terms on which the parties have agreed to settle their differences. The compromise was duly verified before the learned Subordinate Judge. No objection has been taken to its validity by any of the parties concerned. Accordingly we pass a decree in terms of the compromise.

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BHOLA UMAR v. KAUSILLA

FULL BENCH

Before Sir Shah Muhammad Sulaiman, Chief Justice, Mr. Justice Bennet and Mr. Justice Bajpai

RAJPALI KUNWAR (PLAINTIFF) *v.* SARJU RAI AND OTHERS (DEFENDANTS)*

1936

April, 15

Hindu Law of Inheritance (Amendment) Act (II of 1929), section 2—Applicability where the Hindu male died before passing of the Act—Sister's succession—Hindu law—Compromise between a Hindu widow and next reversioner under which he takes a part of the property absolutely for himself and his heirs—Family settlement—Interpretation of statutes —Preamble.

An agreement or compromise was entered into between a Hindu widow in possession of her husband's estate and three nearest reversioners who had brought a suit impugning a deed of gift executed by her; she was also claiming an absolute title under an alleged will. Under this agreement the donee gave up his rights under the deed of gift, and a part of the estate was put in immediate possession of the three reversioners as belonging to them and their heirs absolutely, and it was provided that the rest of the property would, after the widow's death, also belong to them absolutely:

Held that the agreement was not binding, either as a compromise or as a family arrangement, on the person who became entitled to succeed, as the actual next reversioner, on the death of the widow. If the two parties, namely the widow on the one side and the collaterals on the other, had both been claiming title to the estate and a right to immediate possession, it could then have been said that there was a *bona fide* dispute between the parties which could be settled under a family arrangement. As the reversioners were merely challenging the validity of the deed of gift and not claiming any imme-

*First Appeal No. 432 of 1931, from a decree of C. Deb Banerji, Subordinate Judge of Azamgarh, dated the 19th of June, 1931.

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diate title in themselves, they could not by means of the agreement partition the property and acquire an absolute interest for themselves and their own heirs to the exclusion of the actual reversioner who might be entitled to succeed on the death of the widow. In this transaction these collaterals were not representing the entire body of reversioners—indeed they were acting adversely to the interest of the actual reversioner—, nor did the actual reversioner derive title from them: the agreement, therefore, could not be binding on him.

Held, also, that where the succession opened out after the coming into force of the Hindu Law of Inheritance (Amendment) Act of 1929 a sister could take advantage of the provisions of the Act and claim inheritance although the last male owner had died previous to the coming into operation of that Act. Such a case is not one of giving "retrospective effect" to the Act. So, where the Act came into force between the death of a Hindu male and that of his widow who succeeded him, his sister is entitled, in the absence of any nearer heir, to succeed on the widow's death.

The preamble to an Act can no doubt be looked at where the section is ambiguous, and it supplies a key to the mind of the legislature and indicates what its intention was; but where the language of the section is clear, the preamble cannot control its provisions.

Messrs. *Shiva Prasad Sinha* and *R. K. S. Toshniwal*, for the appellant.

Messrs. *Gadadhar Prasad* and *Shambhu Prasad*, for the respondents.

SULAIMAN, C.J.:—The following questions have been referred to us for answer:

(1) Is the agreement dated the 20th of December, 1927, a family settlement?

(2) Is the plaintiff entitled to question the said agreement?

The present suit was filed by the plaintiff for a declaration that an agreement dated the 20th of December, 1927, was null and void against her. She is the sister of Sheo Shobhit Rai, who died about 1926 and on whose death the said agreement was entered into between his widows Mst. Jota Kunwar and Mst. Rumali Kunwar, his step-mother Mst. Rajwanta, another sister's

son Narsingh, and Kashi Rai, Sarju Rai and Bhagwant Rai, three nearest reversioners at the time. A deed of gift had been executed in 1926 by the senior widow Mst. Jota and the step-mother Mst. Rajwanta in favour of Narsingh, who is alleged by the defendants to have been a sister's son; but that fact was not admitted in the written statement in this case. We know very little about the exact nature of the suit that was brought by Kashi Rai and others, but the recitals in the agreement show that the two ladies Jota and Rajwanta were setting up a will of the deceased Sheo Shobhit Rai in their favour and were claiming mutation of names on that account. The application for mutation of names was contested by the collaterals and some revenue cases were pending at the time. We also know that a suit was brought in the civil court by the three collaterals against the widows and the donee and it was pending at the time. The three collaterals were rather distant relations of Sheo Shobhit Rai, being the great-grandsons of Paltan Rai, who was the great-great-grandfather of Sheo Shobhit Rai. There is nothing on the record to show that the collaterals either brought a suit for possession or even alleged that they had been joint with the deceased and were entitled to immediate possession in preference to the two widows. All that happened might have been that they brought a suit for declaration that the deed of gift executed by the two ladies in favour of Narsingh was null and void and would not be binding on the reversioners after the death of the two widows. It was in the course of this litigation that the agreement in question was executed by all the parties who were then involved in litigation. The document was duly registered. The learned Subordinate Judge says that it was filed in court, but there is no direct evidence to prove even that fact.

The present plaintiff Mst. Rajpali Kunwar who is admittedly a sister of the deceased Sheo Shobhit Rai was, as the law then stood, not any heir at all to the

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estate of Sheo Shobhit Rai. She was altogether left out and was of course neither made a party to the agreement nor represented by any one on her behalf. Not being an heir at all she was altogether ignored. Indeed it was clearly recited in the agreement that excepting the collaterals there was no other heir of the deceased. Under this agreement the donee gave up his rights under the deed of gift and the step-mother Mst. Rajwanta claimed only a maintenance allowance without any interest in the estate. Properties in two villages were put in possession of the three collaterals as absolute owners from that very time and the rest of the property of Sheo Shobhit Rai remained in the possession of the two widows as Hindu widows, and it was provided that after their deaths the collaterals or their heirs would enter into possession and enjoyment of the said property as absolute owners. The document was described as a family settlement of the disputes among the parties.

The first question is whether this agreement is in the nature of a family settlement. The evidence on this point is extremely meagre and with the exception of the document itself there is hardly any other material which can throw any light on the circumstances under which this agreement was executed. It is not quite clear what was the exact nature of the dispute between the parties apart from the will which had been set up by the two ladies in their favour. For aught one knows the Hindu widows' estate was never disputed by the three collaterals and they never set up any paramount title of their own in preference to that of the Hindu widows. If this be the fact then it would be difficult to hold that the three collaterals had any *bona fide* dispute with the widows under which the whole estate could be partitioned there and then. The document merely indicates that there was some sort of a compromise between the widows, but all the circumstances

not being before us, it is impossible to say that this agreement was in the nature of a family settlement.

If the two parties, namely the Hindu widows on the one side, and the collaterals on the other, had both been claiming title to the estate and a right to immediate possession, it could then have been said that there was a *bona fide* dispute between the parties which could be settled under a family arrangement. But if the reversioners were merely challenging the validity of the deed of gift executed by the widows in favour of Narsingh and were not claiming any immediate title in themselves, they could not by means of the agreement partition the property and acquire an absolute interest for themselves and their own heirs to the exclusion of the real reversioners who might happen to succeed on the date of the death of the surviving widow when succession opened out. To allow the nearest reversioner to enter into a compromise with a Hindu widow and partition the property and take a part of it exclusively for himself and his own heirs and thereby exclude the reversioner who would become the ultimate heir would be dangerous and would open a wide door for fraud. In such a case it can hardly be said that the nearest collateral who takes a part of the property is representing the entire body of reversioners including that reversioner who would ultimately succeed to the estate on the death of the widow. Indeed he is acting adversely to the interest of such an heir in trying to take the property for himself exclusively.

The learned counsel for the respondents has not been able to cite before us a single case in which property taken by a nearest reversioner exclusively has been held to belong to him to the exclusion of the reversioner who ultimately succeeded to the estate on the death of the widow. The cases which have been cited before us are cases where either a decision against the widow and in favour of the nearest reversioner has been held to be binding on the widow and her own heirs, or cases in

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which a decision against the reversioner has been held to be binding against all other reversioners. Where the reversioners claim title on behalf of the entire body of reversioners, the suit becomes a representative suit and any decision or *bona fide* compromise arrived at would naturally be binding on all persons whom they represent. Similarly where a third party is claiming title to the estate and a suit is brought against the Hindu widow, who, in order to protect the estate, denies the title of the claimant, she is representing the future reversioners as well, and a decision fairly obtained may not only bind the widow but also all other reversioners who come after her. The case before us however is quite different, as here the reversioners attempted to partition the estate with the Hindu widows and retain a part of the property for themselves to the exclusion of the heirs who ought to succeed under the Hindu law. Such an agreement cannot be regarded as a family settlement so as to have a binding character even as regards the persons who were not parties to the agreement, who were not represented at the time and who do not derive title through any of the parties to the agreement.

The next point for consideration is whether the plaintiff has any right to question the said agreement. She would undoubtedly have a *locus standi* to maintain a suit and get a declaration that the agreement is not binding on her if she is a contingent heir to the estate of Sheo Shobhit Rai. In 1926 when the agreement was executed she was undoubtedly not an heir under the strict Hindu law. But in 1929 Act II of 1929 came into force. It is contended on behalf of the plaintiff that she has become an heir by virtue of this enactment. On the other hand, it is urged on behalf of the respondents that to hold that she is an heir would be giving to this Act a retrospective effect inasmuch as Sheo Shobhit Rai had died before the Act came into force even though the succession may open afterwards.

There is considerable preponderance of authority in favour of the view that the plaintiff can take advantage of this Act. This question arose in this Court soon after the coming into force of the Hindu Law of Inheritance (Amendment) Act, and one of us in S.A. No. 1331 of 1930, decided on the 1st of December, 1930, held that as reversioners have no vested interest in the estate at all but have a mere *spes successionis* or a chance of succession, which is a purely contingent right which may or may not accrue, and the succession would not open out until the widow dies, the person who would be the next reversioner at the time would succeed to the estate and the alteration in the rule of the Hindu law brought about by the Act would then be in full force. It was clearly stated that "by holding that in view of this Act the plaintiff at the present moment is not the next reversioner, one is not giving a retrospective effect to the Act". This decision was affirmed by the Letters Patent Bench in *Bandhan Singh* v. *Daulata Kuar* (1). A learned single Judge of the Lahore High Court whose attention was apparently not drawn to these cases took a contrary view in *Janki* v. *Sattan* (2), and a Bench of the Madras High Court in *Gavarammal* v. *Manikammal* (3) followed the latter view. But the learned CHIEF JUSTICE of the Patna High Court in *Chulhan Barai* v. *Akli Baraini* (4) preferred the view expressed in Allahabad and held that where the succession opened out after the coming into force of the Act a sister can take advantage of the provisions of the Act even though the last male owner had died previously. Another Bench of the Lahore High Court, in the case of *Shrimati Shakuntla Devi* v. *Kaushalya Devi* (5), has in a very well considered judgment overruled the previous decision of the learned single Judge of that Court, and dissenting from the Madras view has accepted the Allahabad view. The same Bench in another case in *Sattan* v. *Janki* (6) again adhered to that view. Recently

(1) [1932] A.L.J., 384.
(2) A.I.R., 1933 Lah., 777.
(3) (1933) I.L.R., 57 Mad., 718.
(4) A.I.R., 1934 Pat., 324.
(5) (1935) I.L.R., 17 Lah., 856.
(6) A.I.R., 1936 Lah., 139.

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another Bench of this Court, of which two of us were members, has expressed the opinion that if the succession opens after the coming into force of the Act, a sister is entitled to rank as an heir in the order mentioned in section 2; see *Raj Deo Singh* v. *Janak Raj Kuari* (1). In view of the well considered judgment of the Lahore High Court in *Shakuntla Devi's* case (2) it is no longer necessary to examine in detail the reasons given by the Madras High Court for the contrary view. The learned Judges of the Madras High Court had relied mainly on the language of the preamble and not so much on the language of the substantive section 2 itself. No doubt a preamble can be looked at when the section is ambiguous and it supplies a key to the mind of the legislature and indicates what its intention was, but where the language of the section is clear, a preamble cannot control its provisions. So far as section 2 is concerned it clearly lays down that a sister shall be entitled to rank in order of succession next after certain heirs. There are no limitations or conditions contained in that section. At the time when the succession opens it is therefore open to the sister to say that she is entitled as of right to rank as an heir to the estate of her brother after the other heirs named therein. In the Madras case emphasis was laid on the use of the words "a Hindu male dying intestate" and it was suggested that the word "dying" connotes a future tense and means a person who will die after the coming into force of the Act. The word "dying" by no means connotes a future tense, nor for the matter of that a past tense, exclusively. Taking it literally it would rather connote a present tense. But as pointed out by the learned Judges of the Lahore High Court in *Shakuntla Devi's* case (2) the word is a mere description of the status of the deceased and has no reference and is not intended to have any reference to the time of the death of a Hindu male. The expression merely means "in the case of intestacy of a Hindu male".

(1) [1936] A.L.J., 64. (2) (1935) I.L.R., 17 Lah., 356.

The second ground emphasised in Madras is that to allow a sister, whose brother had died before the Act came into force, to succeed as an heir would amount to giving the Act a retrospective effect, which it would not have in the absence of an express provision that it is retrospective. As pointed out in *Bandhan Singh's* case (1), one is not giving to the Act a retrospective effect if a sister is held to be an heir when the succession opens out after the coming into force of the Act. It would be giving to it a retrospective effect if it were held, for instance, that even though the succession opened out before the Act came into force she is entitled to claim the estate if the suit is brought after the Act.

Lastly it has been contended by the learned counsel for the respondents that the Act was never intended to confer a right of succession on persons who were not heirs previously, but that as indicated by the preamble the intention merely was to alter the order in which certain heirs of Hindu males dying intestate are entitled to succeed. It is therefore urged that inasmuch as a sister was not an heir under the Mitakshara law prior to 1919, the Act was never intended to cover her case. Such an intention would nullify the whole object of the Act. The Act as a matter of fact applies only to persons who but for the passing of this Act would have been subject to the law of the Mitakshara. It does not apply to persons subject to other laws. If we were to hold that inasmuch as a sister was not an heir under the Mitakshara law the Act does not apply to her, the result would be that the Act would be wholly inapplicable to a son's daughter, daughter's daughter, sister and sister's son who are mentioned in section 2 and who were not previously heirs under the Mitakshara law. Such a contention therefore cannot possibly be accepted.

As the present plaintiff was not represented in the previous agreement by the collaterals who obtained rights for themselves, and as a mere compromise by a Hindu

(1) [1932] A.L.J., 384.

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widow is not binding on the reversioners,—*Mahadei* v. *Baldeo* (1)—the plaintiff is entitled to question the agreement.

I would therefore answer the second question in the affirmative.

BENNET, J.:—I agree.

BAJPAI, J.:—I agree.

MISCELLANEOUS CIVIL

Before Mr. Justice Ganga Nath and Mr. Justice Smith

1936
April, 17

DAU DAYAL (PLAINTIFF) *v.* RAM PRASAD (DEFENDANT)*

Agra Tenancy Act (Local Act III of 1926), section 230—Theka of agricultural lands and some shops for an entire sum of annual rent—Suit for arrears of rent—Jurisdiction—Civil and revenue courts.

A suit for arrears of rent due on a joint theka of agricultural lands as well as some shops, the rent being fixed as one entire sum without any apportionment, is cognizable by the civil court. Such a suit is not one of the suits specified in the fourth schedule to the Agra Tenancy Act, and the revenue court can not entertain it and can not give adequate relief to the parties. The suit, therefore, is not excepted from the cognizance of the civil court by the provisions of section 230 of the Agra Tenancy Act. Further, as the rent was not apportioned, it was impossible for the plaintiff to split up his cause of action so as to file a suit in respect of the agricultural lands in the revenue court and another suit in respect of the shops in the civil court.

The parties were not represented.

GANGA NATH and SMITH, JJ.:—This is a reference by an Honorary Assistant Collector of Benares, through the Collector, under section 267, clause (2), of the Agra Tenancy Act (Act III of 1926) under the following circumstances.

A suit was brought for arrears of rent due under a *theka* given by the plaintiff to the defendant in respect

*Miscellaneous Case No. 635 of 1935.

(1) (1907) I.L.R., 30 All., 75.