allow this appeal.

23. Accordingly, while dismissing the defendant's appeal No. 440, we allow the plaintiff's appeal No. 406 of 1944, both with costs.