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MOHSIN RAZA KHAN v. HAIDAR BAKHSH.

The result is that, allowing the appeal, we set aside the decree of the lower appellate court and restore that of the court of first instance dismissing the application for execution. The appellant will have his costs throughout.

Appeal allowed.

Before Mr. Justice Sulaiman and Mr. Justice Kendall.

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DEOKI (DEFENDANT) *v.* JWALA PRASAD (PLAINTIFF).*

Hindu law—Hindu widow—Suit for declaration by next male reversioner—Nearer female heir in existence—Effect of omission to implead the nearer reversionary heir—Act No. I of 1877 *(Specific Relief Act), section* 42.

Plaintiff, alleging himself to be the nearest reversionary heir of her husband, brought a suit against a Hindu widow asking, first, for a declaration of his status as presumptive reversionary heir, and, secondly, for a declaration that a will alleged to have been executed by the husband shortly before his death was a forgery.

At the time of suit there was in existence a nearer heir in the shape of a minor daughter of the defendant, who lived with her, but she was not made a party to the suit.

Held (1) that as regards the first relief sought the suit was not maintainable;

(2) that, as regards the second relief, although it is not correct to say that the existence of a nearer female heir can always be ignored by the next male reversioner, yet, even without any express proof of refusal, concurrence or collusion on her part, the court may exercise its discretion and grant the declaratory relief to the male reversioner, and without insisting upon the female heir being joined in the suit, provided that such a course is not prejudicial to her interests.

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*First Appeal No. 266 of 1925, from a decree of Mirza Nadir Husain, Second Additional Subordinate Judge of Aligarh, dated the 6th of March, 1925.

Rani Anand Kunwar v. *The Court of Wards* (1), *Madari* v. *Malki* (2), *Balgobind* v. *Ram Kumar* (3), *Ishwar Narain* v. *Janki* (4), *Hanuman Pandit* v. *Joti Kunwar* (5), *Raja Dei* v. *Umed Singh* (6), *Lakhpati* v. *Rambodh Singh* (7), *Ramyad* v. *Rambihara* (8), *Venkatanarayan Pillai* v. *Subbammal* (9) and *Kesho Prasad Singh* v. *Sheo Pargash Ojha* (10), referred to.

THIS was a defendant's appeal arising out of a suit for a declaration that the plaintiff was the next male heir of the deceased Hoti Lal and that a will set up by his widow Musammat Deoki in her favour, alleged to have been executed on the 28th of October, 1922, was a false and spurious document. The deceased Hoti Lal had left a daughter Musammat Prembati, who would succeed to the estate if her mother were to die, but the plaintiff did not implead her. She was in fact an unmarried minor girl of tender years and was under the protection of her mother.

The claim was mainly contested by the widow, Musammat Deoki, who pleaded that the deceased had one day before his death executed an unregistered will in her favour conferring upon her an absolute estate. The property in dispute consisted of a one-sixth share in two markets and a one-third share in two residential houses. The defendant further pleaded that the plaintiff was not the next immediate reversioner and was not entitled to maintain the suit for declaration.

The first court decreed the claim by granting the plaintiff a declaration that the alleged will set up by the widow was a forged document. The defendant appealed to the High Court, and on her behalf both the right of the plaintiff to maintain the suit and the finding of the court below as regards the spuriousness of the will were challenged.

(1) (1880) I.L.R., 6 Calc., 764.
(2) (1884) I.L.R., 6 All., 428.
(3) (1884) I.L.R., 6 All., 431.
(4) (1893) I.L.R., 15 All., 132.
(5) Weekly Notes, 1908, p. 207.
(6) (1912) I.L.R., 34 All., 207.
(7) (1915) I.L.R., 37 All., 350.
(8) (1919) 4 Pat. L.J., 734.
(9) (1915) I.L.R., 38 Mad., 406
(10) (1921) I.L.R., 44 All., 19.

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Munshi *Panna Lal*, for the appellant.

Dr. *Kailas Nath Katju*, for the respondent.

The judgement of the Court (SULAIMAN and KENDALL, JJ.), after setting out the facts as above, thus continued :—

As regards the relief that the plaintiff would be the next male heir, it is now well settled that a mere presumptive reversionary heir, who has a mere possibility of succession or *spes successionis* upon the death of a Hindu widow, is not entitled to maintain a suit for a declaration of his so-called reversionary right. A reversioner as such cannot, under section 42 of the Specific Relief Act, claim to be entitled to any legal character or any right to any property. Even assuming that the word "right" may include rights present, future, vested or contingent, such a declaration would be refused as it would be premature. As the actual succession will depend upon the state of things existing when the widow dies, it is impossible to predicate at this moment who would be the reversionary heir of the deceased full proprietor. The declaration sought therefore is futile and must be refused. Indeed the learned advocate for the appellant has conceded that such a declaration cannot be granted.

The next question is whether in the presence of Musammat Prembati, the daughter, who would succeed immediately if the widow were to die, the present plaintiff, who is the male reversionary heir, is entitled to maintain the suit. In the leading case of *Rani Anand Kunwar* v. *The Court of Wards* (1), their Lordships of the Privy Council laid down the general rule that a declaratory suit

"must be brought by the presumptive reversionary heir,—that is to say, by the person who would succeed if the widow were to die at that moment. Such a suit may be brought by a more distant reversioner if those nearer in succession are in collusion with the widow, or have precluded themselves

(1) (1880) I.L.R., 6 Calc., 764 (772).

from interfering." "If the nearest reversionary heir refuses, without sufficient cause, to institute proceedings, or if he has precluded himself by his own act or conduct from suing, or has colluded with the widow, or concurred in the act alleged to be wrongful, the next presumable reversioner would be entitled to sue. In such a case . . . . the court must exercise a judicial discretion in determining whether the remote reversioner is entitled to sue, and would probably require the nearer reversioner to be made a party to the suit."

Following this case it was held in *Madari* v. *Malki* (1), that without proof of any connivance or collusion between a Hindu widow and her daughters, a collateral reversioner was not entitled to maintain such a suit. On the other hand, another Bench held, in *Balgobind* v. *Ram Kumar* (2), that "the existence of female heirs, whose right of succession cannot surpass a widow's estate, does not affect the suit of the nearest presumptive reversionary heir to the full ownership of the estate, and that such presumptive heir can maintain a suit for declaratory relief . . . . irrespective of the question of collusion or concurrence by such female heirs." The former Allahabad case was followed in *Ishwar Narain* v. *Janki* (3). The latter case was approved of in *Hanuman Pandit* v. *Joti Kunwar* (4) and in *Raja Dei* v. *Umed Singh* (5), where it was held that "a remote reversioner presumptively entitled to the full ownership of the property can maintain such a suit as this, where the immediate reversioner is a female, who will take, if anything, a limited or life estate only, her existence offering no bar to the maintenance of the suit." It was pointed out in this last-mentioned judgement that the Madras, Calcutta and Oudh Courts had taken the same view of the Privy Council case. The same principle was accepted in *Lakhpati* v. *Rambodh Singh* (6). The Patna High

(1) (1884) I.L.R., 6 All., 428.
(2) (1884) I.L.R., 6 All., 431.
(3) (1893) I.L.R., 15 All., 132.
(4) Weekly Notes, 1908, p. 207.
(5) (1912) I.L.R., 34 All., 207.
(6) (1915) I.L.R., 37 All., 350 (352).

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Court also has taken the same view in *Ramyad* v. *Rambihara* (1). There is thus a clear preponderance of authority in favour of the view that a reversioner to the full proprietary estate is entitled to maintain a suit without showing collusion between the nearer female heir and the widow, and that the principle laid down by their Lordships of the Privy Council has no application where the next heir is a female and as such entitled only to a life-estate. But with great respect we would point out that all the learned Judges have ignored the significance of the definition of the words "presumptive reversionary heir" as given by their Lordships themselves, and have introduced the words "to the full proprietary interest", which are not to be found in that definition. In *Rani Anand Kunwar's* case (2) their Lordships at page 772 stated "...... must be brought by the presumptive reversionary heir,—that is to say, by the person *who would succeed if the widow were to die at that moment.*" When there is a nearer female heir intervening, it cannot be said by any stretch of the language that the next male heir is the person who would succeed if the widow were to die at that moment. In face of this clear language we are unable to agree that the words "reversionary heir" used by their Lordships meant only "reversionary heir to the full proprietary interest" and did not include the female heir who would succeed immediately if the widow were to die at that moment. Although there have been expressions of the contrary view by so many eminent Judges, we feel it our duty to give effect to the clear language used by their Lordships and hold that the general rule laid down in *Rani Anand Kunwar's* case is not inapplicable to the case where a nearer female heir intervenes, provided that she would be the heir to the estate if the widow were to die at that moment. The rule that the next immediate reversioner should have the right of suit in the first

(1) (1919) 4 Pat. L.J., 734. (2) (1880) I.L.R., 6 Calc., 764.

instance has been re-affirmed by their Lordships of the Privy Council in the case of *Venkatanarayan* v. *Subbammal* (1). There it was held that

"a suit by the presumptive reversioner is a representative suit on behalf of the general body of reversioners, and on the death of the presumptive reversioner the next presumable reversioner is entitled to continue the action. The right to relief on the part of reversioners exists severally in order of succession and arises out of the one and the same transaction impugned as invalid and not binding against them as a body."

Can a suit brought by a daughter be thrown out on the ground that she is not presumptive reversioner as contemplated by their Lordships?

At the same time we fully appreciate the difficulties which might arise if the courts were to insist on strict proof of collusion, concurrence or carelessness on the part of the next female heir, for in many cases such strict proof may not be forthcoming, and lapse of time may make available evidence disappear. But in our opinion the solution of the difficulty does not lie in saying that the general rule laid down by their Lordships of the Privy Council is inapplicable where a female heir intervenes, but in recognizing that the instances mentioned by their Lordships, when the next presumable reversioner can sue, were not intended to be absolutely exhaustive. Their Lordships remarked at page 772:—"In such case, upon a plaint stating the circumstances under which the more distant reversionary heir claims to sue, the court must exercise a judicial discretion in determining whether the remote reversioner is entitled to sue, and would probably require the nearer reversioner to be made a party to the suit." It follows that although we are unable to hold that the existence of a nearer female heir can always be ignored by the next male heir, we are prepared to concede that even without any express proof of refusal, concurrence or collusion on her part there-

(1) (1915) I.L.R., 38 Mad., 406.

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may be special circumstances in which a court may exercise its discretion and grant the declaratory relief to a remoter heir.

Another serious difficulty in the way of the plaintiff is caused by the unfortunate omission to implead Musammat Prembati. The learned advocate for the plaintiff replies and says that once the right of the remoter reversioner to sue is established, there is no rule which requires that the nearer heir should be impleaded. He has brought to our notice that at least in some cases of the Allahabad High Court the nearest female heir had not been impleaded and nevertheless the declaration was granted. In *Balgobind's* case (1) the existence of the daughter Musammat Phulera was discovered only at the trial and made certain after the finding of the first court that she was still alive. Similarly in *Lakhpati's* case (2), Sarju Dei, alleged to be the legitimate daughter of Jita, was not a party and the case proceeded on the assumption that her presence, even if she was legitimate, would not prevent the plaintiff from suing.

In *Rani Anand Kunwar's* case, on top of page 773 their Lordships remarked "the court . . . . . . would probably require the nearer reversioner to be made a party to the suit." Again in *Venkatanarayan* v. *Subbammal* (3) their Lordships said: "There is nothing to preclude a remote reversioner from joining or asking to be joined in the action brought by the presumptive reversioner or even obtaining the conduct of the suit on proof of laches on the part of the plaintiff or collusion between him and the widow or other female whose acts are impugned." This undoubtedly recognizes more than one reversioner being a party to the suit. Similarly one of us, in the case of *Kesho Prasad Singh* v. *Sheo Pargash Ojha* (4), referred to the propriety of impleading other reversioners to a representative suit. As the relief to be granted is a discretionary relief, it cannot be urged

(1) (1884) I.L.R., 6 All., 431.
(2) (1915) I.L.R., 37 All., 350.
(3) (1915) I.L.R., 38 Mad., 406.
(4) (1921) I.L.R., 44 All., 19.

that the non-joinder of the nearest reversioner is, by virtue of order I, rule 9, of no consequence even when she may be prejudiced adversely by the result of the suit. All the same, a suit cannot fail merely on the technical ground that she has not been impleaded, although the relief to be granted is really to her benefit.

We accordingly propose to consider the case on its merits and postpone the consideration of the question whether we should or should not exercise our discretion in granting the declaration till we have examined whe ther the finding of the court below as regards the dis puted will is or is not correct.

[Their Lordships discussed the evidence and continued.]

Having regard to all these circumstances we are of opinion that the finding of the court below that the will has not been proved to be genuine cannot be disturbed in appeal.

If the will is declared to be a forged document the result will be that the absolute estate does not devolve on the widow, but she only gets a Hindu widow's estate. Musammat Prembati, her daughter, if she survives her, would then be the next heir to the estate. On the other hand, if the will were a genuine document the widow would become the absolute proprietor of the property and might dispose of it to any one she likes, even to the exclusion of her daughter. Having regard to these circumstances we are of opinion that it is to the interest of the minor Musammat Prembati, who has unfortunately not been impleaded in this case but is entirely under the guardianship and control of the widow, that it should be declared that the will is not a genuine document and does not destroy the reversionary interest to the estate of the deceased Hoti Lal. We would therefore dismiss the appeal with costs.

Appeal dismissed.