Bal Mukandji Maharaj vs Gokaran Singh And Anr. on 28 September, 1955

Equivalent citations: AIR1956ALL124, AIR 1956 ALLAHABAD 124

JUDGMENT

Roy, J.

1. This is a second appeal by the plaintiff. A suit was instituted in the Revenue Court under Section 226, Agra Tenancy Act of 1926 by Rani Roop Kunwar for the recovery for profits for the years 1341, 1342 and 1343 Fasli of her share of property of Mohal Bhup Singh Kabza No. 1 in village Rachhoha against Diwan Gokaran Singh son of Diwan Chet Singh, the lambardar of the Mohal.

The defence raised on behalf of Diwan Gokaran Singh was that the husband of the plaintiff, namely, Th. Thamman Singh died in a state of jointness with the defendant, and the property in suit being joint ancestral property, the plaintiff could not succeed to it, and the property devolved on Diwan Gokaran Singh by a right of survivorship under the rules of the Mitakshara law.

The Revenue Court framed an issue, namely, whether the family ceased to be a joint family about 20 years ago in the life-time of Th. Thamman Singh, and the Revenue Court referred that issue to the Civil Court for a finding. When the issue was received by the Munsif of Fatehabad at Agra for determination, the learned Munsif considered that the main question for decision was whether Th. Thamman Singh had separated from his brothers and nephews prior to his death, and whether there did occur a disruption in the joint status of the family prior to Th. Thamman Singh's death.

The learned Munsif gave a finding on 14-10-1941, holding that the plaintiff's theory of disruption and separation, as alleged by her, was correct. The Revenue Court accepted that finding, and after a determination of the other issues, granted the plaintiff a decree in the sum of Rs. 472/14/3 with proportionate costs and interest. Diwan Gokaram Singh, the defendant, preferred an appeal against that decision.

During the pendency of that appeal (Revenue Appeal No. 9 of 1946 of the Court of Civil Judge, Agra) Rani Roop Kunwar died. In her place were substituted Sri Balmukundji Mahraj, as her legal representative under a will alleged to have been made by Rani Roop Kunwar in his favour and also Kunwar Yatendra Singh, the brother of Diwan Gokaran Singh as a pro forma party.

The Civil Judge of Agra, by his decision dated 18-9-1948, reversed the finding of the learned Munsif by holding that there was no separation or partition in this family, & that the two brothers, namely,

Th. Thamman Singh and Diwan Chet Singh, so far as the property in village Rachhoha was concerned, had continued to form a joint Hindu family.

The learned Civil Judge accordingly allowed the appeal and dismissed the suit. In Second Appeal the only point that has been argued before me by learned counsel for the appellant is that the view of the lower appellate Court in coming to the conclusion that there was no separation in the family, was incorrect.

2. For purposes of this case we may trace the pedigree of the parties from Diwan Bhup Singh. He had two sons, namely, Rai Bahadur Chet Singh and Th. Thamman, Singh, Chet Singh's sons are Diwan Gokaran Singh, the appellant and Kr. Yatendra Singh pro forma respondent. Rani Roop Kunwar, the plaintiff was the widow of Th. Thamman Singh, Diwan Bhup Singh died long ago. Diwan Chet Singh, the father of Diwan Gokaran Singh died on 1-9-1920. Th. Thamman Singh died on 29-9-1934.

The family held an impartible estate known as the Parna Estate governed by the rule of primogeniture where the eldest of the issues of the last holder of the estate succeeds to him as the absolute owner thereof, and the junior members of that family have only a right of maintenance from the estate. Diwan Bhup Singh was such an absolute owner of that estate under that rule.

After his death his eldest son, Diwan Chet Singh, the father of the defendant became the owner of the estate. His younger brother Th. Thamman Singh acquired only a right of maintenance from that estate and was not entitled to the estate itself. This impartible estate was assessed to a land revenue of about Rs. 9000/- a year. The amount of maintenance allowance which Th. Thamman Singh was entitled to get from the estate, was Rs. 240/- per year.

Th. Thamman Singh, after completing his education entered the Provincial Executive Service somewhere in the year 1906, as a Deputy Collector, and at the time of his death, he rose to the position of a confirmed Collector and Magistrate. The dispute in this case does not relate to any part of the impartible estate of Parna. It relates to a property which was divisible among Diwan Chet Singh and Th. Thamman Singh.

This property situate in village Rachhoha, had been acquired by Diwan Bhup Singh as joint family property and after his death it was in the hands of his sons Diwan Chet Singh and Th. Thamman Singh. If Diwan Chet Singh and Th. Thamman Singh constituted a joint family along with the sons of Diwan Chet Singh, and if the status of the family continued to be joint till the death of Th. Thamman Singh, then after the death of Th. Thamman Singh the sons of Diwan Chet Singh, viz., Diwan Gokaran Singh and Kunwar Yatendra Singh would become the owners of the property by survivorship.

If on the other hand, Th. Thamman Singh died in a state of separation then on his death his share in the property would go by succession to his widow Rani Rup Kunwar, and would not pass on to Diwan Gokaran Singh and Kunwar Yatendra Singh by survivorship.

3. Ordinarily under the Hindu law the presumption is that a family continues to be joint till the contrary is proved. But this presumption, as has been repeatedly pointed out by their Lordships of the Privy Council, varies in the case of brothers and cousins. The presumption is stronger in the case of brothers than in the case of cousins and the farther we go from the founder of the family, the presumption becomes weaker and weaker. The question came to be considered by a learned Judge of this Court in -- 'Kundan Lal v. Raj Behari Lal', AIR 1929 All 513 (A) where at p. 517 of the report it was observed:

> "The ideal Mitakshara family is a thing of the past. Its vestiges are to be found in obscure out-of-the-way corners in rural areas outside the disrupting influence of the modern conditions of life. Where these influences are present, presumption in favour of the jointness of the family has consequently grown feebler."

4. The learned Munsif keeping in view these observations bearing on the question of jointness and separation, and in dealing with this particular aspect with reference to the facts of the present case, came to the conclusion that the circumstances prevailing in the family would lead to the only conclusion that Th. Thamman Singh died in a state of separation, and that his property went by succession to his widow Rani Roop Kunwar.

The learned Civil Judge in reversing the finding of the Munsif, was of the opinion that the circumstances can be explained also on the basis of jointness, and that where that explanation is possible, and the presumption of jointness exists in the case of a Hindu family, these together would lead to the conclusion that there was no separation.

In order to justify the conclusion as to which of these two views was reasonable we have got to look into the circumstances. Admittedly Th. Thamman Singh had nothing to do with the impartible zamindari property known as the Parna Estate and the only interest which he had in that estate, was a claim of maintenance in the sum of Rs. 240/- a year.

The interest accruing out of that estate to Th. Thamman Singh was, therefore, hardly adequate to his needs. The only property which could be said to be joint property of this family was the Rachhoha, village property. This property was comparatively of very small value fetching an annual income of Rs. 400/-. There was no other item of joint property held by the family except the properties stated above.

An impartible estate is not held in co-parce-nary though it may be joint family property. This was the view taken by their Lordships of the Privy Council in -- 'Anant Bhikappa v. Shankar Ram Chandra', AIR 1943 PC 196 at p. 201 (B). At times such a property is referred to as coparcenary and a distinction is drawn between present rights, that is, the right to demand a partition and the right to joint enjoy-ment, and future rights.

In the case of an impartible estate, the right to partition and the right of joint enjoyment are from the very nature of the property, incapable of existence. No coparcenar, therefore, can prevent alienations of the estate by the holder for the time being either by gift or by will nor is he entitled to

maintenance out of the estate except upon proof of custom and relationship to the holder, as in the present case. As regards future rights, in such impartible estates, if the last holder dies intestate, it will devolve by survivorship, the rule of devolution being that where the impartible estate is ancestral the successor to the estate in a joint family governed by the Mitakshara Law would be the survivor from one line to another according to primogeniture and not the members nearest in blood but the eldest member of the senior branch; and in the absence of a custom a female cannot inherit an impartible ancestral estate belonging to a joint family governed by the Mitakshara, where there are any male members of the family who are qualified to succeed to the estate.

It is not contended in the present case that the impartible estate has ceased to be joint family property for purposes of succession. In order to establish that an impartible estate has ceased to be joint family property for purposes of succession, it is not necessary to prove an intention, express or implied, on the part of the junior members of the family to give up their chance of succeeding to the estate, and a mere separation in general status is not sufficient.

The question came up to be considered before their Lordships of the Privy Council in -- 'Komammal v. Annadana Jadaya', AIR 1928 PC 68 (C), and at pages 73 and 74 of the report their Lordships made the following observation:

> "In order to establish that an impartible estate has ceased to be joint family property for the purposes of succession it is necessary to prove an intention, express or implied, on behalf of the junior members of the family to give up their chance of succession to the impartible estate.....
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> It was contended for the appellant that, though there had never been any formal partition, the evidence showed that there had been a separation between the senior and the junior branches of the family, and also that the defendant's branch had become divided inter se, and that, in either event, the defendant's branch had lost their right of succession to the estate.
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> Now once it is established as it must now be taken to be that for the purposes of succession an impartible estate may be joint family property, it is difficult to see upon what principle the fact that the members of the joint family or of any branch of the family have exercised their right of partition over their parti-ble property should be held to divest them of their interest in the impartible estate over which they have no right of partition.
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> It certainly cannot be put upon the ground of surrender or renunciation, for there is nothing in the fact of these partitions of their partible property to suggest any intention of renouncing their rights of succession to the impartible estate, nor do they receive any consideration for such renunciation.....
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> Further to lay down that members of a joint family could not partition their partible property without losing their rights of succession in the impartible estate would

> impose on these families' a restriction on the free right to partition which has been so fully recognized by the decisions of this Board in recent years.
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> Those decisions, which have been cited for the appellant, affirm the right of any adult member of the joint family to become divided in interest as to his share in the joint property by a clear expression of his intention to divide, but there would not appear to be anything in these decisions of which the latest is -- 'Palani Ammal v. Muthu Venkatachala Monlagar', AIR 1925 PC 49 (D), to support the plaintiff's contention.
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> On the other hand it is in conflict with the express decision of this Board in the Challa-palli case, -- 'Y. Mallikariuna Prasada Nayudu v. Y. Duga Prasada Nayudu', 24 Mad 147 (E). In that case the plaintiff, who had sued for partition of a zamindari and other properties, and had failed as to the zamindari, which was held to be impartible, but had succeeded as to the other properties, was held not to have lost thereby his right to sue for maintenance out of the impartible estate on the ground that it had become the separate property of the holder."

5. The weight of this decision would necessarily indicate that where there is a joint family property in the nature of an impartible estate, a member of that family without expressing his intention to surrender or renounce his interest in that property can, in regard to the property which is partible, separate from the other mem-bers either by actual partition by metes and bounds or by a mere expression of his intention to separate qua that property.

6. The property in village Rachhoha was admittedly joint family property. It was comparatively of a small value fetching an annual income of about Rs. 400/-. In the khewat of 1334F. this property was recorded into numerous shares, one-fourth was recorded in the name of Th. Thamman Singh and another one-fourth share was recorded in the name of Diwan Gokaran Singh appellant and his younger brother Kunwar Yatendra Singh both minors under the guardianship of their mother Kumari Ranjani Devi, and the other halt in the Khewat was recorded in the name of other co-sharers.

There are some important considerations arising out of these entries which need a careful notice. If Th. Thamman Singh and the defendants' branch had been joint then it would have been unlikely that the mother would have been recorded as guardian in the presence of Th. Thamman Singh. Furthermore, if they were joint, these specifications of shares should not ordinarily have been expressed.

It is a settled rule of Hindu Law that severance of joint status may be made only by an expression of intention in that behalf by one or more members of the family. A severance may be effected by defining shares of the coparceners and it is not necessary that there should be actual partition of the property by metes and bounds. Defining of shares may be proved inter alia by an entry in the record of rights showing the shares of each member of the family.

Such proof, although not conclusive, may yet gather strength from the proof of separation by other evidence. Th. Thamman Singh, as I have already said, died in the year 1934. On his death the share, which stood in his name in regard to the properly in village Rachhoha, came to be recorded in the name of his widow Rani Roop Kunwar. It was not recorded in the name of the defendants.

It was nobody's case that the name of Rani Roop Kunwar was recorded in the Khewat merely for the sake of consolation. The defendant Diwan Gokaran Singh never objected to the entry of the name of Rani Roop Kunwar in the Khatauni. A copy of the statement of one Magan Behari Lal, who was the 'Karinda' of the defendant made by him on 27-2-1935 in the mutation proceedings, was relied upon on behalf of the plaintiff in order to suggest the theory of separation. That statement was admitted by counsel for the defendant, as appears from an endorsement on the reverse of that statement.

It appears, however, that no formal exhibit mark was assigned to that paper. Failure on the part of the Court to give an exhibit mark on that paper, which was admitted by counsel for the defendant, would not, therefore, exclude that paper from being taken into consideration in evidence. In that statement Magan Behari Lal, the 'Karinda' of the defendant said that "the defendant would not pay the penalty that was claimed by the revenue authorities for the delay in the mutation after the death of Th. Thamman Singh because it was apprehended that the plaintiff, who intended to sue for profits of her share, would not give credit to the amount of penalty claimed by the revenue authorities against the defendant."

That statement had two implications. Firstly, that Rani Roop Kunwar who claimed to be recorded in the Khewat in place of Th. Thamman Singh, had some semblance of right to be so recorded. Secondly, that Rani Roop Kunwar, who intended to sue for profits of her share would not give credit to the amount of penalty that was claimed by the revenue authorities from Gokaran Singh for the delay in the mutation after the death of Th. Thamman Singh. If there was no separation Rani Roop Kunwar was not entitled to be mutated in the record of rights in place of her deceased husband.

Furthermore, she could not have laid any claim for profits accruing out of the property; nor could there have been any question of the penalty that was being demanded by the revenue authorities for the delay in the mutation after the death of Th. Thamman Singh being adjusted or set off against the claim for profits.

7. It has Been observed by the learned Munsif, and those observations have not been challenged before me, that Th. Thamman Singh lived separately from the other members of the family ever since his entry into service in the year 1906, and that from that time upto the date of his death he remained out of station and throughout that period he lived and messed separately.

It was further observed that Th. Thamman Singh acquired separately a house in Etawah and certain zamindari property in the district of Shahjahanpur as also insurance policies and monies in Fixed Deposit and Current Account in the bank. He dealt with his property separately. Likewise Chet Singh his brother held separate property of his own and had separate dealings with such property.

On 23-2-1932, Th. Thamman Singh executed a deed of will in favour of his wife Rani Roop Kunwar. That Will was abundantly proved by reliable evidence of the attesting witnesses and the scribe. It was further proved that the will was made when he was in full possession of his senses. In fact, Th, Thamman Singh died about two years later.

In that will, which had been registered, Th. Thamman Singh stated that all his property which was his personal and self-acquired property consisting of a house in Etawah bearing No. 43, Civil Lines, and zamindari property in Shahjahanpur district, and a share in village Rachhoha in district Agra and three insurance policies in the Oriental Life Assurance Company and monies in Fixed Deposit and in Current Account in the Imperial Bank, Etawah and Allahabad Bank Kanpur, were to go to his wife Rant Roop Kunwar and that she would be the sole and absolute owner of the property and shall have the right to deal with it as she deemed fit, and she will also have the right to decide the question of further disposition of the property according to her personal wishes.

The will further provided that if Rani Roop Kunwar died without making any will relating to the disposition of the property set forth above, or any portion of the said property is left at the death of Rani Roop Kunwar, the same shall go to his younger nephew Kunwar Yatendra Singh. The will itself indicates that Th. Thamman Singh had separated from other members of the family. And even if the separation which is alleged to, have taken place about 20 years ago were not accepted, the will indicated separation at least two years before his death.

These factors could not be explained on any other reasonable hypothesis than the hypothesis of separation. Th. Thamman Singh's relations with his brother and nephews were cordial and that cordiality expressed itself on a number of occasions. The existence of that cordiality would not however be inconsistent with the theory of separation. Here was a family consisting of two branches. One branch, of which Th. Thamman Singh was the member, had no other member except his wife.

Th. Thamman Singh had no child of his own. The other branch represented by Chet Singh had his two sons Diwan Gokaran Singh and Kunwar Yatendra Singh, Th. Thamman Singh had no interest in the impartible estate known as the Parna Estate beyond a maintenance allowance of Rs. 240/- a year. Under such circumstances it would not be unreasonable to suppose that he intended separation and he really did separate before his death when he acquired considerable property of his own which he was anxious to give to his wife in preference to his nephews.

Considerable oral evidence had been adduced on both sides in support of the theory of separation or against it. On the side of the plaintiff responsible Government Officials were examined to show that Th. Thamman Singh not only lived separate from his brother and nephews but he expressed many a time before them that he had separated from them. The evidence that was adduced on behalf of the defendants consisted of the testimony of the defendant himself and some of his low-paid servants.

The learned Munsif, who had had the advantage of assessing that evidence concluded that the oral evidence on the side of the plaintiff was far superior to the oral evidence on the side of the defendant. In view of the circumstances of the case and also in view of the evidence that was produced before him, the learned Munsif was certainly right in coming to the conclusion that the

separation alleged by the plaintiff, was proved.

8. Upon a careful consideration of the evidence on the record and regard being had to the circumstances of the case, I am of opinion that the finding arrived at by the learned Munsif was correct. The decision on that point by the lower appellate Court cannot be supported.

9. The plaintiff was, therefore, entitled to sue for profits for the years 134.1, 1342 and 1343 Fasli. In regard to the measure of profits the learned Assistant Collector granted the plaintiff a decree for Rs. 472/14/3 with proportionate costs and interest. No argument has been addressed to me on that question and it is not urged that that amount was incorrect. Consequently, I would allow this appeal, set aside the judgment and decree of the lower appellate Court and restore that of the Assistant Collector first class, passed on 22-1-1946. The appellant shall get his costs in all the Courts. Leave to appeal is refused.