defendants on the 13th of December, 1947, to complete the contract "at an early date" and if the defendants still could not complete the sale for another three months the plaintiff was perfectly justified in repudiating the contract and in asking the defendants to return the earnest-money received by them. I have no doubt that if the defendants had on the 16th of March, 1948, or at any time thereafter filed a suit for specific performance of the contract against the plaintiff, the said suit would not have met with any success. The suit would have been thrown out on the ground of unreasonable delay more especially when on account of fluctuations in the market the delay had caused serious prejudice to the opposite party.

Mr. Manchanda lastly argued that his clients should not have been burdened with interest. I am of the opinion that the defendants were liable to pay the interest in view of the fact that they had wrongfully withheld the sum of Rs. 5,000 for a considerable time without making any serious attempt at all to complete the sale. I am of the opinion that this appeal must fail and I accordingly dismiss the same with costs.

In cross-objections the plaintiff claims interest at 6 per cent per annum on the amount of Rs. 5,000 from the date of the suit till realisation of the amount. I am of the opinion that the plaintiff is entitled to the same. His money has been wrongfully withheld by the defendants who presumably must have earned interest on the same. I would therefore, allow the cross-subjections but make no order as to costs in respect of the same.

CHOPRA J.—I agree. Chopra, J.

B. R. T.

SUPREME COURT

Before Bhuvaneshwar Prasad Sinha, P. Govinda Menon and J. L Kapur, JJ.

SURINDER KUMAR AND OTHERS,—*Appellants*

versus

GIAN CHAND AND OTHERS,—*Respondents.*

Civil Appeal No. 49 of 1954.

1957

Sept., 24th

Additional evidence—Admission of—Power of Supreme Court as to—Supreme Court Rules—Order 45, Rule 5—Evidence Act (I of 1872)—Section 41—Judgment of Probate Court—Presumption as to—Whether judgment in rem—Judgment obtained during pendency of the appeal in the Supreme Court—Whether can be admitted in evidence—Change of circumstances during the pendency of the appeal—Whether can be taken into consideration in deciding the appeal.

Held, that there is no specific provision for admission of additional evidence by the Supreme Court but rule 5 of Order 45 of the Supreme Court Rules recognises the inherent power of the Supreme Court to make such orders as may be necessary for the ends of justice or to prevent an abuse of process of the Court. Under this rule additional evidence can be admitted by the Supreme Court for the ends of justice.

Held, that a judgment of the Probate Court must be presumed to have been obtained in accordance with the procedure prescribed by law and it is a judgment *in rem*. The objection that the respondents were not parties to it is unsustainable because of the nature of the judgment itself.

Held, that in deciding the appeal the Court has to take the circumstances as they are at the time when the appeal is being decided and a judgment *in rem* having been passed in favour of the appellant, it is necessary to take that aditional fact into consideration in deciding this appeal.

Indrajit Pratap Sahi v. *Amar Singh* (1), *Lachmeshwar Parshad Shukul* v. *Keshwar Lal Chaudhuri* (2), and *Patterson* v. *State of Alabama* (3), relied on.

Appeal by Special Leave from the Judgment and Order, dated the 16th August, 1949, of the Punjab High Court in Regular First Appeal No. 57 of 1949, arising out of the Judgment and Order, dated the 30th November, 1945, of the Court of Senior Sub-Judge, Gurdaspur, in suit No 298 of 1944.

For the *Appellants*: M/s. H. J. Umrigar and K. L. Mehta, Advocates.

For the *Respondents* (except Respondent No. 2): Mr. R. S. Narula, Advocate.

JUDGMENT

The Judgment of the Court was delivered by

Kapur, J.

KAPUR, J.—This appeal by Special Leave is brought from the judgment and decree of the High Court of the Punjab, dated August 16, 1949, reversing the decree of the trial court which had decreed the plaintiffs' suit on a mortgage.

The plaintiffs who are the appellants in this appeal claim to be the legatees under a registered will of their mother's father Lala Guranditta Mal executed on September 6, 1944. One of the items bequeathed to them was the rights in a mortgage executed by the defendants in favour of the testator on October 24, 1932, for Rs. 6,000. On October 25, 1944, they brought a suit in the court of the Senior Subordinate Judge, Gurdaspur, for the recovery of Rs. 5392-2-0 on the basis of the mortgage. They alleged that they were the "representatives and heirs" of Lala Guranditta Mal

(1) I.L.R. 24 Bam. 547.
(2) I.L.R. 35 Mad. 628.
(3) A.I.R. 1953 Mad. 404.

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under the will and in their replication they just stated:

> "We are heirs and representatives of Lala Guranditta Mal mortgagee deceased."

Inter alia the defendants pleaded that they had no knowledge of the will alleged to have been made by Guranditta Mal and they denied that the plaintiffs were heirs and representatives of the mortgagee and therefore had no *locus standi* to sue. Five issues were stated by the learned trial judge out of which the issue now relevant for the purpose of this appeal is the first one:

> (1) Have the plaintiffs a *locus standi* to maintain the present suit as successors-in-interest of Guranditta, deceased?

The learned Subordinate Judge held that the will "had the presumption of its correct execution" because it was registered and also that not obtaining the probate of the will was no bar to the plaintiffs obtaining a decree and passed a preliminary mortgage decree. On the matter being taken in appeal to the High Court the decree of the trial court was reversed and the suit of the plaintiffs dismissed but the parties were left to bear their own costs. The High Court held:

> "It is thus clear that attestation by two witnesses was necessary in order to validate the will now before us. As this requirement of law has not been satisfied the plaintiffs had no *locus standi* to maintain the suit."

A prayer made for the admission of additional evidence under O: 41 R: 27 of the Civil Procedure Code was rejected. The High Court

refused leave to appeal under Article 133 but Special Leave was granted on October 21, 1952. In the meanwhile the probate of the will of Lala Guranditta Mal was granted by the District Judge of Gurdaspur on July 11, 1951, in favour of the present appellants and their mother *Mussammat* Har Devi. The appellants made an application in this court for the admission of additional evidence and prayed that the "probate be placed on the record" as the "probate of the will operated as a judgment *in rem*". They also applied to add *Mussammat* Har Devi as a respondent in the appeal.

An objection to the admission of additional evidence at this stage is taken by the respondents on the ground that the probate was obtained without their knowledge and that the application was made at a late stage, it deprived the respondents of the valuable right which vests in them because the claim has become statute barred and that there is no provision in the Rules of this court for the admission of additional evidence. It is clear that the probate was applied for and obtained after the judgment of the High Court and, therefore, could not have been produced in that court. The judgment of the Probate Court must be presumed to have been obtained in accordance with the procedure prescribed by law and it is a judgment *in rem*. The objection that the respondents were not parties to it is thus unsustainable because of the nature of the judgment itself.

As to the power of this court, there is no specific provision for the admission of additional evidence but r: 5 of O: 45 of the Supreme Court Rules recognises the inherent power of the court

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to make such orders as may be necessary for the ends of justice or to prevent an abuse of process of the court. The Privy Council in *Indrajit Pratap Sahi* v. *Amar Singh* (1), said:

> "that there is no restriction on the powers of the Board to admit such evidence for the non-production of which at the initial stage sufficient ground has been made out."

The powers of this Court in regard to the admission of additional evidence are in no way less than that of the Privy Council. Moreover in deciding the appeal we have to take the circumstances as they are at the time when the appeal is being decided and a judgment *in rem* having been passed in favour of the appellants it is necessary to take that additional fact into consideration. It was so held by the Federal Court in *Lachmeshwar Prasad Shukul* v. *Keshwar Lal Chaudhuri* (2), where Gwyer, C. J., quoted with approval the following observation of Chief Justice Hughes in *Patterson* v. *State of Alabama* (3):

> "We have frequently held that in the exercise of our appellate jurisdiction we have power not only to correct error in the judgment under review but to make such disposition of the case as justice requires. And in determining what justice does require, the court is bound to consider any change, either in fact or in law, which has supervened since the judgment was entered."

(1) L.R. (1923) 50 I.A. 183, 191
(2) [1940] F.C.R. 84.
(3) (1934) 294 U.S. 600, 607.

Varadachari, J., was of the opinion that the hearing of an appeal is under the procedural law of this country in the nature of a rehearing and therefore, in moulding the relief to be granted in appeal an appellate court is entitled to take into account even facts and events which have come into existence since the decree appealed from was passed. He referred to many Indian cases and to the practice of the Judicial Committee of the Privy Council and to some English cases.

In our opinion the fact of the grant of the probate which has supervened since the decision under appeal was given and which has been placed before this court must be taken into consideration in deciding the appeal. In that event the infirmity in the appellant's case due to the want of proper attestation of the will under section 63 (1) (c) of the Indian Succession Act would be removed. Because of the view we have taken the other objection raised by the respondents becomes wholly inefficacious. The finding of the High Court on this point is, therefore, reversed.

We, therefore, allow this appeal, set aside the judgment and decree of the Punjab High Court and remit the case to the High Court for decision of the other issues which had not been decided.

As the appellants did not obtain the probate till after the appeal was filed in this court and made the application for the admission of additional evidence at such a late stage, they will pay Rs. 500 as costs of this court to the respondents within two months. In default of such payment the appeal shall stand dismissed with costs, i.e., Rs. 500.

B. R. T.

CIVIL REFERENCE.

Before Bhandari, C. J. and Tek Chand, J.

S. RAGHBIR SINGH SANDHAWALIA,—*Applicant*

versus

THE COMMISSIONER OF INCOME-TAX, PUNJAB, PEPSU, HIMACHAL PRADESH, SIMLA,—*Respondent.*

Civil Reference No. 22 of 1953.

1957

Sept., 24th

Indian Income-tax Act (XI of 1922)—Section 16—Gift of a part of movable property of a Hindu undivided family made by the Karta to his wife—Whether valid and divests the family of its title to that property—Gift—Essentials of—Hindu Law—Power of father to alienate coparcenary property by way of gift—Extent of—Hindu Law as interpreted in the Punjab—Power of a member of joint Hindu family to alienate joint family property—Extent of—Alienation, whether void or voidable—'Assent', 'Consent'—Meaning of—Intention—Meaning of and how to be ascertained—"reasonable"—Meaning of—Gift of joint family property—Whether reasonable—How to be determined—Tax payer—How far entitled to decrease or avoid his liability.

R. S. and his only son H. S. were members of a Hindu undivided family which possessed properties, movable and immovable, worth serveral millions of rupees. R. S. made a gift of shares of the value of Rs. 2,40,000 to his wife without the consent of H. S. but without any objection by him. The question arose whether the income from dividend on the gifted shares was the property of the family or of the donee.

Held, that the gift of a joint family asset of the value of Rs. 2,40,000 by Shri Raghbir Singh, *Karta* of the family, to his wife, being a gift of affection of a reasonable share of ancestral moveable property, is valid and effective and divests the family of its title to the gifted property even if the said gift was made without the consent of the other adult coparcener and consequently the income received from the gifted property was the income of the donee and not of the Hindu undivided family.