counter to the true scope and purpose of the Rules. There is no reason, in my opinion, to aggravate the misfortune suffered by the petitioner in his father's death by putting a strained interpretation on rule 65(1) to deprive him even of the inheritance which he is entitled to receive as the heir of deceased.

In my view, there is a manifest error of law committed by the authorities and I would accordingly allow this petition and quash the orders of the Settlement authorities which are Annexures 'A' and 'B' to this petition. The petitioner would get the costs of his petition.

K. S. K.

APPELLATE CIVIL.

Before S. S. Dulat and Prem Chand Pandit, JJ.

HARDAS KAUR AND ANOTHER,—*Appellants.*

versus

BAKHTAWAR SINGH AND OTHERS,—*Respondents.*

Regular Second Appeal No. 479 of 1957

1960

Oct., 31st

Indian Limitation Act (IX of 1908)—Article 144—Last male owner dying in 1937—Possession of the lands left by him taken by his sisters without any right or title—Next heir dying in 1952—Suit for possession by reversioner brought in 1954—Whether within time—Possession of the sisters—Whether adverse ab initio.

J, the last male owner of the land in dispute died in 1937. P was to succeed to his property as his next heir. Instead of P, the sisters of J, came into possession of the property without any right or title. P did not consent to the possession of the sisters of J. P died in 1952 and the suit for possession was brought in 1954 by 5th degree collaters of J and P. The question arose whether the suit was within time.

Held, that the suit was barred by time. The possession of the sisters of J was without any right whatsoever to this property and without the consent of the next heir and consequently adverse to him. It follows that their possession was not only adverse to the real owner P, but was

adverse against the whole world including the persons, who had to succeed to P. The case would, however, have been different if J's sisters had come into possession with the consent of P or on the basis of some alienation from him for, in that case, their possession would not have been adverse to the reversioners, especially during the lifetime of P. To safeguard their interests against such an alienation, the reversioners could file a suit for a declaration that the alienation made by P would not affect their reversionery rights after the death of P and could later on bring a suit for possession within limitation after the death of P.

Roda, etc., v. *Harnam, etc.* (1), and *Sunder* v. *Salig Ram* (2), distinguished.

Kaka and others v. *Labh Chand and others* (3), and *Kahla Singh* v. *Diala* (4), relied upon.

Second Appeal from the decree of the Court of Shri H. S. Bhandari, Additional District Judge, Ferozepore, dated the 25th day of April, 1957, affirming that of Shri Birendra Singh Yadav, Sub-Judge, 1st Class, Fazilka (Camp Mukatsar), dated the 30th July, 1956, granting the plaintiffs a decree for joint possession of 221/240th share of the land in suit situated in village Bodiwala Kharak Singh against the contesting defendants No. 1 and 2 and dismissing their suit in rsepect of the remaining share in the land of that village and also dismissing their suit in respect of the suit land situated in village Bhalliana and for mesne profits and leaving the parties to bear their own costs and further ordering that the remaining defendants were *pro forma.*

The lower appellate Court left the parties to bear their own costs.

K. L. Kapur, V. C. Mahajan and N. N. Goswamy, Advocates, for the Appellants.

F. C. Mital, G. P. Jain and D. S. Keer, Advocates, for the Respondents.

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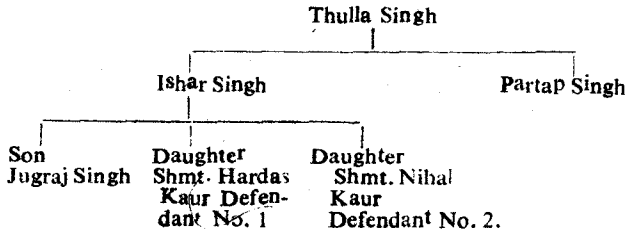
(1) 18 P. R. 1895.
(2) 25 P. R. 1911.
(3) 106 P. R. 1906.
(4) 113 P. R. 1906.

JUDGMENT

PANDIT, J.—The following pedigree-table will be helpful in understanding the facts of this case :— Pandit, J.



Jugraj Singh and Partap Singh, *Jats* of village Bodiwala Kharak Singh in tehsil Fazilka of district Ferozepore jointly held, in equal shares, 129 *bighas* 15 *biswas* of proprietary land in this village and occupancy rights in 106 *kanals* 16 *marlas* in village Bhalliana. In 1937, Jugraj Singh, died without leaving any widow or issue and on his death his half share in the above land in both the villages was mutated by the revenue authorities in favour of his two sisters Shrimati Hardas Kaur and Shrimati Nihal Kaur who are defendants Nos. 1 and 2 in the present case and they are in possession of the same since then. On 19th January, 1952, Partap Singh also died without any issue or widow and his share in this land was also taken possession of by Shrimati Hardas Kaur and Shrimati Nihal Kaur. In December, 1954, plaintiffs, who are fifth degree collaterals of Jugraj Singh and Partap Singh, brought the present suit for possession of the land in dispute on the ground that they and defendants Nos. 3 to 11 were the collaterals of Jugraj Singh and Partap Singh, that the suit land was ancestral *qua* them and the deceased, that according to custom, which governed the parties in matters of succession, they were better heirs of Partap Singh and Jugraj Singh than defendants Nos. 1 and 2, that regarding the share of Jugraj Singh the mutation in favour of defendants Nos. 1 and 2 was got sanctioned by Partap Singh

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and it, therefore, amounted to an alienation and as it was without consideration and legal necessity the plaintiffs had a right to sue for possession of that land also after the death of Partap Singh, that their suit with regard to the share of Jugraj Singh was within time because their right to sue for possession accrued on the death of Partap Singh in 1952. The plaintiffs also claimed mesne profits.

The suit was resisted by defendants Nos. 1 and 2 only who pleaded that the suit in respect of the share of Jugraj Singh was barred by time, that according to custom they were preferential heirs of their deceased brother and also their uncle Partap Singh, that the suit land was not ancestral *qua* the plaintiffs, that the plaintiffs were estopped by their conduct from filing the suit and that the plaintiffs' claim in respect of mesne profits was not maintainable.

On the pleadings of the parties a number of issues were framed. The trial Court granted the plaintiffs a decree for joint possession of their 221/240th share of the land in dispute situated in village Bodiwala Kharak Singh, but the rest of their suit was dismissed. The trial Court found that only the land situated in village Bodiwala Kharak Singh had been proved to be ancestral *qua* the plaintiffs while the rest was not, that the sisters were excluded by the collaterals of the 5th degree regarding ancestral property and, therefore, the plaintiffs were better heirs than defendants Nos. 1 and 2 regarding the ancestral property, that the suit for possession with regard to the share of Jugraj Singh was within time because the possession of defendants Nos. 1 and 2 was not adverse to the plaintiffs during the lifetime of Partap Singh, that the mutation in respect of the share of Jugraj Singh was not sanctioned in favour of defendants Nos. 1 and 2 with the consent of Partap Singh, that

the plaintiffs were 5th degree collaterals of Jugraj Singh, deceased, that the land in village Bhalliana being non-ancestral the plaintiffs had no right to the same, that in the presence of the collaterals, neices could not be deemed to be the heirs of their uncle, that the plaintiffs' were not estopped from bringing the suit, that the plaintiffs' could not sue for possession for more than their share, that the plaintiffs' share in the land in village Bodiwala Kharak Singh came to 221/240th and that the suit for mesne profits was not maintainable in a civil Court.

Against the decision of the trial Court, the plaintiffs, defendants Nos. 1 and 2 and Jodh Singh defendant, went up in appeal to the learned Additional District Judge, Ferozepur, who dismissed all the three appeals, holding that neither according to custom nor according to Hindu Law defendants Nos. 1 and 2 could succeed to the estate of Partap Singh in preference to the collaterals, that the suit regarding the share of Jugraj Singh was not barred by limitation firstly because the possession of defendants Nos. 1 and 2 though adverse to Partap Singh could not be adverse to the plaintiffs until after his death when their right to possession accrued and secondly because the plaintiffs' right to sue for possession was not derived from or through Partap Singh who was the nearer reversioner of the last male owner, that the parties were governed by custom and not by Hindu Law, that as regards the ancestral land in village Bodiwala Kharak Singh, the plaintiffs were better heirs as compared to defendants Nos. 1 and 2, and that defendants Nos. 1 and 2 could not derive any benefit from the provisions of section 14 of the Hindu Succession Act, 1956.

Defendants Nos. 1 and 2 have come here in second appeal against the decree of the lower appellate Court.

Learned counsel for the appellants in the first instance contended, though half-heartedly, that sisters were better heirs even *qua* ancestral property as against collaterals of the 5th degree.

Question No. 58 and its answer in the *Riwaj-i-am* of this district prepared by Currie is as follows :—

> "*Question 58.*—Does the property ever devolve upon sisters or upon sisters' sons ? If upon sisters' sons, how are their shares computed ?
>
> *Answer.*—Sisters and their sons never inherit the property.
>
> *Note.*—The above is correct, in that sisters do not succeed *qua* sisters, but there are insances of unmarried sisters succeeding in the same way as the unmarried daughters till marriage.

Of course in the event of the complete absence of other heirs sisters might succeed."

Riwaj-i-am entries being in favour of the collaterals onus, however, light it may be, had been rightly placed on the defendants Nos. 1 and 2 to prove that they were preferential heirs as compared to the plaintiffs. After going through the evidence that had been produced in this case and a number of authorities that were cited on the question of custom, both the Courts came to the conclusion that the defendants had failed to discharge this onus. It was not clear from the three or four instances to which reference was made by the learned counsel for the appellants whether the collaterals were in existence or not when the sisters had succeeded. On the other hand, the plaintiffs had produced a number of instances to show that in several cases even where the property was

non-ancestral, sister's right was not recognized as against the collaterals. The special custom set up by the defendants has not been established in this case and it is proved on the record that as far as this District is concerned the rights of sisters to ancestral property has not been recognized by the Courts and, therefore, they do not exclude the collaterals of 5th degree when the property is ancestral.

A faint attempt was then made by the learned counsel for the appellants to prove that under special custom defendants Nos. 1 and 2, as neices, were better heirs of Pratap Singh as against the plaintiffs. Reliance for this was placed by the learned counsel on the principle of representation namely that when a person has a right to succeed to another and he dies before the latter, then his immediate heir can succeed in his place. But this is, of course, subject to the condition that at the time when succession opens, there does not exist anyone else having a superior right to succeed. Customary Law of the Punjab does not recognize brother's daughters as better heirs than the collaterals. Therefore, when Partap Singh died, if there were no collaterals in existence, then Shrimati Hardas Kaur and Shrimati Nihal Kaur could succeed. But in the presence of the collaterals, they had no right to succeed to the ancestral property of Partap Singh. Reliance was placed by the learned counsel for the appellants on *Chajja Singh* v. *Pritam Singh* (1). but in that case the brother's daughter was allowed to succeed on the principle of represetation, because there was no collateral in existence and property would have gone to the State by escheat. Therefore, I find that defendants Nos. 1 and 2 had no right to succeed to the property of Partap Singh in the presence of the plaintiffs.

(1) A.I.R. 1950 Pepsu 59 (F.B.).

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The main question which is to be decided in this case is the one which is covered by issue No. 2, namely, whether the suit is within time with regard to the share of Jugraj Singh in the property, in dispute. Both the Courts below have held, after discussing a number of authorities, that the present suit filed in 1954 is clearly within limitation because the possession of defendants Nos. 1 and 2 was not adverse to the present plaintiffs during the life-time of Partap Singh and adverse possession against them started only from January, 1952, when Partap Singh died. The main reason given for the view, that the plaintiffs had no right to sue for possession so long as Partap Singh lived, was that they got this right *only* on his death in 1952. Consequently, the possession of defendants Nos. 1 and 2, which commenced in 1937 on the death of Jugraj Singh, might be adverse to Partap Singh who was the next heir to Jugraj Singh in preference to defendants Nos. 1 and 2, but it was not adverse to the plaintiffs who had no right to sue for possession so long as Partap Singh was alive. The view taken was that although the collaterals succeed to the property as heirs of the last male holder, but heir right to sue for possession is derived not from the last male holder but from the common ancestor who held the land.

In my opinion the view taken by the Courts below is not sound in law. When Jugraj Singh, died in 1937, Partap Singh was to succeed to his property as his next heir. Instead of Partap Singh, defendants Nos. 1 and 2 came into possession of the property without any right or title to the same. The case of the plaintiffs was that defendants Nos. 1 and 2 entered into possession with the consent of Partap Singh and a definite issue, namely, issue No. 3, was framed regarding this matter and it has been found that defendants Nos. 1 and 2 did not enter into possession of the property in suit with

the consent of Partap Singh. Therefore, it is celar that the possession of defendant Nos. 1 and 2 was without any right whatsoever to this property and without the consent of the next heir and consequently adverse to him. If once we come to the conclusion that the posession of defendants Nos. 1 and 2 was adverse to the real owner, namely, Partap Singh, then there is no escape from the conclusion that it was adverse against the whole world and I cannot understand on what principle of law can it be held that it was not adverse to the persons who had to succeed Partap Singh. Of course, if the defendants had come into possession with the consent of Partap Singh or on the basis of some alienation from him, as for instance, a gift in their favour, then their possession would not have been adverse to the plaintiffs' especially during the lifetime of Partap Singh. To safeguard their interests against such an alienation, the plaintiffs could, in that case, file a suit for a declaration that the alienation made by Partap Singh in favour of defendants Nos. 1 and 2 would not affect their reversionary rights after the death of Partap Singh, and could later on bring a suit for possession within limitation after the death of Partap Singh.

The Courts below have placed reliance on two Full Bench decisions of the Punjab Chief Court reported as *Roda, etc.* v. *Harnam, etc.* (1), and *Sundar* v. *Salig Ram, etc.* (2), for holding that the suit of the plaintiffs with regard to the share of Jugraj Singh was not barred by limitation.

In *Roda, etc.*, v. *Harnam, etc.*, (1), the facts were that a sonless proprietor made a gift of ancestral land in favour of strangers. Within 12 years of the yeath of the proprietor, his collaterals brought a suit for possession of the gifted property. The defence raised was that the suit was barred

(1) 18 P.R. 1895.
26 P.R. 1911

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by time because the donees had been in possession of the property for more than 12 years before the suit. The question referred to the Full Bench was, whether the suit was within limitation. It was held by the Full Bench that the suit was governed by Article 144 of the Indian Limitation Act and was within time because it was brought within 12 years of the date when the defendants' possession became adverse to the plaintiffs, such date being the date of death of the donor. That case has no application to the instant case, because there when the gift was made in favour of the defendants by the last male holder, the possession of the donees was not adverse to anybody so long as the donor was alive. It was a permissive possession and it became adverse to the next heirs only after the death of the donor and, therefore, where the suit was brought within 12 years of the date of the death of the donor, it was well within limitation.

The other Full Bench case, *Sunder* v. *Salig Ram, etc.*, (1), is again a case of an alienation. In that case the facts were that the last male owner died leaving a widow who died in 1876, and a mother who died in 1892. The widow had alienated part of the land and had placed the alienee in possession. The alienation was not for necessity. The nearest reversioner died in 1903 without challenging the alienation or expressly assenting to it. The collaterals filed a suit in 1909 against the heirs of the alienee for possession of the land alienated. A question arose as to whether the plaintiffs' suit was within time. The Full Bench consisting of Sir Arthur Reid, C.J., Kensington and Rattigan, JJ., held that it was within time. As will be seen, the defendants in that case were in possession on the basis of an alienation and

(1) 26 P.R. 1911.

they did not come into possession as trespassers from the very start. Reliance in that case was place on the earlier Full Bench ruling in *Roda, etc.*, v. *Harnam, etc.*, (1), referred to above.

In *Kaka and others* v. *Labh Chand and others* (2), a Division Bench of the Punjab Chief Court held that a person who has held possession of agricultural land adversely against the next reversioner of a deceased proprietor is competent in a suit for possession to set up such adverse possession against the more remote reversioners, the cause of action in such a case accrues on the death of the deceased proprietor and not on the death of the next reversioner.

The facts in that case were on all fours with the facts in the instant case. The property in suit in that case belonged jointly to two brothers Anupa and Mehtaba. Anupa had two step-sons, Beli and Kaka. In 1881 Anupa died and was succeeded by Beli and Kaka who had, in law, no such right, because Mehtaba was the rightful heir to the property of Anupa and he never tried to oust Beli and Kaka. Mehtaba died in 1894 and Beli and Kaka took possession of his land as well. The plaintiffs, who were collaterals in the sixth degree, sued for the entire lands of Anupa and Mehtaba on the ground that the defendants being the step-sons of Anupa, were not entitled to the same. The first Court decreed the suit of the plaintiffs with regard to Mehataba's land but dismissed the plaintiffs' claim as regards Anupa's land. The learned Divisional Judge, on appeal, however, held that because Mehtaba consented to Beli and Kaka retaining possession of the land, adverse possession did not begin to run in their favour until Mehtaba's death.

The Division Bench of the Punjab Chief Court did not agree with the learned Divisional Judge on

(1) 18 P.R. 1895.
(2) 106 P.R. 1906.

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the ground that the view of the Divisional Judge, "which, pushed to its logical conclusion, would practically make it impossible ever to obtain a title by adverse possession as regards agricultural land. It might be 1,000 years before one of the collaterals refused his 'consent', yet on this theory he would still have a right to sue within 12 years of the death of the last consenting heir."

The Division Bench further held that there was no proof on the record that Mehtaba entered into possession as Anupa's heir and then made a gift of the land to Beli and Kaka, and on this ground the learned Judges differentiated that case from *Roda, etc.*, v. *Harnam, etc.*, (1). The learned Judges were of the opinion that time clearly began to run from the date of Anupa's death and the defendants had acquired a good title by more than 12 years' adverse possession. As will be seen, the defendants, in that case came into possession of the property without any title whatsoever and, therefore, their possession was adverse from the very start and they did not come into possession on the basis of any alienation as was the case in the two Full Bench ruling referred to above.

There is another case reported in *Kahla Singh* v. *Diala* (2), where the facts were almost similar to those in the present case and it was held as under :—

> "In 1875 one B. got the land of his wife's former husband D. mutated in his name, he having no right to it whatever. D. S., the nearest collateral of D., died on 10th December, 1903, and his sons brought the present suit on 4th July, 1914, to recover the land, i.e., within 12 years of

(1) 18 P.R. 1895.
(2) 113 P.R. 1916.

their father's death. Held following *Kaka and others* v. *Labh Chand and others* (1), that the possession of B, not being a person who obtained possession by virtue of an alienation but a mere trespasser had been adverse *ab initio* to all descendants of the common ancestor of D and the plaintiffs, and that the suit was consequently barred by limitation under Article 144 of the Indian Limitation Act."

In this authority, the two Punjab Chief Court Full Bench rulings mentioned above were distinguished on the ground that it was not a suit to recover land from an alienee but from a trespasser. It was observed by the learned Judge—

"But *Sundar* v. *Salig Ram, etc.*, (2), after all, relies mainly on a previous Full Bench decision, *Roda, etc.*, v. *Harnam, etc.*, (3), which also is a case of a suit to recover land alienated, and which holds that a plaintiff does not derive his right to sue from or through the last male owner inasmuch as his right to sue for possession, in spite of the last owner's act of alienation, is derived from no individual but from the customary rule which places a restriction upon the owner's powers of disposition of ancestral property and renders him liable to be controlled in that respect by his collateral heirs. This seems to

(1) 106 P.R. 1906.
(2) 26 P.R. 1911.
(3) 18 P.R. 1895.

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me the basis of the whole decision, and the above reasoning certainly cannot be held to apply to a case in which there has been no alienation at all."

It is noteworthy that he learned Judge has observed that before writing that judgment he had the advantage of consulting his learned brother Rattigan, J., who wrote the judgment in *Sundar* v. *Salig Ram, etc.*, (1).

It will thus be seen that the decision in *Sundar* v. *Salig Ram, etc.*, (1), applied to cases where the defendants did not come into possession as trespassers but on the basis of some alienation made in their favour.

The other case, *Harnaman* v. *Desondhi* (2), relied upon by the Court below, was again a case in which possession had to be recovered by the plaintiff from an alienee but not from a trespasser.

In *Buta Singh* v. *Mangu* (3), Sir Shadi Lal, C.J., and Hilton, J., approved of the decisions in *Kaka and others* v. *Labh Chand and others* (4), and *Kahla Singh* v. *Diala* (5), and observed as under:—

> "If the act of Gurmukh Singh be not treated as an alienation, the possession of the contesting defendants with effect from the date of the partition in 1906 was adverse to Gurmukh Singh who was entitled to the whole of the estate at that time.

(1) 26 P.R. 1911.

(2) I.L.R. 1 Lah. 210.

(3) A.IR. 1930 Lah; 9=120 I.C. 598.

(4) 106 P.R. 1906.

(5) 113 P.R. 1916.

The defendants were trsepassers *qua* the property and as laid down in *Kaka* v. *Labh Chand* (1), and *Kahla Singh* v. *Diala* (2), their possession must be deemed to be adverse, not only to Gurmukh Singh but to all the defendants of the common ancestor. The suit is, therefoer, barred by limitation even under Article 144, Schedule I, Limitation Act."

The view taken in *Kahla Singh* v. *Diala* (2), also finds support from a Division Bench decision in *Mahnu* v. *Shihan Singh*, (3).

The facts of the case reported in *Hasti* v. *Hira* (4), which is a Single Bench decision by Scott-Smith, J., are not similar to those of the present case.

A number of other authorities were also cited on both sides, but they need not be discussed as they are not quite relevant to the point in issue.

In view of what I have said above, I am of the opinion that the suit of the plaintiffs with regard to the share of Jugraj Singh in the property in dispute was barred by limitation.

A preliminary objection has been raised in this appeal by the learned counsel for the respondents that Anant Singh plaintiff No. 13 died on the 12th October, 1959, and Mst. Mahan Kaur plaintiff No. 12 died on 4th February, 1959, and their legal representatives have not been brought on the record, and consequently the apepal has abated ***qua*** their shares in the property. The

(1) 106 P.R. 1906.
(2) 113 P.R. 1916.
(3) 76 P.R. 1919.
(4) A.I.R. 1922 Lah. 37.

learned counsel for the appellants, concedes this point.

Learned counsel for both the parties are agreed that the share of defendants Nos. 3, 4, 5, 9 and 11 (who did not join the plaintiffs in the suit) in Partap Singh's half share of the land in village Bodiwala Kharak Singh comes to 91/960th and the share of deceased plaintiffs Nos. 12 and 13 (*qua* whose shares the apeal has abated) in Jugraj Singh's half share of the land in this village is 1/30th.

Pandit, J.

In view of what has been said above, I would partly accept this appeal and would modify the judgment and decree of the lower appellate court to this extent that the plaintiffs would be granted a decree for joint possession of 389/960th share in Partap Singh's half shares of the land in village Bodiwala Kharak Singh and in addition the legal representatives of plaintiffs' Nos. 12 and 13 would be granted a decree for joint possession of 1/30th share in Jugraj Singh's half share of the land in this vilage. In the circumstnces of this case, the parties would, however, be left to bear their own costs in this Court also.

Dulat, J.

S. S. Dulat, J.—I agree.

K. S. K.

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