PRIVY COUNCIL

MUHAMMAD HUSAIN KHAN AND OTHERS *v.* KISHVA NANDAN SAHAI

J. C.* 1937 *May*, 7

[On appeal from the High Court at Allahabad]

Hindu law—Ancestral property—Property inherited from maternal grandfather, whether ancestral—Mitakshara—Misjoinder of causes of action—Misjoinder as ground for reversal or remand in appeal—Privy Council practice—Civil Procedure Code, section 99.

The word "ancestor" in its ordinary meaning includes an ascendant in the maternal, as well as the paternal, line; but the "ancestral" estate, in which, under the Hindu law, a son acquires jointly with his father an interest by birth, must be confined, as shown by the original text of the Mitakshara, to the property descending to the father from his male ancestor in the male line.

Venkayyamma Garu v. *Venkataramanayyamma Bahadur* (1), explained. *Atar Singh* v. *Thakar Singh* (2), referred to.

The provisions contained in the Civil Procedure Code do not regulate the procedure in the Privy Council in hearing appeals from India, but there can be no doubt that the rule embodied in section 99 proceeds upon a sound principle and is calculated to promote justice, and a trial should not be rendered abortive when the alleged misjoinder has affected neither the merits of the case nor the jurisdiction of the Court.

Where the plaintiff in a suit died and his widow was substituted as his legal representative and amended the plaint by adding an alternative cause of action which had accrued to her in her personal capacity and the suit was tried on the amended plaint and the parties adduced all the evidence relating to both causes of action; *Held*, that even if there were a misjoinder, the decree should not be reversed on that ground.

Appeal (No. 97 of 1934) from a decree of the High Court (January 23, 1933) which reversed a decree of the Additional Subordinate Judge of Banda (January 17, 1929).

**Present*: Lord MAUGHAM, Sir SHADI LAL and Sir GEORGE RANKIN.

(1) (1902) I.L.R., 25 Mad., 678; 29 I.A., 156. (2) (1908) I.L.R., 35 Cal., 1039; 35 I.A., 206.

1937

MUHAMMAD HUSAIN KHAN v. KISHVA NANDAN SAHAI

The material facts are stated in the judgment of the Judicial Committee.

1937. *March* 1, 2, 4, 5 *and* 8. *Dunne, K.C., Wallach and T.K. Kidwai, for the appellants*: The amendment of the plaint should not have been allowed. Objection to it was taken at the earliest stage, namely, when the application for amendment was made. The Subordinate Judge, before whom the suit then was, allowed the amendment. The defendants continued to object. They raised the question in their written statement in reply to the amendment and an issue on the question was framed by the Additional Subordinate Judge who tried the case. The trial Judge held that the amendment should not have been allowed. The High Court held the amendment was rightly allowed as it was necessary to determine the real questions in issue between the parties. It is submitted that the High Court was wrong. The effect of the amendment was to bring in a new cause of action in which the widow was making a personal claim. Here there is not a question of misjoinder which would bring in section 99 of the Code of Civil Procedure. The amendment alters the character of the suit. The section should not be given too wide an interpretation. *Prima facie* an amendment which changes the character of the suit does affect the parties and is an injustice Section 99 does not apply to a case within order II, rule 5 where there is a statutory prohibition. It applies only to irregularities; *Inaganti Venkatarama Row* v. *Venkatalingam Nayanim* (1). The case of *Lord Tredegar* v. *Roberts* (2) was very like the case here. Reference was also made to *Mā Shwe Mya* v. *Maung Mo Hnaung* (3). On the question of the claim under the will, it was found that Ganesh, the father of Bindeshri, got the property from his maternal grandfather. The question, therefore, is whether he had a right to dispose of it by will or whether it was ancestral property over which he had no power of testamentary disposition.

(1) (1921) 42 M.L.J., 43. (2) [1914] 1 K. B., 233.
(3) (1921) I.L.R., 48 Cal., 832; 58 I.A., 209.

[*De Gruyther, K.C., intervening*: My case is that Ganesh did not inherit, but got the property under a will.]

There has been a difference of opinion in India as to whether property inherited from a maternal grandfather is ancestral property in which, under the Mitakshara, a son acquires by birth a joint interest with his father. In the trial court the point was abandoned because the case there was governed by a decision of the High Court by which the trial Judge was bound. Reference was made to *Karuppai Nachiar* v. *Sankaranarayanan Chetty* (1), *Vythinatha Ayyar* v. *Yeggia Narayana* (2), *Ramayya* v. *Jagannadhan* (3), *Jamna Prasad* v. *Ram Partap* (4), *Bishwanath Prasad* v. *Ganjadhar Prasad* (5) and *Jasoda Koer* v. *Sheo Pershad Singh* (6). The last case, on this point, was overruled by *Venkayyamma Garu* v. *Venkataramanayyamma Bahadur* (7), in which it was decided that there can be ancestral property even in the case of obstructed inheritance, that is that ancestral property is not limited to unobstructed inheritance. Colebrooke, Chap. II S. 6 and Mayne, paragraph 563A, were referred to.

The facts of the case were discussed and *Chhatra Kumari Devi* v. *Mohan Bikram Shah* (8) was referred to.

De Gruyther, K.C., Hyam and Tileshwar Prasad, for the respondent (called on to reply only on the question as to whether the property was ancestral): *De Gruyther, K.C.*: The questions are (1) whether, when persons hold property jointly, the property becomes ancestral in the hands of their successors, and (2) whether, when a person inherits property from an ancestor, it is ancestral within the meaning of the Mitakshara irrespective of whether the ancestor from whom it is inherited is a paternal or maternal ancestor. The only point argued in *Venkayyamma's* case (7) was whether, when two undivided

(1) (1903) I.L.R., 27 Mad., 300.
(2) (1903) I.L.R., 27 Mad., 382.
(3) (1915) I.L.R., 39 Mad., 930.
(4) (1907) I.L.R., 29 All., 667.
(5) (1917) 3 Pat.L.J., 168.
(6) (1889) I.L.R., 17 Cal., 33(38).
(7) (1902) LL.R., 25 Mad., 678: 29 I.A., 156.
(8) (1931) I.L.R., 10 Pat., 851; 58 I.A., 279.

1937

MUHAMMAD HUSAIN KHAN v. KISHVA NANDAN SAHAI

brothers inherited property and treated it as joint property, on the death of one the surviving brother took by survivorship. If nephews inherit from a divided uncle, the property is not ancestral. Daughters' sons take *per capita*. If property inherited by a daughter's son were ancestral, his father, if alive, would have an undivided interest in it and could claim partition. It is quite clear that daughters' husbands do not inherit. It follows that property in the hands of daughters' sons is not ancestral. But if two sons of a daughter are joint when they inherit, the property becomes joint. Reference was made to *Atar Singh* v. *Thakar Singh* (1), *Bishwanath Prasad* v. *Ganjadhar Prasad* (2), *Jamna Prasad* v. *Ram Partap* (3), *Karuppai Nachiar* v. *Sankaranarayanan Chetty* (4) and *Vythinatha Ayyar* v. *Yeggia Narayana* (5).

Hyam, following: The question is what was really decided in *Venkayyamma's* case (6) and what is the meaning of the passage in the judgment relied on by the appellant. All that was decided was that the property inherited by the two brothers in that case from their maternal grandfather was in their hands joint property with rights of survivorship. The Board was discussing the character of the property in the hands of the brothers without reference to others, e.g. their sons. The word "ancestral" was not used in the technical sense in which it is used in Hindu law.

Dunne, K.C., in reply: *Venkayyamma's* case (6) has been in force since 1902. The view taken in Madras, where the Mitakshara is in force, is right. It may be possible, if the case were being argued anew, to contend that the view taken in that case is wrong. But the question now is, what is the meaning of the words used by Lord LINDLEY. The view taken was that the brothers took by inheritance and that the property was in their

(1) (1908) I.L.R., 35 Cal., 1039; 35 I.A., 206.
(2) (1917) 3 Pat.L.J., 168.
(3) (1907) I.L.R., 29 All., 667.
(4) (1903) I.L.R., 27 Mad., 300.
(5) (1903) I.L.R., 27 Mad., 382.
(6) (1902) I.L.R., 25 Mad., 676, 29 I.A., 156.

hands ancestral. It was necessary to decide the point of the character of the property.

The judgment of the Judicial Committee was delivered by Sir SHADI LAL:

This is an appeal from a decree of the High Court of Judicature at Allahabad, dated the 23rd January, 1933, which reversed a decree of the Subordinate Judge of Banda, dated the 17th January, 1929, and allowed the plaintiff's claim for possession of a village called Kalinjar Tirhati with mesne profits thereof.

One Ganesh Prasad, a resident of Banda in the Province of Agra, was the proprietor of a large and valuable estate, including the village in dispute. He died on 10th May, 1914, leaving him surviving a son, Bindeshri Prasad, who was thereupon recorded in the revenue records as the proprietor of the estate left by his father.

In execution of a decree for money obtained by a creditor against Bindeshri Prasad the village of Kalinjar Tirhati was sold by auction on 20th November, 1924; and the sale was confirmed on 25th January, 1925 Bindeshri Prasad then brought the suit, which has led to the present appeal, claiming possession of the property on the ground that the sale was vitiated by fraud. He died on the 25th December, 1926, and in March, 1927, his widow, Giri Bala, applied for the substitution of her name as the plaintiff in the suit. She was admittedly the sole heiress of her deceased husband, and this application was accordingly granted. She also asked for leave to amend the plaint on the ground that under a will made by her father-in-law, Ganesh Prasad, on 5th April, 1914, her husband got the estate only for his life, and that on the latter's death his life interest came to an end, and the devise in her favour became operative, making her absolute owner of the estate including the village in question. She accordingly prayed that, even if the sale be held to be binding upon her husband, it should be declared to be inoperative as against her rights of ownership.

1937

MUHAMMAD HUSAIN KHAN v. KISHVA NANDAN SAHAI

The trial Judge made an order allowing the amendment, and on 28th May, 1927, recorded reasons to justify that order. But in July, 1927, when the defendants in their additional pleas again objected to the amendment, the learned Judge framed an issue as to the validity of the amendment. He was, thereafter, transferred from the district; and his successor, who decided the suit, dismissed it on various grounds, and one of these grounds was that the amendment of the plaint changed the nature of the suit and should not have been allowed. The High Court, on appeal by the plaintiff, has dissented from that conclusion, and held that the amendment was necessary for the purpose of determining the real questions in controversy between the parties.

On behalf of the defendants, who are the appellants before their Lordships, it is contended that, while Giri Bala could continue the suit on the cause of action which accrued to her husband, she was not entitled to add to it an alternative cause of action which accrued to her in her personal capacity. It is, however, clear that the suit has been tried on the amended plaint, and that the parties have adduced all the evidence relating to both the causes of action. Their Lordships do not think that, even if there is any substance in the objection raised to the amendment of the plaint, it should now be allowed to prevail and all the time and labour expended on the trial of the suit should be thrown away. To prevent the mischief which may be caused by the reversal of the decree in a case of this kind, section 99 of the Code of Civil Procedure, 1908, provides that no decree shall be reversed or substantially varied, nor shall any case be remanded in appeal, on account of any misjoinder of parties or causes of action, or any error, defect or irregularity in any proceedings in the suit, not affecting the merits of the case or the jurisdiction of the court. Now, the High Court has decided that the trial of the suit on the alternative causes of action is sanctioned by the law, and it is not suggested that the alleged misjoinder of the causes of action has affected the merits of the case or the

jurisdiction of the court. The issue is now narrowed down to the simple point whether, even if there was a misjoinder, their Lordships should, on that ground, reverse the decree granted by the High Court. The provisions contained in the Civil Procedure Code do not regulate the procedure of their Lordships in hearing appeals from India, but there can be no doubt that the rule embodied in section 99 proceeds upon a sound principle and is calculated to promote justice; and their Lordships are not prepared to adopt a course which would merely prolong litigation. Assuming that the High Court has erred in overruling the objection to the amendment and in upholding the trial on both the causes of action, they do not think that the trial should be rendered abortive, when the alleged misjoinder has affected neither the merits of the case nor the jurisdiction of the court.

The next question for determination is whether Giri Bala has established her title to the village in dispute, and the answer to that question depends upon the *factum* and the validity of the will alleged to have been made, on the 5th April, 1914, by her father-in-law, Ganesh Prasad, upon which she founds her claim.

[The judgment then proceeded to review the evidence in respect of the will and the circumstances in which it was made, and came to the following conclusion.]

Their Lordships, therefore, agree with the High Court that the issue as to the *factum* of the will must be decided in favour of the plaintiff.

The validity of the will is challenged on the ground that the testator had no authority to dispose of the property, as it belonged to a Hindu coparcenary consisting of himself and his son. It is common ground that the property was inherited by Ganesh Prasad from his maternal grandfather, Jadu Ram; and the question arises whether it was ancestral in his hands in the sense that his son acquired therein an interest by birth jointly with him. There is a diversity of judicial opinion upon this

1937

MUHAMMAD HUSAIN KHAN v. KISHVA NANDAN SAHAI

question in India; vide, *inter alia, Karuppai Nachiar* v. *Sankaranarayanan Chetty* (1), *Jamna Prasad* v. *Ram Partap* (2), *Bishwanath Prasad* v. *Ganjadhar Prasad* (3). But the matter is of considerable practical importance, and their Lordships think that it should not be left in a state of uncertainty.

The learned counsel for the appellants argues that the property inherited by a daughter's son from his maternal grandfather is ancestral property, and he relies, in support of his argument, upon the expression "ancestral property" as used in the judgment of this Board in *Venkayyamma Garu* v. *Venkataramanayyamma Bahadur* (4), in describing the property which had descended from the maternal grandfather to his two grandsons. It is to be observed that the grandsons referred to in that case were the sons of a daughter of the propositus, and constituted a coparcenary with right of survivorship. On the death of their mother they succeeded to the estate of their maternal grandfather, and continued to be joint in estate until one of the brothers died. Thereupon, the widow of the deceased brother claimed to recover a moiety of the estate from the surviving brother. The question formulated by the Board for decision was, whether the property of the maternal grandfather descended, on the death of his daughter, to her two sons jointly with benefit of survivorship, or in common without benefit of survivorship. This was the only point of law which was argued before their Lordships, and it does not appear that it was contended that the estate was ancestral in the restricted sense in which the term is used in the Hindu law. Their Lordships decided that the estate was governed by the rule of survivorship, and the claim of the widow was, therefore, negatived. The brothers took the estate of their maternal grandfather at the same time and by the same title, and there was apparently no reason why they should not hold that estate in the same manner

(1) (1903) I.L.R., 27 Mad., 300.
(2) (1907) I.L.R., 29 All., 667.
(3) (1917) 3 Pat.L.J., 168.
(4) (1902) I.L.R., 25 Mad., 678: 29 I.A., 156.

as they held their other joint property. The rule of survivorship, which admittedly governed their other property, was held to apply also to the estate which had come to them from their maternal grandfather. In these circumstances it was unnecessary to express any opinion upon the abstract question of whether the property, which a daughter's son inherits from his maternal grandfather, is ancestral property in the technical sense that his son acquires therein by birth an interest jointly with him. This question was neither raised by the parties nor determined by the Board. It appears that the phrase "ancestral property", upon which reliance is placed on behalf of the appellants, was used in its ordinary meaning, namely, property which devolves upon a person from his ancestor, and not in the restricted sense of the Hindu law which imports the idea of the acquisition of interest on birth by a son jointly with his father.

There are, on the other hand, observations in a later judgment of the Board in *Atar Singh* v. *Thakar Singh* (1) which are pertinent here. It was stated in that judgment that unless the lands came "by descent from a lineal male ancestor in the male line, they are not deemed ancestral in Hindu law". This case, however, related to the property which came from male collaterals, and not from maternal grandfather; and it was governed "by the custom of the Punjab", but it was not suggested that the custom differed from the Hindu law on the issue before their Lordships.

The rule of Hindu law is well settled that the property which a man inherits from any of his three immediate paternal ancestors, namely, his father, father's father and father's father's father, is ancestral property as regards his male issue, and his son acquires jointly with him an interest in it by birth. Such property is held by him in coparcenary with his male issue, and the doctrine of survivorship applies to it. But the question raised by

(1) (1908) I.L.R., 35 Cal., 1039; 35 I.A., 206.

1937

MUHAMMAD HUSAIN KHAN v. KISHVA NANDAN SAHAI

this appeal is whether the son acquires by birth an interest jointly with his father in the estate which the latter inherits from his maternal grandfather. Now, Vijnanesvara, the author of Mitakshara, expressly limits such right by birth to an estate which is paternal or grand-paternal. It is true that Colebrooke's translation of the 27th sloka of the first section of the first chapter of Mitakshara, which deals with inheritance, is as follows: "It is a settled point that property in the paternal or ancestral estate is by birth." But Colebrooke apparently used the word "ancestral" to denote grand-paternal, and did not intend to mean that in the estate which devolves upon a person from his male ancestor in the maternal line his son acquires an interest by birth. The original text of the Mitakshara shows that the word used by Vijnanesvara, which has been translated by Colebrooke as "ancestral", is *paitamaha* (पैतामह) which means belonging to *pitamaha* (पितामह). Now, *pitamaha* ordinarily means father's father, and, though it is sometimes used to include any paternal male ancestor of the father, it does not mean a maternal male ancestor.

Indeed, there are other passages in Mitakshara which show that it is the property of the paternal grandfather in which the son acquires by birth an interest jointly with, and equal to that of, his father. For instance, in the 5th sloka of the fifth section of the first chapter, it is laid down that in the property "which was acquired by the paternal grandfather . . . the ownership of father and son is notorious; and, therefore, partition does take place. For, or because, the right is equal, or alike, therefore, partition is not restricted to be made by the father's choice, nor has he a double share." Now, this is the translation of the sloka by Colebrooke himself, and it is significant that the Sanskrit word, which is translated by him as "paternal grandfather", is *pitamaha* (पितामह). There can, therefore, be no doubt that the expression "ancestral estate" used by Colebrooke in translating the 27th sloka of the first section of the first chapter was intended to mean grand-paternal estate. The word

"ancestor" in its ordinary meaning includes an ascendant in the maternal, as well as the paternal, line; but the "ancestral" estate, in which, under the Hindu law, a son acquires jointly with his father an interest by birth, must be confined, as shown by the original text of the Mitakshara, to the property descending to the father from his male ancestor in the male line. The expression has sometimes been used in its ordinary sense, and that use has been the cause of misunderstanding.

The estate which was inherited by Ganesh Prasad from his maternal grandfather cannot, in their Lordships' opinion, be held to be ancestral property in which his son had an interest jointly with him. Ganesh Prasad consequently had full power of disposal over that estate, and the devise made by him in favour of his daughter-in-law, Giri Bala, could not be challenged by his son or any other person. On the death of her husband, the devise in her favour came into operation and she became the absolute owner of the village Kalinjar Tirhati, as of the remaining estate; and the sale of that village in execution proceedings against her husband could not adversely affect her title.

For the reasons above stated, their Lordships are of opinion that the decree of the High Court should be affirmed, and this appeal should be dismissed with costs. They will humbly advise His Majesty accordingly.

Solicitors for the appellants: *T. L. Wilson & Co.*

Solicitors for the respondent: *Douglas Grant & Dold.*