itself, an objection can be taken any time. In my opinion, the facts of the present case do not attract the rule of the decision in Madras case but on the other hand is hit by the rule of constructive *res judicata* as propounded by their Lordships of the Supreme Court in Mohanlal Goenka *v.* Benoy Kishna Mukherjee (1).

This petition, therefore, must fail and is dismissed. In the circumstances, we would make no order as to costs.

PREM CHAND PANDIT, J.—I agree.

R N.M.

APPELLATE CIVIL

Before Shamsher Bahadur and Prem Chand Pandit, JJ.

AMAR NATH,—*Appellant*

versus

SUNDER LAL AND OTHERS,—*Respondents.*

Regular First Appeal No. 48 of 1956

July 12, 1967

Appeal—Records of the case lost irrecoverably—Reconstruction of the record—How to be effected—Duty of the appellant in the matter stated.

Held, that where the records of a case are irrecoverably lost in appeal, there is the inherent power in the appellate Court to reconstruct the records of the Court from which an appeal lies to it. But it remains the duty of the unsuccessful party to displace the judgment appealed from and, further, it is his duty to lead secondary evidence with regard to the matters on which he places reliance and, finally, that the successful party cannot be deprived of the fruits of the decree from which an appeal has been taken. The statements of witnesses cannot be recorded afresh, as that would amount to re-hearing which the Courts have repeatedly deprecated in such cases.

First Appeal from the decree of the Court of Sub-Judge, 1st Class, Jagadhri, dated the 30th day of November, 1955, dismissing the plaintiff's suit and leaving the parties to bear their own costs.

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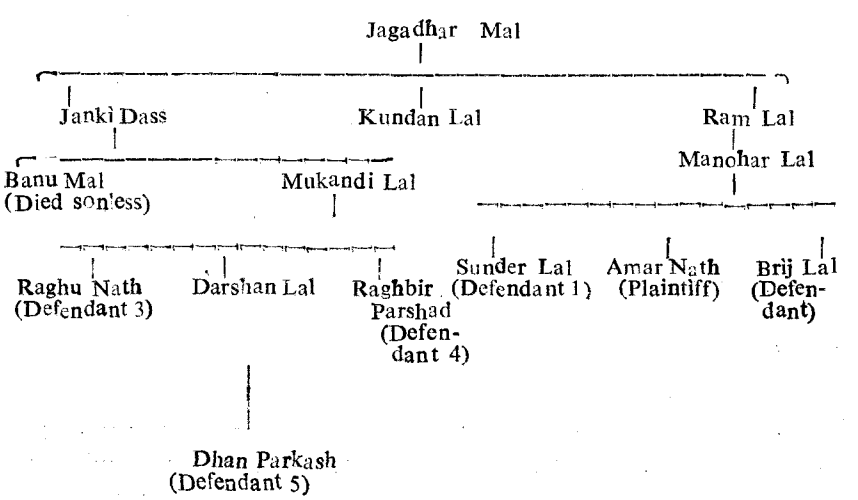
ROOP CHAND, ADVOCATE, for the Appellant.

ANAND SARUP, SENIOR ADVOCATE WITH R. S. MITTAL, ADVOCATS, for the Respondents.

JUDGMENT.

SHAMSHER BAHADUR, J.—This is an appeal of Amar Nath, plaintiff whose suit for a declaration, that the family partitions effected on 24th of March, 1938, and 28th of July, 1942, were not binding on him, was dismissed by the Court of the Subordinate Judge, First Class, Jagadhri, on 30th of November, 1955.

Sunder Lal and Brij Lal, defendants 1 and 2, respectively, are brothers of Amar Nath plaintiff, while defendants 3 and 4 are 4th degree collaterals and defendant 5 is fifth degree collateral of the plaintiff. Raja Ram and Mani Ram, defendants 6 and 7, respectively, are hte alienees of the prpoerty whcih had fallen to the share of the plaintiff. The following pedigree-table would be helpful in understanding the relationship between the plaintiff ond his relation-defendants:—



There are, in all, 10 properties which are the subject-matter of dispute, 3 of these being Havelis in Jagadhri town in the same street, one shop in the Abadi of Jagadhri town, one vacant site of an Ihata in the Abadi of Yamunagar in Jagadhri tehsil, one Bailkhana in Jagadhri town and four houses also in the Abadi of Jagadhri town. According to the plaintiff, these properties were acquired by Jagadhar Mal, the common ancestor, having been purchased by him in the names of others members of the family with the funds of the joint Hindu Family which now consists, according to him, of the plaintiff and defendants 1 to 5. The plaintiff asserts that when the first partition of 24th of March, 1938 was effected between the plaintiff and the first five defendants, the plaintiff "was not keeping sound mental equilibrium". According to this partion, the share of the plaintiff and his two brothers—Sunder Lal and Brij Lal, defendants—was allocated 2/3rd share of the Haveli, which is property No. 3, and the Bailkhana which is described as property No. 6. According to defendants 3 to 5, the plaintiff and his two brothers raised a dispute regarding the properties, which did no constitute joint Hindu Family properties, and to settle the dispute amicably a *sulehnama* or a compromise deed was executed on 24th of March, 1938. This plea of these defendants would explain the disproportionately small share of the properties which fell to the lo tof the plaintiff an dhis two brothers. Subsequently on 28th July of 1942, the two-third share of the Haveli and the Bailkhana were the subject-matter of partition between the plaintiff and the first two defendants. Two Kothas of this Haveli and two-third share of the Bailkhana were given over to the plaintiff. The Bailkhana was sold on behalf of the plaintiff, his wife and defendant 2 to defendant No. 6 (Raja Ram) on 22nd of August, 1946, and defendant No. 6 subsequently disposed of the Bailkhana in favour defendant No. 7. The case of the plaintiff, as set up in the plaint, in short, was that the settlement and partition with regard to the properties, which belonged to the joint Hindu Family, were not binding on him, he being under a legal disability at the relevant periods, and, consequently, he prayed for a declaration that, being still a co-parcener, he is entitled to his share in the joint family property.

Written statements in resistance of the suit were filed by defendants 2, 3, 4 and 5. The second defendant, who is the plaintiff's own brother, denied that Amar Nath was an idiot and

stated, on the other hand, that he (Amar Nath) was in enjoyment of "sound intellect at the time of registration of the deeds" which are now sought to be challenged. According to this defendant, only properties Nos. 1 to 3, which are Havelis, were ancestral, while properties Nos. 2, 5 and 6 belonged to Kundan Lal, property No. 4 was owned by Janki Das and Kundan Lal, while property No. 7 belonged to Sunder Lal, the first defendant, by virtue of a will which was executed in his favour by Mangal Sain. Property No. 8 was purchased by the second defendant from Raj Kumar, and, similarly, property No. 9 had been mortgaged in his favour by means of a registered deed of 4th of May, 1951 and the property (No. 9), having been redeemed, cannot now be a subject-matter of the dispute. Property No. 10 had been purchased by defendants 3 to 5. There being a dispute about the first three properties, this defendant asserts that a mutual settlement was reached on 24th of March, 1938 whereby a portion of one of the Havelis and the Bailkhana were given to him and his two brothers. Defendants Nos. 3 to 5 joined the second defendant in denying the right of the plaintiff to bring the suit. It was asserted that the plaintiff was neither insane nor an idiot and had been conducting his retail business at all relevant times. The plaintiff had prolonged litigation with the owners of the shop, in which he was a tenant, and had been pursuing this case as well as others. In 1940 the plaintiff gifted this property in favour of his wife and got suits filed on her behalf against his own brothers, and this litigation culminated in their dismissal in the year 1951. As mentioned before, defendants 3 to 5 denied the joint family nature of the property, but, as disputes had been raised, a compromise was effected.

On the pleadings of the parties, the following issues were framed:—

(1) Whether the parties to this litigation, other than defendants 6 to 7, did not constitute a joint Hindu Family ?

(2) Whether the entire suit property was the property in possession of the above joint Hindu family?

(3) Whether the partitions of the types mentioned in the written statements of defendants in respect of the above property did actually take place and which property came to which party and to what effect ?

(4) If issue No. 3 is proved, whether those partitions and the sale in dispute are illegal and void, as alleged in the plaint?

(5) What is the share of the plaintiff in the suit property ?

(6) Whether the defendants are entitled to special costs under section 35-A, Civil Procedure Code? If so, to what amount?

(7) Whether the above partitions were being acted upon? If to what relief?

(8) Relief.

I have referred, in some detail, to the pleadings of the parties as I will to the judgment of the learned Judge as most of the record of the case has been lost and it has not been possible to have it reconstructed. On the first issue, the conclusion of the learned Judge is against the plaintiff. That there is a presumption in Hindu Law in favour of the existence of a joint Hindu family, so far as the father and his sons are concerned, there can be no dispute. The learned Judge has found that there can be no presumption of jointness of the plaintiff with defendants 3 to 5 who are related in the 4th or 5th degree. A bare perusal of pedigree-table shows that while Sunder Lal and Brij Lal may be presumed to be joint with Amar Nath, such a conclusion with regard to Raghunath, Raghbir Parshad and Dhan Parkash would have to be proved affirmatively by evidence. Reference may be made to article 233 of Mulla's Hindu Law, 13th edition, at page 259, where it is said:—

> "Generally speaking, 'the normal state of every Hindu family is joint-Presumably every such family is joint.....In the absence of proof of division, such is the legal presumption' ....The presumption of union is the greatest in the case of father and sons . . .
>
> 'The presumption is stronger in the case of brothers than in the case of cousins, and the farther you go from the founder of the family the presumption becomes weaker and weaker'. The reason is that 'brothers are for the most part undivided; second cousins are generally separated' ".

The learned Judge has relied on the statements of Banarsi Dass, Krishan Chander and Banu Mal as also on the testimony of the defendants, Sunder Lal, Brij Lal and Raghunath, who have deposed

that the parties to the litigation, other than defendants 5 and 7, did not constitute a joint Hindu family.

Mr. Roop Chand, the learned counsel for the plaintiff-appellant, contends that the learned Judge has not sufficiently emphasised that the presumption is stronger in the case of brothers and has asked us to infer that at least the presumption should prevail in the case of plaintiff and his two brothers who are defendants 1 and 2. In view of the documents of partition and the oral evidence the strength of such a presumption is very much weakened and in the absence of any evidence to the contrary it must be held that the plaintiff and the defendants did not constitute a joint Hindu family at the time when the suit was brought.

So far as the second issue is concerned, the learned Judge has found that house No. 7 is the exclusive property of Sunder Lal who acquired it by the will (Exhibit D/6A) executed by Mangal Sain in his favour. Property No. 8 has been found to belong to defendant 2. The Court has found that there was no evidence to show that the property in suit was acquired by Jagadhar Mal and was purchased by the nucleus of joint family funds. Only Haveli No. 2 has been found to be joint between the parties. On the third issue the Court has found that the *Sulehnama* (Exhibit D. 3) of March 24, 1938, effected a settlement by which two-third portion of the Haveli and the Bailkhana came to the share of the plaintiff and the first two defendants, and further that the deed (Exhibit D. 2) of 28th of July, 1942 brought about a partition between the plaintiff and his two brothers. Regarding insanity pleaded by the plaintiff, it is the conclusion of the Court under issue No. 4 that while the judgments (Exhibits P/1-2) show that the plaintiff was insane on 12th of February, 1940, this insanity has not been found to have been established when the impugned documents were executed in 1938 and 1942. On these conclusions; there could be no question of there being a share of the plaintiff in the suit property, subject-matter of issue No. 5. On the seventh issue, the Subordinate Judge has found that the partitions have been acted upon right up to the time of the suit. In view of these findings, the suit of the plaintiff has been dismissed. It may be observed in passing that certain preliminary objections of the defendants regarding the maintenance of the suit in its present form, the valuation of the suit for purposes of court-fee and jurisdiction and

misjoinder of parties were decided in favour of the plaintiff as preliminary issues.

The principal contention, of Mr. Roop Chand, the learned counsel for the appellant, is that the record of the case having been lost, no adequate opportunity has been afforded by the trial Judge to the plaintiff for its reconstruction. It is submitted that the entire oral evidence, the documentary evidence of the plaintiff and some of the documents produced by the defendants have not been printed in the record, as these have been found to have been lost. Only the pleadings, the judgment and the principal documents in the case filed by the defendants have been included in the printed paper book. So far as this objection is concerned, it would be well to refer to the order of Narula, J., passed on 18th of March, 1966. From its perusal, it appears that the appeal instituted by the plaintiff at one time was dismissed for non-prosecution by Tek Chand, J., on 13th of June, 1957, and it was eventually restored by the order of the same learned Judge on 13th of October, 1958. The record, however, could not be printed as some of the documents and oral evidence were missing and, ultimately, the file of the case was submitted by the Subordinate Judge, Jagadhri, to this Court on 17th of September, 1965, for reconstruction. A police case was registered for the loss of the record and some proceedings went on to fix the responsibility for the loss of the record. The Subordinate Judge, when asked to reconstruct the record, reported that the local counsel for the parties did not cooperate and they did not have the briefs in their possession. The Advocates of the High Court employed by the parties were then approached and Mr. Anand Swaroop, counsel for the defendant-respondents, submitted some attested copies of the documents among these being the registered deeds of 1938 and 1942. Narula, J., on 11th of March, 1966 directed notices to be sent to Mr. Anand Swaroop and Mr. Lakhanpal, the counsel for the parties, to help in the work of reconstruction of the file. There was lack of cooperation and the parties, especially the plaintiff did not pursue the matter to press for the acceptance of secondary evidence. The District Judge was asked by Narula, J., to complete the reconstruction of the records "to the extent it is possible and forward the entire available material with his final report to the Registrar" on or before the 28th of May, 1966. Ch. Roop Chand, learned counsel for the appellant, was asked to arrange to procure and file in the

High Court within four weeks the certified copies of the documents which could be procured. In pursuance of this direction, a report was submitted on 19th of May; 1966 by the Subordinate Judge; Jagadhri, that "the aid of the counsel for the parties was sought for the reconstruction of the missing documents", and details were given of the documents which had been produced by parties' counsel. The plaintiff, on whose behalf the grievance about the defective reconstruction of the file has been made, appeared before the Subordinate Judge and stated that he had handed over his documents to Shri Madan Lal Saxena, Advocate, Chandigarh, who had since left practice and whose whereabouts were not known. The parties did not lead any secondary evidence, and such of the documents or copies thereof as had been submitted to him, have been included in the printed paper book.

So far as the law on the subject is concerned, reference may first be made to one of the earliest decisions of the Calcutta High Court of Sir Barnes Peacock, C.J., and Jackson, J., in *Baboo Gooroo Dyal Singh* v. *Durbaree Lal Tewaree* (1). In that case after a decree had been obtained, which was appealed from, the record was irrecoverably lost in transit from the first to the second court. The High Court directed the lower appellate court to receive secondary evidence from both parties of the papers which made up the entire record, and Jackson, J., speaking for the Court (Sir Barnes Peacock, C.J., concurring) observed:—

> "In such a state of things, the Court has to choose between two orders, viz., either to direct the Court below to receive such secondary evidence of the contents of the original record as may be forthcoming, or to order an entirely new trial.
>
> To the latter of these two courses, there is this obvious objection that the plaintiff, who ordinarily has to prove his case, and who had, in this instance, obtained the decree of the Court of first instance, is obliged again to go through the same ordeal . . .
>
> It appears to me that the plaintiff being in possession of a decree which, unless lawfully reversed on appeal, is

(1) 7 Sutherland's Weekly Reporter 18.

final, ought not, in consequence of an accident for which he is not to blame, to be placed in a worse position than he was before the trial of his case. And, therefore, while I would permit either party to do what he could to enable the Appellate Court to deal lawfully with the appeal, I would not go farther, nor deprive the plaintiff absolutely of the fruit of his decree."

The next decision, also of the Calcutta High Court, is *Raj Gir Sahaya* v. *Ishwardhari Singh and others* (2). It is the decision of a Division Bench, and, in the leading judgment, Asutosh Mookerjee, J., after a discussion of the English and American law on the subject, made the following observation (at page 248):—

"But although a Court has inherent power in the case of loss or destruction of a judicial record to restore such record, it does not follow by any means that execution may not be issued before reconstruction of the record. It is further clear that, to prove the contents of the lost judicial record, secondary evidence may be given, and there is no restriction as to the nature of the secondary evidence admissible."

Sadasiva Aiyar, J., in the Madras case of *Kamakshamma* v. *Emperor* (3), also held that the "Court has an inherent power in the case of loss or destruction of a judicial record to restore such record and where what is lost is the judgment, it is open to the Judge to re-write the judgment from memory and from the materials before him and place it on the record." Mr. Roop Chand placed reliance on a Bench decision of the Madras High Court consisting of the Chief Justice, Sir Walter Schwabe, Oldfield and Ramesam,JJ., in *Marakarutti* v. *Veeran Kutti* (4), in which *all* the relevant authorities have been reviewed including the judgments to which I have already adverted. Schwabe, C.J., in delivering the judgment, held that:—

"(1) there is inherent power in the Appellate Court to reconstruct the records of the Court from which an appeal lies to it:

(2) (1910) 11 Cal. L.J. 243.
(3) (1913) 25 Mad. L.J. 445.
(4) I.L.R. (1923) 46 Mad. 679.

(2) the appellant has, in order to get his appeal heard at all, to satisfy the Court what the record is of the case in which he has failed;

(3) the Court has *not* got to have the case re-heard. The respondent is entitled to the benefit of having the judgment which he has got in his favour on the original hearing;

(4) in reconstructing the record, the Court will have to go very near to re-hearing, but the Court will always have to apply its mind to ascertain not what the rights of the parties were, but what the destroyed record of the suit was and on that record, when reconstructed, it will have to act on the ordinary principles on which it would have acted if the original record had been before it;

(5) it is worth observing that in the Appellate Court, probably the best evidence of what took place in the Court below will be found in the judgment, if that has been preserved, of the District Munsif, or of the Subordinate Judge, as the case may be, who heard the case and recorded findings; and lastly

(6) that the statement of the case as set out in the judgment appealed from will be as good evidence as can be obtained and, in all probability, better than any other, being contemporaneous of what took place before him."

A perusal of these authorities makes it plain that it remains the duty of the unsuccessful party to displace the judgment appealed from and, further, it is his duty to lead secondary evidence with regard to the matters on which he places reliance and, finally, that the successful party cannot be deprived of the fruits of the decree from which an appeal has been taken.

While the defendants have adduced secondary evidence in the shape of attested copies of documents, the plaintiff has failed to lead any proof in this Court. Mr. Roop Chand has placed reliance on Exhibits P. 1 and P. 2 to establish that Amar Nath had been insane. As observed in the judgment of the trial Court, these documents only show that in the year 1940 Amar Nath was suffering from this disability, but, as rightly observed by the learned Judge, there is no positive proof to lead to the inference that Amar

Nath was unable to comprehend his affairs or to conduct them in 1938 or 1942. In these years he had been conducting prolonged litigation on all fronts, and, from the oral evidence on which reliance has been placed by the trial Judge, in whose presence it was examined, he has reached conclusions which are supported by the documents referred to by him in his judgment. It is idle to contend, as has been done by Mr. Roop Chand, that, as he was unable to have copies of the statements made by witnesses, he should have been allowed to call such of the witnesses as are still alive. No such request was ever made on behalf of the plaintiffs, and, indeed, the Subordinate Judge and also the High Court have given repeated opportunities to the plaintiff to explain his position and help the courts in reconstructing the record. It is pointless for Mr. Roop Chand to argue at this stage, when the reconstruction of the record has been done, that better results could have been obtained by adopting a different procedure. We are not impressed by the argument that the statements of witnesses should have been recorded afresh, as that would have amounted to a re-hearing which the courts have repeatedly deprecated in such cases. If the plaintiff had made such a suggestion at the earliest opportunity, it may have been worth consideration, but the time and place for it are now gone and this Court cannot entertain it at this stage.

It remains to make a brief reference to the documents on which reliance has been placed by the trial Judge in giving his judgment whereby he dismissed the plaintiff's suit. The first document at page 32 of the paper-book is a will (Exhibit No. 1) executed by Shri Mangal Sain on 12th of September, 1937 in favour of Sunder Lal, the first defendant. Adequate proof was furnished for the execution of this will and nothing has been urged to suggest that it has not been validly taken into consideration. The document (Exhibit 4) at page 44 of the paper book is the *Sulehnama* of 24th of March, 1938. Some disputes had been raised by the parties, and it was decided to resolve them by an amicable settlement. This family settlement in the form of a *Sulehnama* duly supported by the evidence available at the time when it was recorded, has been found to be a document duly proved and we have no reason to differ from the conclusion reached by the trial Judge regarding its purported effect. The same observations apply to the partition deed of 28th of July, 1942 (Marked No. 2) at page 35 of the paper-book. The document (Marked No. 3) at page 39 of the paper-book is a registered sale-deed of 4th of June, 1952 executed by Beni Parshad and Raj Kumar

in favour of Brij Lal (defendant No. 2) and supports the pleas raised by the second defendant in his written statement. Another sale-deed of 2nd of August, 1946 (Marked No. 5) at page 50 of the paper-book was executed by Brij Lal (defendant No. 2) and others in favour of Datu Ram and another. Exhibits P. 1 and P. 2, which have not found a place in the paper-book, have been duly considered by the learned Subordinate Judge, and the execution of no other documents has been made a grievance of by Mr. Roop Chand.

In the result, we see no reason to differ from the conclusions and findings of the learned Judge and we would, accordingly, affirm the decree awarded by him in favour of the defendants. In the circumstances, we would make no order as to costs.

PREM CHAND PANDIT, J.—I agree.

K.S.K.

INCOME-TAX REFERENCE

Before D. K. Mahajan and R. S. Narula, JJ.

THE COMMISSIONER OF INCOME-TAX, PUNJAB,—*Petitioner*

versus

M/S MOTHU RAM-PREM CHAND,—*Respondents.*

Income-tax Reference No. 48 of 1964

July 12, 1967

Income-tax Act (XI of 1922)—Ss. 25-A and 28—Applicability and effect of—"Where"—Meaning of—Assessee, Hindu undivided family—Assessment for 1954-55 completed on September 30, 1954—H.U.F. disrupted with effect from March 31, 1956 and application for an order under S. 25-A recognising the disruption filed on March 13, 1957—Order imposing penalty in respect of 1954-55 assessment passed on November 28, 1958—Order under S. 25-A passed on January, 29, 1960—Imposition of penalty—Whether valid.

Held, that a plain reading of section 28 of the Indian Income Tax Act, 1922, shows that there are two conditions precedent for invoking the same, viz:—

(i) there should be in existence "any person" who has concealed the particulars of his income or deliberately furnished inaccurate particulars thereof; and