APPELLATE CIVIL

Before Mr. Justice Collister and Mr. Justice Bajpai

1938 December, 22

LACHHAM SINGH MANRAL AND ANOTHER (DEFENDANTS) *v.* JHAGAR SINGH MANRAL AND OTHERS (PLAINTIFFS)*

Hindu law—Inheritance—Collaterals of full blood and of half blood—Custom—Kumaun customs abrogating Mitakshara rules of succession—Manrals—*Immigrants into Kumaun—Whether governed by Mitakshara or by Kumaun customs—Burden of proof.*

The Manrals, who are Hindu immigrants from the United Provinces settled in Kumaun, are, in matters of succession, to be governed by the Mitakshara and not by the Kumaun local customs which apply to the Khasas of Kumaun, unless it is established that any particular family has adopted such local customs in renunciation of the Mitakshara law.

The customs mentioned in Mr. Panna Lall's "Kumaun Local Customs" and Dr. Joshi's "Khasa Family Law" apply *prima facie* to the Khasas and not necessarily to the Hindu immigrants from the plains who, in the absence of evidence to the contrary, will be deemed to be governed by the law which applied to them in the province from which they migrated. In the case of high caste Hindu immigrants from the United Provinces, like the Manrals, the law that will ordinarily apply to them will be the Mitakshara law, unless evidence of renunciation of that law and adoption of the local customs be forthcoming.

The Manrals of Kumaun are neither the aborigines nor the early settlers and conquerors represented by the Khasas or Khasiyas, but the late settlers from the plains, apparently Surajbansi Thakurs who came from Oudh some two thousand years back and who lived without intermarriage with the Khasas. It is not possible to say that the same customs govern the Manrals as the Khasas of Kumaun merely because the Manrals have settled in Kumaun.

So, although there is a custom among the Khasas of Kumaun that in matters of succession there is no difference between brothers of the whole blood and brothers of the half blood and that the principle of full representation is allowed, in the sense that when the male line of descendants has died out it is treated as never having existed, the last male who left

*Second Appeal No. 1516 of 1936, from a decree of P. C. Agarwal, Additional District Judge of Kumaun, dated the 15th of June, 1936, *reversing* a decree of *Lachhmi Narain*, Additional Civil Judge of Ranikhet, dated the 15th of November, 1935.

descendants being regarded as the propositus, yet this custom and principle are not necessarily applicable in the case of Manrals.

In a dispute about succession in a family of Manrals it is not necessary for the party whose claim is in accordance with the Mitakshara to produce evidence to prove that the family was governed by the Mitakshara law; on the contrary it is the duty of the opposite party to set up and prove the adoption by the family of a custom at variance with the Mitakshara law.

Messrs. *P. L. Banerji* and *B. L. Dave*, for the appellants.

Messrs. *G. S. Pathak* and *N. D. Pant*, for the respondents.

COLLISTER and BAJPAI, JJ.:—This is an appeal by Dhyan Singh Manral defendant No. 1 and Lachham Singh Manral defendant No. 6. The plaintiffs brought a suit for declaration of title in respect to certain property detailed at the foot of the plaint. They alleged that "according to law and family custom the estate of an issueless co-sharer devolved upon the full blood collaterals excluding the half blood collaterals', that Mst. Kiri, the wife of Bhawan Singh, died in October, 1932, and the plaintiffs and defendants Nos. 7 and 8, according to the pedigree filed, became entitled to the estate of Bhawan Singh in preference to defendants Nos. 1 to 6, but as the defendants had obtained a mutation order in their favour a cloud had been cast upon the plaintiffs' title and a suit for declaration became necessary. Defendants 7 and 8 were, by an order dated the 17th of December, 1934, transferred to the array of plaintiffs and became plaintiffs 10 and 11. Bhawan Singh is a descendant of Madho Singh and the plaintiffs are descendants of Prem Singh and Bhim Singh. Madho Singh, Prem Singh and Bhim Singh are the sons of Bache Singh from the first wife. The defendants are the descendants of Narpat Singh who was the son of Bache Singh from the second wife. Plaintiffs 2, 3 and 10 are removed from the common ancestor in the same degree as defendants 1 and 6, whereas the rest of the

1938

LACHHAM SINGH MANRAL v. JHAGAR SINGH MANRAL

plaintiffs and the rest of the defendants are a degree lower, but in the plaint no distinction was made and all the plaintiffs claimed the relief equally.

The defendants pleaded that they were the collaterals of Bhawan Singh, the last male owner of the property in suit, and were descendants of the common ancestor Bache Singh and were entitled to the property in question in the same manner as the plaintiffs and that the property in question should be distributed according to *bhai bant* (distribution of property according to the number of brothers) and not according to *sautiya bant* (division of property according to number of wives). There was a further plea that as defendants Nos. 1 to 6 were in possession of the property in question and mutation of names had been effected in their favour the plaintiffs' suit for mere declaration was not maintainable.

The court of first instance held that the possession of the defendants was not proved and therefore a suit for declaration was not defective. It, however, held that under the Kumaun customs the plaintiffs, although they were the descendants of full blood brothers, were not exclusively entitled to hold the property in suit. The suit of the plaintiffs for declaration was therefore dismissed. The lower appellate court held that the custom set up by the defendants had not been satisfactorily proved, and the plaintiffs' suit was therefore decreed.

In second appeal before us it is contended that the view taken by the lower appellate court is wrong and that the decree of the trial court ought to be restored. It is said that the plaintiffs never asserted that they were governed in matters of inheritance by the Mitakshara school of Hindu law which draws a distinction between the descendants of the full blood and the descendants of the half blood, and that, further, the custom set up by the defendants had been proved. Great reliance is placed by the defendants on Mr. Panna Lall's book "Kumaun Local Customs".

Mr. Panna Lall, I. C. S., was deputed by the Local Government of the United Provinces to inquire into and collect the customs that were prevailing in Kumaun, and he has accordingly written a book on the general customs applicable to the Hindus of the hill tracts of the Kumaun division, excluding certain castes for which rules are given separately. At page 3, paragraph 17 (*a*) of Mr. Panna Lall's book it is stated: "There is no difference between brothers of the whole blood and consanguine brothers (i.e. having the same father but different mothers)." At page 69, paragraph 266, he says; "Under the Mitakshara, brothers of the whole blood succeed before those of the half blood; and undivided brothers are preferred to divided brothers. In Kumaun these rules are not observed strictly. There are numerous instances of the breach of both of these rules, especially in the Garhwal district. But the custom cannot be said to be invariable. Instances are known ——especially among the more enlightened people—— where a whole brother has excluded a step-brother. This inclines one to ask whether the opposite custom is not due merely to ignorance. Whatever the cause may be, the fact remains that in a large number of cases no difference has been made between whole brothers and half-brothers, or between divided and undivided brothers." Dr. Joshi has written a book on the Khasa Family Law in the Himalayan districts of the United Provinces, India, (a thesis presented for the degree of Doctor of Laws to the London University) and in this book he has commented at page 294 on paragraph 266 of Mr. Panna Lall's book. He says: "Mr. Lall found that 'among the more enlightened people' a whole brother excluded a step-brother. It is not the law of the 'enlightened people', but of those who follow the Mitakshara, as under that system brothers of the whole blood exclude brothers of the half blood. The opposite custom, of there being no distinction between whole blood and half blood,does not result, as Mr. Lall suggests, from ignorance, but from divergence between the

1938

LACHHAM SINGH MANRAL v. JHAGAR SINGH MANRAL

principles of succession among the Khasas and in Hindu law." Dr. Joshi has made a comparative study of the subject and has referred to the customs prevailing in the Punjab and the customs prevailing in Kumaun. He quotes from the Digest of Sir William Rattigan, page 14, where four leading canons governing the agriculturists in the Punjab are mentioned and the one dealing with collateral succession was, "that when the male line of descendants has died out, it is treated as never having existed, the last male who left descendants being regarded as the *propositus*", and therefore as the brother's sons of their father no question of full blood and half blood can arise.

In his Introduction Dr. Joshi says that in his book an attempt has been made to state the customary law of a people resident in the Himalayas, and known as the Khasas or Khasiyas who are the lineal descendants of a wave of immigrants probably pre-Vedic in date but Aryan in race. At page 7 of the Introduction he says: "According to Mr. Atkinson the Hindu population of the Himalayan districts consists of (1) the aboriginal or at least long-settled tribes of Khasiya Brahmans and Rajputs and their followers the Doms; (2) the Hindu immigrants from the plains belonging to all classes; (3) the Tibetan immigrants in the Bhotiya tracts; (4) mixed classes. By the mixed classes he means the natives of hills who have been converted to Christianity or Muhammadanism. The Tibetan immigrants in the Bhotiya tracts are called the Bhotiyas." Dr. Joshi's book, therefore, deals principally with the aboriginals and the long-settled tribes of the Khasiya Brahmans and Rajputs.

In the present case we have got to deal with Manrals. Dr. Joshi at page 27 of his Introduction says: "It seems that the Khasas settled in Kumaun and the adjacent countries in remote antiquity after subduing the aborigines now known as the Doms. We do not know whether this event happened before or after the migration of the Vedic Aryans." At page 31 he says:

1938

LACHHAM SINGH MANRAL v. JHAGAR SINGH MANRAL

"It has been shown that excluding the Doms and the Bhotiyas, there are two main classes of Hindu population in the Himalayan districts:—(1) the early settlers and conquerors represented by the Khasas, (2) the late settlers from plains who are a very small minority." It is obvious that the Manrals with whom we have to deal are neither the aborigines nor the early settlers and conquerors represented by the Khasiyas, but the late settlers from the plains. At page 8 he observes: "Nearly all the high caste Brahmans and Rajputs claim to have migrated to these parts, at the earliest, a thousand years back, with the exception of Suraj Bansi Thakurs who have a tradition that they came from Oudh 2,000 years back"; and at page 10 he says: "Rajputs who claim descent from the immigrants from the plains are in Kumaun (1) the Suraj Bansi Katyuris represented by the Rajbars of Askot and Jaspur, the Manurals and others, (2) the Raoteias."

From his book it appears that Manrals are those Suraj Bansi Thakurs who came from Oudh two thousand years back. At page 28 he says: "The earliest ruling dynasty known to authentic history is of the Katyuris. The Katyuri Raja of Kumaun and Garhwal was styled 'Sri Basdeo Giriraj Chakra Churamani' and the earliest traditions record that the possessions of the Joshimath Katyuris extended from the Satlaj as far as the Gandaki and from the snow to the plains, including the whole of Rohilkhand." A description of the Manrals is to be found in Mr. Walton's District Gazetteer of Almora and at page 94 the following passage occurs: "By far the most illustrious in descent and the most respected at the present day are the Rajwars and Manrals or Manurals. Both families are descended from the Surajbansi Katyuri Rajas who once ruled in the north of Kumaun. The Rajwars now live in Jaspur of Bichla Chaukot and Askot to the extreme east of the district, where they hold an impartible raj. The Manrals represent the branch which on the deposition of Birdeo, the last Katyuri king, and the annexation of his king-

1938

LACHHAM SINGH MANRAL v. JHAGAR SINGH MANRAL

dom by the Chands, settled in Pali. Their name is connected with the Manila peak in Palla Naya above Bhikia Sen, and the village of Sain Manur on the same ridge in Walla Salt. The families are said to hold sanads granted by various members of the Chand dynasty, and by the Gurkha governors of later days." It will thus appear that the Manrals are among "the enlightened people of Kumaun" and it is not possible to say that the same custom governs them as the ordinary Khasas of Kumaun. At page 31 of his book Dr. Joshi says: "For the purposes of the lawyer the Khasas include not only the original members of the Khasa race but also the immigrant Brahmans and Rajputs and their issue by Khasa women who accept and follow the rules of Khasa Family Law." No evidence has been given in the present case about any intermarriage between the Khasas and the Manrals, and, as pointed out by Mr. Walton, the Manrals are "the most respected at the present day"

The various passages quoted in our judgment from Mr. Panna Lall's book and from Dr. Joshi's book make it clear that there is a custom among the Khasas of Kumaun that there is no difference between brothers of the whole blood and consanguine brothers and that so far as Khasas are concerned the principle of full representation is allowed, in the sense that when the male line of descendants has died out it is treated as never having existed, the last male who left descendants being regarded as the *propositus*. If this principle of representation were allowed in the present case there can be no doubt that the plaintiffs would not be entitled to any preference over the defendants, but it is very doubtful if this principle can be applied in the case of Manrals.

A great deal was said before us as to the pleadings of the parties. It is, however, a pity that the court below did not take the statements of the parties under order I, rule 10 of the Civil Procedure Code. Mr. *P. L.*

Banerji on behalf of the appellants argued that the plaintiffs did not allege in so many words that they were governed by the Mitakshara Hindu law and all that they said was that according to law and family custom which had all along been observed in the family of the parties the estate of an issueless co-sharer devolved upon the full blood collaterals, and the issue that was struck in the case on this point was, "Do under the Kumaun custom the descendants of a full blood brother exclude the descendants of half blood brother?" But there can be little doubt, as observed by the trial court, that the contention of the plaintiffs was that they were governed by the Mitakshara law and therefore under the provisions of that law they were entitled to get exclusion of the defendants. Relying on the case of *Tula Ram Sah* v. *Shyam Lal Sah* (1) it was contended that in that case the plaintiffs claimed that by the custom obtaining in Kumaun they were entitled to the property of Lachi Ram to the exclusion of his daughter's sons and that the defendants, who were the daughter's sons of Lachi Ram, never pleaded that they were entitled under the Hindu law to succeed to the grandfather nor did they ever state that they had come from any other part of the country or that they carried with them any local law or custom. MUKERJI, J., in that case observed (page 851): "It being the fact that the parties were residents of Kumaun, and it being the fact that Mr. Panna Lall's book purported to contain a statement of law prevailing in Kumaun, the Commissioner" (who at that time was the High Court for Kumaun) "was right in applying what should be taken as a good *prima facie* evidence of the local custom. If anybody wanted to plead that no such custom obtained or for any particular reason the local custom did not apply to him, it was for that party to say so specifically."

It is true that in the plaint filed by the plaintiffs no specific mention of the Mitakshara was made, but it was clearly understood in the courts below that the

(1) (1924) I.L.R. 49 All. 848.

1938

LACHHAM SINGH MANRAL v. JHAGAR SINGH MANRAL

plaintiffs did allege that they were governed by the Mitakshara law, and it is not stated in the grounds of appeal before us that the plaintiffs' allegations in the plaint were to the contrary and that the trial court had erred in any way in saying that the contention of the plaintiffs was that they were governed by the Mitakshara law. The plaintiffs did not state that they had come from any other part of the country, but from the judgments of the courts below it is clear that Dr. Joshi's book and Mr. Walton's Gazetteer were brought to the notice of the courts and these books were cited for showing that the Manrals were not the same as the Khasas and the customs mentioned in Mr. Panna Lall's book applied *prima facie* to the Khasas and not necessarily to the Hindu immigrants from the plains who, in the absence of evidence to the contrary, will be deemed to be governed by the law of the country from which they migrated. In *Balwant Rao* v. *Baji Rao* (1) their Lordships of the Privy Council laid down four propositions: First, that *prima facie* a Hindu residing in any particular province of India is governed by the law of that province. Second, that if any such family migrates to another province it carries its own law with it. Third, that any such family may renounce its original law and adopt the law of the province to which it migrates, but that such renunciation must be proved by evidence. Fourth, that the personal law which a migrating Hindu carries with him is the law as it stood at the time of the migration.

From the above it follows that the Hindus of the United Provinces will be governed by the Mitakshara law and since this law applies in Kumaun with certain modifications mentioned in Mr. Panna Lall's book in the cases of Khasas, it may be taken that a Khasa residing in Kumaun will be governed by the customs mentioned in Mr. Panna Lall's book; at the same time in the cases of Hindu immigrants from the plains like the Manrals the

(1) (1920) I.L.R. 48 Cal. 30.

law that will ordinarily apply to them will be the Mitakshara law, and, even if they migrate to a custom-ridden place like Kumaun, they will be governed by the Mitakshara law unless evidence of renunciation be forthcoming. In the cases of the Sahs there was evidence of such renunciation, as pointed out by DANIELS, J., in *Tula Ram Sah* v. *Shyam Lal Sah* (1), and Mr. Stiffe's judgment dated the 6th of August, 1927, and the judgment of this Court in *Gangi Sah* v. *Harlal Sah* (2) deals with the Sahs, who seem to have adopted the customs prevailing in Kumaun.

It was pointed out by their Lordships of the Privy Council in *Bhagwan Singh* v. *Bhagwan Singh* (3) that in order to bring a case under any rule of law, laid down by recognized authority for Hindus generally, it is not necessary that evidence must be given of actual events to show that in point of fact the people subject to that general law regulate their lives by it. It was not necessary, therefore, for the plaintiffs to produce evidence to prove that they were governed by the Mitakshara law, and, as we have mentioned before, no advantage can be taken by the defendants out of the plaint for it was understood by everybody concerned that their contention was that they were governed by the Mitakshara law; on the contrary it was the duty of the defendants to set up and prove a custom at variance with the Mitakshara law. They did set up such a custom and they attempted to prove it by Mr. Panna Lall's book which *prima facie* is evidence of a custom stated therein. At paragraph 266 Mr. Panna Lall himself says that the custom is not invariable, in the sense that it does not apply to the more enlightened people. It was observed by their Lordships of the Privy Council in *Ramalakshmi Ammal* v. *Sivanantha Perumal* (4): "but it is of the essence of special usages modifying the ordinary law of succession that they should be ancient and invariable; and it is further essential that they should be established

(1) (1924) I.L.R. 49 All. 848(853). (2) I.L.R. [1939] All. 122.
(3) (1898) I.L.R. 21 All. 412. (4) (1872) 14 M.I.A. 570(585).

1938

LACHHAM SINGH MANRAL v. JHAGAR SINGH MANRAL

to be so by clear and unambiguous evidence. It is only by means of such evidence that the courts can be assured of their existence, and that they possess the conditions of antiquity and certainty on which alone their legal title to recognition depends." It may be conceded that the custom is invariable so far as the Khasiyas are concerned, but it is not applicable to the high caste Brahmans and Rajputs who were immigrants in Kumaun. The Mitakshara may have been written in the eleventh century, but it is only a commentary on the ancient Hindu law which does draw a distinction between full blood and half blood. Their Lordships of the Privy Council in *Garuddas* v. *Laldas* (1) observed that under the Benares school of the Mitakshara, under the original text "to the nearest *sapinda* the inheritance next belongs", brothers such as are of the full blood take the inheritance in the first instance and that the preference of the whole blood to the half blood is not confined to the brothers of the *propositus,* but is a principle applicable to all *sapindas* in the same degree of consanguinity. There might have been a controversy as to the extent to which this preference will hold good in the ascending and in the descending line in earlier days so far as judicial decisions went, but there can be no doubt that the law always was as has been interpreted by their Lordships of the Privy Council in *Garuddas's* case. We must, therefore, hold that if the Mitakshara law is applicable to the Manrals of Kumaun who have settled in Kumaun, the plaintiffs are entitled to succeed.

We have already said that on the question of custom the defendants relied on Mr. Panna Lall's book and gave no evidence. As a matter of fact it was admitted by Thakur Mohan Singh, a witness on behalf of the defendants, that when Subedar Bhim Singh, a person mentioned in the pedigree, died without leaving any sons, his property passed to Narpat Singh's offspring. Narpat Singh was a brother of Subedar Bhim Singh by

(1) [1933] A.L.J. 774.

the same mother whereas Madho Singh, Prem Singh and Bhim Singh were also the brothers of Subedar Bhim Singh but by a different mother. To the same effect was the evidence of the plaintiffs' witnesses. It is argued on behalf of the defendants by learned counsel that some of the plaintiffs are a degree lower than the other plaintiffs and also a degree lower than defendants 1 and 6, but all the plaintiffs claimed the property equally. It does not follow necessarily from this that they eliminated the distinction between full brothers and half brothers. In any event, this fact in itself is too slender a foundation for holding that the custom set up by the defendants has been established.

In *Rup Chand* v. *Jambu Prasad* (1) their Lordships of the Privy Council observed: "The question in the present case was, and is, whether a custom, applicable to the parties concerned, and authorising the adoption of a married boy, has been established. This is, strictly speaking, a pure question of fact determinable upon the evidence given in the case." Although in certain cases a question of custom may become a mixed question of fact and law, yet in the present case, in the absence of any evidence that the family of the parties has intermarried with the Khasiyas or that they adopted the customs prevailing in Kumaun generally, it would not be proper to interfere in second appeal with the finding of the lower appellate court that the custom set up by the defendants has not been satisfactorily proved. We may observe, as was observed by their Lordships of the Privy Council in the case just mentioned, that there is great weight in the criticisms advanced by Mr. *Banerji* against the judgment of the court below and our decision in the present case may be "an unsatisfactory precedent if in any future instance fuller evidence regarding the alleged custom should be forthcoming", but on the whole we see no reason to interfere with the finding of the court below. We therefore dismiss this appeal with costs.

(1) (1910) I.L.R. 32 All. 247.