APPELLATE CIVIL

Before Eric Weston C.J. and Harnam Singh, J.

1952

August, 22nd

CHAMAN LAL, ETC.,—*Defendants-Appellants*

Versus

Mst. ANGURI, ETC.,—*Plaintiffs-Respondents*

Civil Regular Second Appeal No. 328 of 1948.

Custom, (Delhi State)—Succession—Gour Brahmans of Mehrauli,—Whether daughter is excluded by collaterals to the self-acquired property of her father—Riwaj-i-Am of Delhi District, Questions and Answers 60 and 61—Whether presumptive evidence of the Custom recorded therein.

Held, that amongst Gaur Brahmans of Mehrauli, Delhi State, daughter is not excluded by collaterals in regard to the self-acquired property of her father.

Held further, that answers to questions 60 and 61 of the *Riwaj-i-Am* of Delhi District compiled in 1911 are not presumptive evidence of the Custom recorded therein as they are opposed to the general custom and the custom prevailing in the neighbouring districts.

Second appeal from the decree of the Court of the 1st Additional District Judge, Delhi, dated the 22nd March 1948, modifying that of Shri A. N. Bhanot, Sub-Judge, 1st Class, Delhi, dated the 25th November 1947 (dismissing the plaintiffs' suit with costs to this extent that the plaintiffs' claim regarding the land comprised in Khewat Nos. 156 and 159 and the house situate in Mohalla Mahajanan, Mehrauli, be decreed and leaving the parties to bear their own costs.

BISHAN NARAIN, for Appellants.

TEK CHAND, for Respondents.

JUDGMENT

Harnam Singh, J.

HARNAM SINGH, J. This order disposes of Regular Second Appeal No. 328 of 1948 and—the connected cross-objections.

In Regular Second Appeal No. 328 of 1948 the question that arises for decision is whether amongst Gaur Brahmans of Mehrauli, Delhi State, daughter is excluded by collaterals in regard to the self-acquired property of her father.

In cross-objectons plaintiffs challenge the correctness of the decision given by the subordinate Courts that the land comprised in Khewat Nos. 187, 188, 163, 224, 279 and 65 and two-storeyed house in suit are ancestral *qua* the defendants.

Now, the land and the houses in suit belonged to Kirpa Ram. On his death mutation with regard to the land in suit was sanctioned on the 15th of August 1940, in the names of the defendants.

On the 18th of November 1940, *Mst.* Anguri, daughter of Kirpa Ram, and Budh Ram, son of *Mst.* Channo, instituted the suit out of which this appeal has arisen claiming possession of the property left by Kirpa Ram on the ground that daughter excludes collaterals in regard to the self-acquired property of her father. *Mst.* Channo, mother of Budh Ram, was the pre-deceased daughter of Kirpa Ram. In paragraph No. 2 of the plaint it was stated that the property in suit was the self acquired property of Kirpa Ram.

Defendants resisted the suit pleading *inter alia* that in matters of succession the parties were governed by customary law of Delhi State according to which daughter is excluded by collaterals in regard to ancestral and self-acquired property of her father.

On the pleadings of the parties the Court of first instance fixed the necessary issues and ultimately dismissed the suit on the 19th of December 1941. From that decree the plaintiffs went up in appeal but they remained unsuccessful. On second appeal the suit of the plaintiffs in regard to the ancestral property was dismissed, but the case was remanded for fresh decision on the point whether daughter is excluded by collaterals in regard to the acquired property of her father amongst Gaur Brahmans of Mehrauli, Delhi State. By the remand order enquiry was ordered into the ancestral and non-ancestral character of the property in suit.

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Pursuant to the order of remand the following issues were fixed by the Court of first instance:—

(1) Are the daughters excluded by the collaterals (of the degree of the defendants) from inheriting the self-acquired property of their father according to the custom of Gaur Brahmans?

(2) Which of the property in suit is ancestral *qua* the defendants and which portion of it is self-acquired of Kirpa Ram?

(3) Is Budh Ram, plaintiff, the legal representative of Mst. Channo deceased?

In deciding the suit the Court found that amongst Gaur Brahmans of Mehrauli daughters are excluded by collaterals from inheriting the self-acquired property of their father, that the land comprised in *Khewat* Nos. 156 and 159 and the house situate in Mohalla Mahajanan were the self-acquired property of Kirpa Ram and that Budh Ram was the legal representative of *Mst.* Channo, daughter of Kirpa Ram. In the result the Court of first instance dismissed the suit.

From the decree passed by the Court of First instance on the 25th of November 1947, plaintiffs appealed.

In allowing the appeal the First Additional District Judge, Delhi, has decreed the plaintiffs' claim regarding the land comprised in *Khewat* Nos. 156 and 159 and the house situate in Mohalla Mahajanan, Mehrauli. Parties have been left to bear their own costs throughout.

From the decree passed by the First Additional District Judge, Delhi, on the 22nd of March 1948, defendants appeal under section 100 of the Code of Civil Procedure while the plaintiffs cross-object.

Mr. Bishan Narain appearing for the defendants-appellants urges that the onus of proving

issue No. 1 ought to have been placed on the plaintiffs. The argument raised is that the answers to questions Nos. 60 and 61 of *Riwaj-i-am* of the Delhi District compiled in the year 1911 are admissible in evidence to prove the facts stated therein subject to rebuttal.

In Regular Second Appeal No. 1234 of 1942 questions Nos. 60 and 61 and the answers thereto were considered by the Court and it was found that no presumption arose in favour of the collaterals from the answers to questons Nos. 60 and 61. In dealing with the point Mohammad Sharif, J. (Abdul Rashid, Acting C.J., concurring) said:—

> "In view of the facts that the questions 60 and 61 were complex questions, which could not be easily understood; that the *Riwaj-i-am* is opposed to the general custom; that the females are adversely affected thereby and that there is the absence of any clear instance in support of this custom, the presumption which might otherwise attach to the *Riwaj-i-am* is destroyed. It may also be mentioned in this connection that the Gaur Brahmans living at a distance of a few miles from Mehrauli have a custom which is quite different from the one mentioned in the *Riwaj-i-am* of Delhi district. I.L.R. 17 Lah. 84 is a case of Gaur Brahmans of Kharkhanda, district Rohtak where a daughter excluded the collaterals in the 8th degree from the non-ancestral property. Similarly in a case reported as 7 P.R. 1916 a daughter among Gaur Brahmans excluded the third degree collaterals from self-acquired property in the contiguous tahsil of Palwal in Gurgaon district. Custom in the Punjab is mostly tribal and Gaur Brahmans living in Mehrauli cannot be said to follow a custom different from that is followed by their brethren living at a distance of a few miles. The

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mere artificial administrative boundary of a district should not affect the custom of the tribe residing in and outside its limits. I hold, therefore, that the custom to exclude daughters from self-acquired property among the Gaur Brahmans has not been proved upon the present record. But as the case in both the lower Courts had proceeded upon the assumption that it was for the daughters to establish that they had any right as against collaterals even in self-acquired property in view of the *Riwaj-i-am* entry no concrete instances might have been considered necessary to be brought upon the record by the defendants. In order to give them an opportunity to prove their case on this special and exceptional custom set up by them, viz., that even as regards self-acquired property, daughters would be excluded by collaterals of the degree of the present respondents, I would accept this appeal and remand the case for a fresh trial. The burden of proving this custom will be on the *collaterals and it is for them to establish their case by producing evidence oral or documentary as they think fit and the daughters would have the right to rebut that evidence.*"

Regular Second Appeal No. 1234 of 1942 arose from the suit out of which the present appeal has arisen. Pursuant to the order of remand passed in Regular Second Appeal No. 1234 of 1942 issues were fixed by the Court of first instance placing the onus of proving issue No. 1 upon the defendants. In the Court of first instance no objection appears to have been taken by the defendants as indeed it could not be taken with regard to the allocation of onus of issue No. 1. In these circumstances it is futile to contend that the *Riwaj-i-am* is presumptive evidence of the custom recorded in the answers to questions Nos. 60 and 61.

Question Nos. 60 and 61 and the answers thereto as recorded in the *Riwaj-i-am* of 1911 read as under:—

"*Question* 60. Under what circumstances are daughters entitled to inherit? Are they excluded by the sons or the widows, or by the near male kindred of the deceased? If they are excluded by the near male kindred, is there any fixed limit of relationship within which such near kindred must stand towards the deceased in order to exclude his daughters? If so, how is the limit ascertained? If it depends upon descent from a common ancestor, state within how many generations relatively to the deceased such common ancestor must come?

Answer 60. All tribes—With the exception of a few families where inheritance devolves according to Muhammadan law giving a certain share to daughters, a daughter is excluded from inheritance by the male kindred of the deceased related through males, however distant. Unmarried daughters, however, receive maintenance till marriage.

Question 61. Is there any distinction as to the rights of daughters to inherit (1) the immovable or ancestral, or (2) the movable or acquired, property of their father?

Answer 61. All tribes—Daughters do not inherit. But in Muhammadan families where inheritance goes by the Muhammadan law and daughters inherit a certain prescribed share, no distinction is made between the movable and immovable, ancestral and acquired property of the father."

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As pointed out in Regular Second Appeal No. 1234 of 1942 question No. 61 seems to consider that all immovable property is ancestral while all movable property is acquired which is evidently incorrect.

In accordance with the custom recorded in answer to questions Nos. 60 and 61 collaterals are preferred to daughters with respect to the succession to ordinary household goods though such a custom has never been considered to be a part of the customary law.

Question No. 60 comprises within its purview the rights of daughter to inherit her father's property of all kinds and under every conceivable set of circumstances. It includes cases in which the deceased left him surviving a son, a widow and a daughter and also cases where he died sonless but left a widow and a daughter and also cases where the contest was between daughter and near male kindred of the father. In the last case it also tries to ascertain the limit of relationship within which collaterals exclude daughters, but in this part of the question it is not made clear whether the reference is to ancestral or self-acquired property or both.

In the printed *Riwaj-i-am* there is no indication that those who were summoned to declare the custom gave separate replies to the component parts of question No. 60. Clearly, the finding given by the Court in Regular Second Appeal No. 1234 of 1942 that the presumption which might otherwise attach to the *Riwaj-i-am* was destroyed is not open to challenge.

In these circumstances the sole question that arises for decision in Regular Second Appeal No. 328 of 1948 is whether the defendants-appellants have established the special custom that daughter is excluded by collaterals in regard to acquired property of her father amongst Gaur Brahmans of Mehrauli.

In order to prove the special custom defendants-appellants rely upon instances furnished by the succession to the estate of Siri Ram, Hira Lal, Mohan Lal, Shibba, Nanak and Prabhu.

Exhibit D. 87 deals with the succession to the estate of Siri Ram who was brother of Kirpa Ram, succession to whose estate is in dispute in the present appeal. Siri Ram died in 1913 and on his death *Mst.* Nihali, widow of Siri Ram, succeeded to his estate. In November 1918, *Mst.* Nihali died. From Exhibit D. 87 it appears that no enquiry was made as to the existence of daughter of Siri Ram when the mutation was sanctioned on the 17th of December, 1918. *Mst.* Ashrafi, D. W. 19 gave evidence that on the death of *Mst.* Nihali the estate devolved upon Kirpa Ram. *Mst.* Ashrafi is the daughter of Kirpa Ram. Amir Singh, D.W. 11, husband of *Mst.* Ashrafi gave evidence similar to that given by *Mst.* Ashrafi. Clearly the evidence furnished by Exhibit D.87 shows that Mst. Ashrafi, daughter of Kirpa Ram, did not succeed to the landed property of Kirpa Ram though that property was self-acquired. On the record it is, however, clear that *Mst.* Ashrafi never made any claim to the self-acquired property of her father and there was no refusal by Kirpa Ram. *Mst.* Ashrafi gave evidence on the 20th of February 1947, whereas the mutation, Exhibit D. 87, was sanctioned on the 17th of December 1918. As pointed out by the Court of first appeal by giving evidence, on the 20th of February 1947, *Mst.* Ashrafi was not giving evidence against her own pecuniary interests.

Exhibit D. 72, judgment in civil suit No. 876/64 of 1936/37, relates to the succession to the estate of Hira Lal, Brahman of Mandauthi, Tahsil Jhajar, District Rohtak. In that case the decision proceeded upon the answers to questions Nos. 56 and 57 in the *Riwaj-i-am* of Tahsil Jhajar prepared in the Settlement of 1909. In deciding the case the Court proceeded on the basis that the entries in the *Riwaj-i-am* were admissible in evidence to prove the facts entered therein subject to rebuttal.

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In the present case it has been found that the answers to questions Nos. 60 and 61 raise no presumption to prove the facts entered therein. Clearly, Exhibit D. 72 does not advance the case of the defendants-appellants.

Exhibit D.103 relates to the succession on the death of Mohan Lal. From the mutation proceedings it appears that Mohan Lal died in August 1916, and on his death his estate devolved on Mukh Lal, son of Siri Ram, and Pirthi, son of Ramji Lal. In Exhibit D.103 there is no suggestion that the claim of the daughter, if any, of Mohan Lal was considered. Sukh Lal, D.W. 24, gave evidence that Mohan Lal died leaving a daughter *Mst.* Badamo by name. In the first place the case deals with the custom prevailing among the Gaur Brahmans of Rohtak District and in the second place the trial Court has come to the conclusion that there was no satisfactory evidence on the record that Mohan Lal died leaving a daughter. The evidence given by Sukh Lal, D.W. 24, showing that *Mst.* Badamo was the daughter of Mohan Lal has been doubted and no arguments were addresed to us on the point. Mohan Lal, Mukh Ram and Ramji Lal were the sons of Suji Ram and Pirthi was the son of Ramji Lal. Clearly, Exhibit D. 103 does not establish the custom set up by the defendants-appellants.

Exhibit D. 106 relates to the succession to the estate of Shibba of Village Khera Khurd, Tahsil, and District Delhi. Shibba was a Gaur Brahman by caste. On the death of Shibba which occurred on the 31st of December 1926, dispute arose as to the succession to his estate. Bishna, son of Dhola, claimed the land as against Bhima, son of Behari, and *Mst.* Sukhdei, widow of Amin Lal. Behari and Amin Lal were brothers of Shibba. Indeed, the mutation was sanctioned on the assumption that Shibba had died issueless. Indisputably, the land left by Shibba was the self-acquired property of Shibba as is evidenced by mutation, Exhibit D. 105. In the absence of evidence that Shibba died leaving daughter Exhibit D. 106 furnishes no evidence on the point under consideration.

Exhibit D. 99 relates to succession to the estate of Nanak, Gaur Brahman of Tajpur, Tahsil and District Delhi. The mutation was sanctioned on the 10th of January 1943. In the mutation proceedings no claim was put forward by the daughter, if any, of Nanak. As stated above, the mutation of Nanak's estate was sanctioned on the 10th of January 1943, and there is not a syllable on the record to show that the mutation has not been challenged.

Exhibit D. 97 deals with succession to the estate of Prabhu Dayal. On the death of Prabhu Dayal the estate devolved upon Bishan Sarup and Kishan Parkash, sons of Kalu Mal. Prabhu Dayal was the son of Har Narain, Gaur Brahman of Bahadurgarh, Tahsil Jhajar, District Rohtak. In the first place there is no satisfactory evidence on the record to show that Prabhu Dayal died leaving a daughter and in the second place the succession to the estate of Prabhu Dayal was governed by *Riwaj-i-am* of Jhajar Tahsil, Rohtak District. In these circumstances I do not think that Exhibit D. 97 advances the case of the defendants-appellants.

From the *resume* of documentary evidence given above it is clear that barring Exhibit D. 87 dealing with the succession to the estate of Siri Ram the other evidence is of no assistance to the defendants-appellants. Oral evidence given by the witnesses on both sides has been rejected and on a perusal of that evidence I see no reason to differ from the decision of the Court of first appeal with regard to the appreciation of that evidence. That being the position, the question that arises for determination is whether Exhibit D.87 is sufficient to establish the special custom set up by the defendants-appellants. In my judgment the Court of first appeal was right in finding that evidence examined by the defendants was insufficient to prove that amongst Gaur Brahmans of Mehrauli, Delhi State, a daughter is excluded by collaterals in regard to self-acquired property of her father.

In the result the appeal fails and is dismissed with costs.

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In the memorandum of cross-objections the finding given by the Courts below with regard to the ancestral nature of the property is challenged but the cross-objections are not pressed before us and are dismissed with costs.

In the result Regular Second Appeal No. 328 of 1948 and the cross-objections are dismissed with costs.

E. Weston, C. J.

E. WESTON, C.J.—I agree.

CIVIL REFERENCE (APPELLATE SIDE)

Before Eric Weston, C.J., and Harnam Singh, J.

IN THE MATTER OF THE INCOME-TAX ASSESSMENT OF MESSRS CHIRANJIT LAL MULTANIMAL, R. B., BHATINDA, PATIALA STATE,—*Petitioner*

versus

THE COMMISSIONER OF INCOME-TAX,—*Respondent.*

Civil Reference No. 8 of 1950 (Income-tax)

Income-tax—Cheque sold by assessee to Bank outside British India—Bank receiving payment in British India—Assessee whether can be held to have received payment in British India—Negotiable Instruments Act (XXVI of 1881) Section 50—Effect of.

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Held, that under section 50 of the Negotiable Instruments Act the endorsement of a Negotiable Instrument followed by delivery transfers to the endorsee the property therein with the right of further negotiation. The section provides, however, that the endorsement may, by express words, restrict or exclude such right, or may merely constitute the endorsee an agent to endorse the instrument or receive its contents for the endorser or for some other specified person. In the absence of the cheque and evidence as to the precise words used in the endorsements and in view of the certificate by the Bank it must be accepted that the endorsements were of the nature contemplated by the substantive part of section 50 rather than those contemplated by the proviso to the section. That being so when once property in cheques passed by endorsements made outside British India the assessee must be taken to have received what he did outside British India and the subsequent receipts in British India by the Bank were receipts by the Bank and not receipts by the assessee.