# APPELLATE CIVIL.

1906
*January* 15.

*Before Sir John Stanley, Knight, Chief Justice and Mr. Justice Sir William Burkitt.*

BACHCHO KUNWAR (PLAINTIFF) v. DHARAM DAS (DEFENDANT).*

*Hindu law—Joint Hindu family—Ancestral property—Self-acquired property—Property inherited from collateral, acquired after litigation supported by joint family funds.*

The head of a joint Hindu family owning a large amount of joint ancestral property acquired by inheritance from a collateral branch of the family property both movable and immovable after litigation ending in a compromise. This litigation was carried on by means of money belonging to the joint family business. *Held*, on a finding that the business of the family usually necessitated the existence of a very large floating balance, and that the money used for this litigation was in a short time re-credited by the head of the family in the family accounts, that the money should be treated as borrowed, that there was no appreciable detriment to the ancestral property, and consequently the property which passed under the compromise above referred to was self-acquired and not ancestral property. *Rani Mewa Kunwar* v. *Rani Hulas Kunwar* (1), and *Rai Nursing Das* v. *Rai Narain Das* (2) referred to.

PARAS DAS was the managing member of a joint family owning a large amount of ancestral property. Paras Das and his first cousin, Umrao Singh, were the reversionary heirs of one Pardman Kunwar, and under ordinary circumstances the property would have devolved on them as self-acquired property by "obstructed inheritance." One Dip Chand, however, set up a claim to the property. The consequent litigation ended in a compromise under which half the property went to Dip Chand and half to Paras Das and Umrao Singh equally. Paras Das died leaving a will by which he purported to bequeath a life estate in a portion of his share in this property to his daughter-in-law, Bachcho Kunwar, the plaintiff. Paras Das' son, Dharam Das, husband of Bachcho Kunwar, refused to put Bachcho Kunwar into possession of the property so given to her. The plaintiff Bachcho Kunwar thereupon brought this suit against Dharam Das for the recovery of the property. It appeared that Paras Das had for the purpose of the expenses of the litigation made some use of ancestral funds which he repaid within a year. The defendant, Dharam Das, therefore contended that the

* First Appeal No. 117 of 1904, from a decree of Babu Madho Das, Subordinate Judge of Saharanpur, dated the 17th of February, 1904.

(1) (1874) L. R., 1 I. A., 157. (2) (1871) 3 N.-W. P., H. C., Rep., 217.

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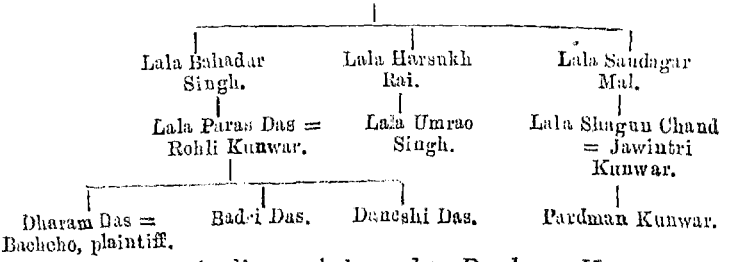
property must be treated as joint family property. The lower Court (Subordinate Judge of Saharanpur) agreed with this contention. The plaintiff appealed.

Hon'ble Pandit *Sundar Lal*, for the appellant.

Mr. *W. Wallach*, Babu *Jogindro Nath Chaudhri*, Babu *Satya Chandra Mukerji* and Dr. *Satish Chandra Banerji*, for the respondent.

STANLEY, C.J. and BURKITT, J.—The suit out of which this appeal has arisen was one for the recovery by the plaintiff of landed and house property situate in the district of Saharanpur, which was bequeathed to the plaintiff by Lala Paras Das, her father-in-law, as a provision for her maintenance. The Court below found in favour of the will of Paras Das, but held that the property in dispute was an accretion to the joint property of the family and, therefore, Paras Das had not power to dispose of it. From this decision the plaintiff has appealed. The subjoined genealogical table will be found useful:—




The property in dispute belonged to Pardman Kunwar. He died without issue on the 28th of September, 1895, and was succeeded by his mother, Musammat Jawintri Kunwar. She died on the 25th of June, 1898, and Paras Das and his cousin, Umrao Singh, as the reversionary heirs of Pardman Kunwar, in the absence of issue of Pardman Kunwar, would be entitled to his property. Under ordinary circumstances the property so devolving would be self-acquired property seeing that it came by what is termed "obstructed inheritance." On the death, however, of Musammat Jawintri Kunwar, one Dip Chand was set up as the owner of the property of Pardman Kunwar as having been adopted by Musammat Jawintri Kunwar. Paras Das and Umrao Singh disputed the adoption and instituted a suit against Dip

Chand for recovery of the property, and this suit was compromised on the 29th of September, 1898, on the terms that half of the property should be given to Dip Chand and the other half to Paras Das and Umrao Singh equally. Paras Das thus got one-fourth. The property which is in dispute in this litigation is part of the property which Paras Das so acquired. He executed three testamentary instruments in respect of his property, and thereby made arrangements for the division of it amongst his sons, Dharam Das, Badri Das and Daneshi Das. The first of these is a will of the 16th of February 1902. In that will it is recited that the testator had two kinds of property, namely, ancestral property acquired with ancestral funds, and property which he acquired by right of inheritance from Pardman Kunwar. Then followed a direction that his three sons should become the owners of his movable and immovable properties in equal shares, coupled with a statement to the effect that, with a view to avoid disputes in future, the testator had made three lots of the immovable property, and that each of his sons should either by mutual consent get his name entered in respect of one of the lots, or else effect a partition of the three lots by drawing lots. On the 12th of March, 1903, Paras Das executed a codicil to his will, but it is unnecessary to give the details of it as it has no bearing upon the questions before the Court. On the 17th of April, 1903, he executed a second codicil, in which reference is made to the arrangements already made in regard to the property. It contains a recital in the following terms:—"Whereas the conduct and manners of my eldest son, Dharam Das, are altogether improper, and the circumstance of his associating with vicious persons is likely to bring about his entire ruin and he is for the same reason likely to waste his share of the property very quickly and not leave anything for the subsistence and maintenance of his wife, Musammat Bachcho Kunwar . . ." Then, after a recital of the nature of the property owned by him and of the lots into which it was divided, the testator directed that if lot No. 1 should be allotted to Dharam Das, then out of it certain specified properties should be given to Musammat Bachcho Kunwar and mutation of names in respect of it should be effected in her favour. Similarly, if lot No. 2 should be allotted to Dharam Das, it was

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provided that other property also specified should be given to her, and if lot No. 3 should be allotted to Dharam Das other property also thereafter mentioned should be given to her. The will contained a further provision that if Dharam Das should interfere with the effecting of mutation of names in favour of the plaintiff or should offer any obstruction to her possession, he should be absolutely deprived of the entire property which, out of the estate of Pardman Kunwar, was entered in his lot, and that that property should go to the plaintiff. It was also further provided that Bachcho Kunwar should only have a life estate in the property so bequeathed to her. Paras Das died on the 2nd of May, 1903, and thereupon his property was divided between his three sons. By mutual arrangement, however, Dharam Das took the landed or field property comprised in lot No. 1 together with the house property forming part of lot No. 3, instead of the house property forming part of lot No. 1, the directions given by the testator being to this extent ignored. Dharam Das refused to put the plaintiff into possession of the property so given to her, and had his own name recorded in respect of all the property which fell to his share.

In consequence of this the litigation commenced which has given rise to this appeal. It is admitted that when Paras Das sued Dip Chand he and his sons were living jointly as members of a joint Hindu family. The family was possessed of a large amount of ancestral property of which Paras Das was the manager. A banking business was carried on at Meerut, Simla and Dehra Dun, and Paras Das was Treasurer of Meerut and Simla. It is admitted that Paras Das took out of the family till sums amounting to Rs. 9,000 for the expenses of the litigation, but this money he repaid in the course of a year. It is conceded by the respondents that if Pasras Das had acquired possession of the property of Pardman Kunwar without litigation it would have been his self-acquired property with which he could deal as he pleased; but it is contended that inasmuch as he acquired the property by litigation, and in view of the fact that he took money for the expenses of the litigation out of the family till, the property must be treated as joint family property. This view of the situation found favour with the

learned Subordinate Judge. He says in the course of his judgment:—"The parties to that suit (*i.e.* the suit against Dip Chand) made a compromise, and by virtue of the compromise each party got a moiety, Dip Chand Kunwar one-half and the other half was taken by Paras Das and Umrao Singh together in equal shares. Paras Das thus acquired one-fourth of the estate of Pardman Kunwar which was held by Dip Chand. I do not think that Paras Das' acquisition in this way can amount to succession by inheritance from a collateral. To determine the nature of acquisition it must be found out how it was made." Later on he says in regard to the fact that the expenses of the litigation were defrayed by moneys taken from the family till:—"All the moneys including deposits of the firm of Bahadur Singh and Paras Das were joint and ancestral of the family. As soon as Paras Das acquired the property on the 29th of September 1898, through the *sulehnama* of that date, it became a portion of the estate of the ancestral firm. No subsequent act of the deceased (that is Paras Das) could change its nature. It is argued on behalf of the plaintiff that after the *sulehnama* the amount due for the expenses of the suit were discharged at the end of the year, but I do not think that any subsequent discharge could alter the nature of the property," and later on he observes:—"I do not understand how there can be any real discharge from income of the estate of Pardman Kunwar. Paras Das had never any money of his own. What he had was joint with the family. The estate was acquired from joint and ancestral funds. This income was, therefore, also joint and ancestral." We have to see whether the learned Subordinate Judge is right in the view thus expressed. The law on the subject is reasonably clear, but the difficulty lies in the application of it to the facts of each particular case. Where the members of a joint family acquire property by or with the assistance of joint funds, or by their joint labour, the property so acquired is the joint property of the persons who have so acquired it, whether it is an accretion to an ancestral property or has arisen without any nucleus of joint family property. Property also which was originally self-acquired may become joint property if it has been thrown by the owner of it into the joint stock with the

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intention of giving up all separate claims to it. It is clear also that a member of a joint family may acquire and hold as separate property, property which has come to him without detriment to the ancestral property, such as among others property which has devolved upon him by obstructed inheritance. "The whole contest in each instance is," says Mr. Mayne, "to show that the gain has been without 'detriment to the estate.' In early times the slightest assistance from the joint patrimony, however indirect, was considered to be such a detriment, and the possession of any joint property was considered as conclusively proving that there had been such an assistance. The Madras Court has always lent very strongly against self-acquisition, but the recent tendency of decisions seems to be towards a more sensible view of the law, following out its spirit rather than its letter."

Was, then, the Court below right in holding that property which was acquired under the compromise of a claim such as the claim of Paras Das, cannot be treated as property acquired by succession from collateral, and was it right in holding that the property was acquired by Paras Das from joint and ancestral funds? The claim of Paras Das and Umrao Singh to the property was as reversionary heirs of Pardman Kunwar. Their claim was resisted by Dip Chand on the allegation that he was the adopted son of Pardman Kunwar, and as such entitled to succeed to his property. If Dip Chand failed to establish the validity of his adoption, admittedly Paras Das and Umrao Singh would, as reversionary heirs, have succeeded in their claim to the whole of the property of Pardman Kunwar. If, on the other hand, the validity of the adoption was established, the claim of Paras Das and Umrao Singh was bound to fail. Both parties appear to have had misgivings as to the ultimate issue of the litigation, and consequently entered into a compromise, according to which the right of Paras Das and Umrao Singh to one-half of the property of Pardman Kunwar was recognised, they abandoning all claims to the other half. It seems to us that the compromise and decree passed on it amounted to a recognition by Dip Chand of the rights of Paras Das and Umrao Singh as reversionary heirs as they had previously asserted them so far

as regards one-half of the property, and cannot be regarded as conferring a new and distinct title on them. Paras Das and Umrao Singh in fact under the compromise acquired a moiety of the property in the capacity of reversionary heirs of Pardman Kunwar and in that capacity alone.

This view finds support in the judgment of their Lordships of the Privy Council in the case of *Rani Mewa Kunwar* v. *Rani Hulas Kunwar* (1). In that case property partly situate in Rohilkhand and partly in Oudh, which had formerly belonged to the common ancestors of the appellant and the respondent, was claimed by each on the ground of heirship. By a deed of compromise, the parties agreed to divide the property in certain proportions and the agreement was carried out in Rohilkhand but not in Oudh, where the respondent continued in possession. After the lapse of nine years the appellant sued for possession of her share of the property in Oudh. The Judicial Commissioner on appeal held that after the execution of the deed of compromise the titles of the parties rested not on inheritance but on contract, and that the suit was barred, whether the three years or the six years' term of limitation was held to be applicable. Their Lordships, reversing this decision, held that the claim did not rest on contract only, but on title to the land acknowledged and defined by the contract, and that the suit was subject only to the limitation of 12 years prescribed by section 1(12)(1) of the Limitation Act. In their judgment their Lordships, referring to the agreement of compromise, observe :—"That agreement assumes that the parties were severally claiming, by virtue of some right of inheritance, the property of Raja Ruttun Singh; that there were questions between them which might disturb the rights which each claimed, and it was better, instead of a long litigation, to settle these rights, and they do settle them by arriving at this agreement, which provides that the property shall be held in certain shares and shall be divided according to those shares," and later on:—"The compromise is based on the assumption that there was an antecedent title of some kind in the parties, and the agreement acknowledges and defines what that title is. The claim does not rest on contract

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only but upon a title to the land acknowledged and defined by the contract, which is part only of the evidence of the appellant to prove her title, and not all her case." So here the rights of Paras Das and Umrao Singh did not rest only on the compromise, but upon a title to the land acknowledged and defined by the compromise. The learned Subordinate Judge was, therefore, in our opinion in error in holding that Paras Das acquired his share of the property by virtue of the compromise only.

But then it is further contended that the property was acquired from joint ancestral funds. The contention is that, inasmuch as Paras Das made use of the moneys in the family till for the expenses of the litigation with Dip Chand, the property the possession of which he recovered by virtue of the compromise became impressed with the character of and must be treated as joint family property, notwithstanding the fact that the moneys so used were fully repaid in the course of a year. On behalf of the appellant it is said that the money was merely borrowed by Paras Das, and that this is shown by the accounts kept by him in regard to the property. The family was a banking firm and had a large amount of money at its disposal, and it cannot be said that the temporary use made by Paras Das of the money applied in the expenses of the litigation caused any real detriment to the ancestral property. The question in each case is, was the property acquired without detriment to the family funds? Separate property may be acquired with money borrowed on the sole credit of the borrower (2 MacNaghten Prin. H. L., 151). *Rai Nursingh Das* v. *Rai Narain Das* (1). It is true that no interest was debited against Paras Das in respect of the money taken by him, but the estate would have suffered no loss thereby, unless the money was actually required for the business of the bank. In view of the large transaction carried on by the firm, there would necessarily be a much larger sum than Rs. 9,000 from time to time in the Bank's safe.

We find, moreover, that Paras Das left in deposit after the repayment of the Rs. 9,000, large sums representing the profits of the property acquired by him from Pardman Kunwar and did not charge interest in respect of these moneys. A credit

(1) (1871) 3 N.-W. P., H. C. Rep., 217.

and debit account was kept in the name of Paras Das (see No. 250C. of the Record). This account was opened on the 24th of October, 1898, shortly after the compromise, and in it we find an entry on the debit side of the money spent in connection with the litigation with Dip Chand. The entry is as follow:— "Spent in connection with the case up to Savan Sudi 9th, Sambat 1956, Rs. 9,654. On Asaj Sudi 9th, Sambat 1956, corresponding to the 14th of October, 1899, a balance was due by Paras Das of Rs. 8,863-13-1, as appears by the account No. 252C. of the Record. We further find from an extract from the cash-books (No. 260C. of the Record) that on Asaj Badi 4th, a sum Rs. 26,068-13-3 were credited on account of the income received from the estate of Sumer Chand and Pardman Kunwar. By this amount the money taken by Paras Das for the purposes of the litigation was not merely discharged, but a balance of of Rs. 8,987-12-10 remained over to the credit of Paras Das. Also in the account of Paras Das entitled "in respect of the estate of the brothers Sumer Chand and Pardman Kunwar.' (No. 262C of the Record) for the following year, the account so kept opened with a credit on Asaj Sudi 9th, Sambat 1956, of Rs. 8,863-13-1. It thus is seen that the money which was borrowed was repaid by Paras Das and a large amount stood to his credit in his account with the firm.

In view of these facts we cannot see our way to hold that property, which admittedly would have been self-acquired property, became an increment to the joint family property by reason of the fact that Paras Das applied money of the family in the prosecution of his litigation. The transaction we think ought to be regarded as a borrowing, by Paras Das, of money of the firm and nothing more. The joint estate suffered no appreciable detriment by the transaction, and it would be, we think, unduly extending the principle of Hindu law applicable to acquisitions by the aid of joint funds or joint exertion if we were to hold that the property, which came to Paras Das from a collateral branch of the family, became joint family property.

It is further contended that even if the property is to be treated as self-acquired property in the hands of Paras Das, he voluntarily threw it into the joint stock, and so it became joint

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property. We fail to discover in the evidence any indication of an intention on the part of Paras Das to abandon his separate claim to the property; on the contrary, all dealings with it, including the separate accounts kept by Paras Das, manifest an intention on his part to retain it as self-acquired property. In his will of the 16th of February, 1902, he treats this property as self-acquired property. In that will he states that he has two kinds of property, *i.e.* "(*a*) the ancestral property and such property as has been acquired by him with the ancestral fund;" and "(*b*) the property which I received by right of inheritance under a decree out of the property left by Pardman Kunwar." And again in the codicil of the 17th of April, 1903, he also distinguishes the two classes of property and describes the property acquired from Pardman Kunwar as "The property which I obtained out of the estate of Pardman Kunwar, under a decree of the court, and it is my exclusive property and which I can transfer to any person I like." This disposes of the main questions which have been discussed before us.

There was a further argument addressed to us which was timidly advanced, namely, that the provision made by the codicil for the plaintiff was void on the ground that the testator having by his will given an absolute interest in his share of the property to Dharam Das could not make the dispositions which he purported to do in favour of the plaintiff. There appears to us to be no force in this contention. By the codicil the testator in effect partially revoked the disposition made by the will in regard to the share which was allotted to plaintiff, giving the plaintiff a life interest in that part of his estate and so far modifying the gift in favour of the defendant. The plaintiff became tenant for life of this portion of the property and the defendant owner of the reversionary interest.

It only remains to consider a further point which has been raised by the learned advocate for the respondents. As we have already pointed out, the testator divided his property which we may describe as landed or field property into three lots, numbered 1, 2 and 3, and his house property into three lots which we shall describe as $1^1$, $2^2$ and $3^3$. He provided that lot 1 and $1^1$,

lot 2 and $2^2$, and lot 3 and $3^3$ should go to his three sons respectively. Dharam Das, however, under an arrangement with one of his brothers, took lot 1 and lot $3^3$ instead of 1 and $1^1$. Mr. *Chaudhri* contended that the testator could not prevent his sons from making any division of the property between them which they might think fit. We do not think that this is so in regard at least to the self-acquired property. Dharam Das was precluded, we think, by the provisions of the will from doing any act which would prejudice the disposition made by the will in favour of the plaintiff, and it must be taken that whatever portion of the property fell to his lot, was onerated with the obligations imposed by the will in favour of the plaintiff. The will expressly provided that if Dharam Das interfered in the proceedings for effecting mutation of names in the plaintiff's favour or offered any obstruction to her possession, he should be absolutely deprived of all the property which out of the estate of Pardman Kunwar might be entered in his lot, and the entire of this property should go to the plaintiff. The plaintiff is willing to abide by the arrangement made by Dharam Das in regard to the lots, and take lots 1 and $3^3$. Of this, Dharam Das cannot reasonably complain. The objection has, therefore, no force. The plaintiff we may state has abandoned her claim to have certain houses demolished.

For the foregoing reasons, we are of opinion that the decree of the Court below cannot be supported. We accordingly allow the appeal, set aside the decree of the Court below and give a decree to the plaintiff-appellant for possession of the property claimed in the plaint, and for mesne profits to be ascertained in execution. The plaintiff-appellant will be entitled to the costs of this appeal and also the costs in the Court below.

*Appeal decreed.*