APPELLATE CIVIL

Before Mr. Justice Bennet and Mr. Justice Verma

1938 October, 10

GANGI SAH (DEFENDANT) *v.* HARLAL SAH AND OTHERS (PLAINTIFFS) AND INDRALAL SAH AND ANOTHER (DEFENDANTS)*

Hindu law—Inheritance—Custom—Kumaun customs abrogating Mitakshara rules of succession—Principle of representation forms the basis of Kumaun customs relating to inheritance.

The true basis of the Kumaun customs relating to inheritance, which modify the Mitakshara rules of succession, is, as pointed out in Dr. Joshi's "Khasa Family Law", the recognition and application of the principle of representation. In a Hindu family governed by such customs the estate of a deceased person who has left no male issue is treated, in the matter of inheritance, as if left by the last male in the family tree who has left male heirs; so that if a man dies sonless his brothers do not inherit as brothers but as sons of the father to whom the estate is deemed to have reverted on the sonless man's death, i.e. after the father the next heirs are all the descendants of the father, and the principle of representation is fully applied to the case.

Panna Lal's "Kumaun Local Customs" and Joshi's "Khasa Family Law" were referred to.

Messrs. *P. L. Banerji, B. L. Dave* and *R. K. Dave*, for the appellant.

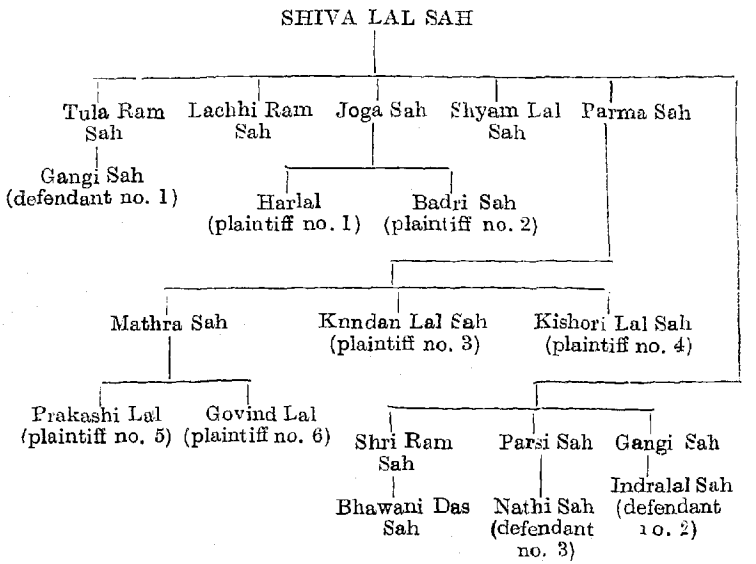
Messrs. *A Sanyal* and *N. D. Pant*, for the respondents.

BENNET and VERMA, JJ.:—This is an appeal filed by one of three defendants in a suit for declaration of right to, and recovery of possession of, a two-fifth share in certain property, which has been decreed by both the courts below.

The parties are residents of a village in the district of Almora and belong to the same family.

*Second Appeal No. 1433 of 1934, from a decree of J. R. W. Bennett, District Judge of Kumaun, dated the 13th of March, 1934, confirming a decree of Chandra Dhar Juyal, Assistant Collector first class of Almora, dated the 18th of October, 1933.

The following pedigree is given in the plaint and has been admitted by the defendants:



Of the eight sons of Shiva Lal, Shyam Lal died in his lifetime. Subsequently, on Shiva Lal's death, there was a separation among the remaining seven sons of Shiva Lal. Of the seven sons, Lachhi Ram Sah was the first to die and there was a litigation in respect of his property which came up to this Court. The case is reported in *Tula Ram Sah* v. *Shyam Lal Sah* (1). We shall have occasion to refer to this litigation later.

The property in dispute in the present suit belonged to Bhawani Das, son of Shri Ram. Bhawani Das died in the year 1918 without leaving any male issue. At the time of his death, Tula Ram Sah, Gangi Sah and Parsi Sah were the only three out of the sons of Shiva Lal Sah alive. Subsequently Parsi Sah and Gangi Sah also died and their respective sons, Nathi Sah and Indarlal Sah, are defendants in the suit, out of which the appeal before us has arisen, along with Gangi Sah, the appellant, who is the son of Tula Ram Sah. The first two plaintiffs are the sons of Joga Sah, the plaintiffs

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Nos. 3 and 4 are the sons of Parma Sah and plaintiffs Nos. 5 and 6 are the grandsons of Parma Sah, being sons of Mathura Sah, deceased, who was a son of Parma Sah. It may be noted that Shiva Lal Sah had married thrice. Tula Ram Sah was born of one wife, Lachhi Ram Sah and Joga Sah were born of another wife and the remaining five sons of Shiva Lal Sah, namely Shyam Lal, Parma, Shri Ram, Parsi and Gangi Sah were born of the third wife.

There was a second litigation in the family and that related to this very property, namely the property left by Bhawani Das. On Bhawani Das's death, Parsi Sah and Gangi Sah seem to have taken possession of his property to the exclusion of the other members of the family. Parsi Sah and Gangi Sah died shortly afterwards. Tula Ram, the father of the present appellant, brought a suit in the year 1925 against the sons of Parsi Sah and Gangi Sah, namely Nathi Sah and Indarlal Sah, on the ground that he was equally entitled to succeed to Bhawani Das's property along with Parsi Sah and Gangi Sah. The contention of the defendants in that suit, namely Nathi Sah and Indarlal Sah, was that their fathers, Parsi Sah and Gangi Sah, being full brothers of the father of Bhawani Das Sah, were, under the Hindu law, entitled to preference over Tula Ram Sah who was only a half brother of Bhawani Das Sah's father. Tula Ram Sah's case, on the other hand, was that according to the custom prevailing in Kumaun, which modified the Hindu law, no distinction was recognized between brothers of the full blood and those of the half blood, and that the same rule should be applied to a case where the question was as to the succession of uncles to the property of a deceased nephew. Tula Ram Sah based his case on the record of customs contained in Mr. Panna Lal's book, "Kumaun Local Customs". The suit was dismissed by the trial court, but on appeal by Tula Ram Sah it was decreed by the Commissioner

of Kumaun, whose court was the High Court for Kumaun at that time. The custom that Tula Ram Sah relied on in that case is contained in paragraph 17 of Mr. Panna Lal's book and refers in terms only to a case where the inheritance devolves upon brothers to the estate of a deceased brother. The learned Commissioner observed in his judgment: "It seems to me that a doctrine that applies to two relations as brothers must apply to them as uncles." The result was, as stated above, that Tula Ram's suit was decreed on the finding by the learned Commissioner that according to the Kumaun customs an uncle of the half blood was as much entitled to succeed to the property of a deceased nephew as was an uncle of the full blood. This judgment of the learned Commissioner was delivered on the 6th of August, 1927.

The present suit was filed in March, 1928. In paragraph 6 of the plaint it is stated that according to the Kamaun customs the plaintiffs were entitled to a two-fifths share in the property left by Bhawani Das, i.e., the share to which the plaintiffs' ancestors, Joga Sah and Parsi Sah, would have been entitled if they had been alive at the time of the death of Bhawani Das. In other words, the plaintiffs' case was that the parties were not governed by the Mitakshara Hindu law in matters of inheritance and that the doctrine of representation was recognized by the Kumaun customs which applied to them. In his written statement the appellant Gangi Sah did not plead that the parties were governed by the Mitakshara in matters of inheritance. Paragraph 4 of the additional pleas of his written statement, which is the only paragraph which deals with the matter at all, states: "According to the Kumaun customs the plaintiffs are not entitled to get any share in the property of Bhawani Das, deceased." Thus it was the case of neither party that the rules of inheritance laid down in the Mitakshara applied to the parties and both parties relied on the customs prevailing in Kumaun. The suit was decreed by the trial

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court. It is noteworthy that the defendants Nos. 2 and 3, i.e., Indarlal Sah and Nathi Sah, the sons of Gangi Sah and Parsi Sah, submitted to the decree of the trial court and defendant No. 1, Gangi Sah son of Tula Ram Sah, alone appealed to the lower appellate court. His appeal has been dismissed by the lower appellate court and he has filed this second appeal.

In the lower appellate court not only Mr. Panna Lal's book was referred to but Dr. L. D. Joshi's "Khasa Family Law" was also cited and relied upon. The learned Judge below has, after referring to paragraph 17 of Mr. Panna Lal's book, adverted to the implications of the extension of the rule therein laid down to the case of uncles succeeding to the property of a deceased nephew having been recognized in the suit filed by Tula Ram Sah, the father of the present appellant, and decided by the learned Commissioner of Kumaun on the 6th of August, 1927, and has further relied on the fuller treatment and discussion of the subject contained in Dr. Joshi's book and has held that the principle of representation should be applied to the present case. After hearing learned counsel at length, we have come to the conclusion that the learned Judge was right in his conclusions.

Paragraph 17 of Mr. Panna Lal's book is contained in the section headed "Inheritance" and is as follows:

"17. Brother—(*a*) There is no difference between brothers of the whole blood and consanguine brothers (i.e., having the same father but different mothers). On the other hand, uterine brothers (i.e., having the same mother but different fathers) are not entitled to succeed as brothers. (*b*) There is no difference between divided and undivided or re-united brothers. They share the inheritance together in equal shares. (*c*) On the inheritance devolving upon brothers, a predeceased brother is represented by his sons, son's issue, or by his widow; and his share is taken by them."

In a subsequent portion of the book headed "Commentary", the following paragraph occurs at page 70:

"268. The custom in Kumaun differs from the Mitakshara in respect of the order of succession of brothers and their issue

also. Under the Mitakshara a brother excludes sons of a deceased brother, as he is nearer in relationship. But in Kumaun such nephews take their father's share. So also when there are no brothers, but only nephews, the latter under the Mitakshara share *per capita* (M.H.L., page 801) but in Kumaun they can take only their father's share *per stirpes*. This custom is admitted universally, though it is not mentioned in any of the published books."

It has been contended before us by the learned counsel for the appellant that the rules mentioned by Mr. Panna Lal should be strictly confined to the matters with which they deal and should not be extended at all. It is urged that what Mr. Panna Lal found and recorded deals only with those cases where the question is as to the succession of brothers and their issue to the property of a deceased brother, and that that rule ought not to be extended to a case like the present. It is conceded that in the previous litigation the rule laid down in Mr. Panna Lal's book was extended to the succession of uncles to the property of a deceased nephew. But it is argued that no further extension should be made. It seems to us, however, that the real basis of the Kumaun custom which modifies the rule of the Mitakshara is correctly stated in Dr. Joshi's book. Dr. Joshi has made a comparative study of the subject and has referred to the customs prevailing in the Punjab and has pointed out that the true basis of the rule which modifies the rules of the Mitakshara is that the estate is treated as if left by the last male in the family tree who has left male heirs. The matter is dealt with at page 287 of his book. At pages 293 and 294 Dr. Joshi quotes Sir William Rattigan who has laid down as one of the canons of customary law governing collateral succession "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 has pointed out that the result is that if a man dies sonless his brothers do not inherit as brothers but as sons of the father to whom the estate reverted on the sonless man's death. Dr. Joshi then states at page 294: "We find

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that the same rule is applicable to the Khasas. After the father the next heirs are all the descendants of the father. Full representation is allowed in this case too." At pages 296—298 the learned author has pointed out the main distinctions between the rules of the Mitakshara on the one hand and the rules based on custom prevailing among the hill-tribes on the other. He has rightly referred to the observations of their Lordships of the Privy Council in the case of *Soorendronath Roy* v. *Heeramonee Burmoneah* (1) where their Lordships have laid down: "But still there is in the Hindu law so close a connection between their religion and their succession to property, that the preferable right to perform the Shradh is commonly viewed as governing also the question of the preferable right to succession of property; and as a general rule they would be expected to be found in union." At page 298 Dr. Joshi points out that the doctrine of Shradh has no application to the Khasas and that "In their case the tie of blood cooperates with the tie of land to decide the law of inheritance." It seems to us that Dr. Joshi's book deals with the whole subject of inheritance among the hill-tribes of Kumaun in a comprehensive manner and points out the principles which underlie the modifications made by the customs prevailing in Kumaun to the rules of the Mitakshara. In our judgment the learned Judge of the lower appellate court is right in holding that the principle of representation having been clearly recognized by the customs prevailing in Kumaun and having clearly been emphasised in the judgment of the Commissioner of Kumaun dated the 6th of August, 1927, in the suit brought by the father of the appellant, the natural consequence is that the plaintiffs' case, based as it is on the same principle of representation, must succeed.

As we have mentioned above, there was a litigation in this family on the death of Lachhi Ram Sah. He died leaving a widow and a daughter and two daughter's sons. The question that arose was as to whether the

daughter and the daughter's sons were excluded from inheritance according to the Kumaun customs. The plaintiffs in that suit were Tularam Sah, the father of the appellant before us, and Indarlal Sah and Nathi Sah, who are defendants Nos. 2 and 3 in the present suit. In that suit also the contention was that the parties were not governed by the Mitakshara and that they were governed by the Kumaun customs and that according to those customs the then plaintiffs were entitled to the property of Lachhi Ram to the exclusion of his daughter's sons. The claim in that case also was based entirely on Mr. Panna Lal's book and the Commissioner of Kumaun had decreed the suit holding that Mr. Panna Lal's book was *prima facie* evidence of the custom relied on by the plaintiffs and that the burden to prove that the rule of succession was in accordance with the Mitakshara lay on the party alleging that the Mitakshara applied to the parties of that case. This Court agreed with the Commissioner of Kumaun and held in favour of the plaintiffs of that suit: *Tula Ram Sah* v. *Shyam Lal Sah* (1). Thus it is clear that it is an admitted fact that the parties to this appeal are not governed by the rules of the Mitakshara in the matter of inheritance. As we have pointed out above, the rule of inheritance contended for by the plaintiffs respondents is based on the doctrine of representation which prevails in Kumaun.

The learned counsel for the appellant has relied on the copy of a judgment dated 22nd August, 1928, of the Additional District Judge, Kumaun. The parties to that litigation were residents of a village in the district of Naini Tal. The competition was between the son of an uncle and the grandson of another uncle of the deceased owner of the property. The grandson had pleaded that he as well as his mother were heirs in addition to the uncle's son, who was the plaintiff, and another uncle's son who was not a party to the suit. Oral evidence of a custom in modification of the rule of

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the Mitakshara was given and reliance was also placed on Mr. Panna Lal's book. The trial court had held that the uncle's son, who was the plaintiff, being higher in degree, was entitled to preference in accordance with the rule of the Mitakshara and that the custom set up by the uncle's grandson, who was the defendant, had not been proved. The learned Additional District Judge agreed with the trial court and dismissed the defendant's appeal. Referring to Mr. Panna Lal's book, he observed: "In my opinion it would be unjustifiable for me to extend the rule laid down in this Manual of Customs. . . .In my opinion I should not be justified in extending the customs as laid down by Mr. Panna Lal so as to apply to all collaterals." He further observed that the defendant himself seemed very uncertain about the precise terms of the alleged custom on which he wished to rely, because he claimed in his written statement that he and his mother were both heirs. He also found that the defendant and his witnesses disagreed as to the precise nature of the custom, while the witnesses produced by the plaintiff (the uncle's son) had given evidence which was consistent with the plaintiff's case. In these circumstances the learned Judge dismissed the appeal of the uncle's grandson. In our opinion this judgment can be of no assistance in the decision of the case before us. That case was decided on a consideration of the defects in the pleading and the evidence of the defendant. Dr. Joshi's book had not been published at that time and attention had not been focussed on the true basis of the custom, viz., the principle of representation. Nothing had happened in the family of the parties of that litigation—at any rate, nothing was brought to the notice of the court—to show that the family had ever followed any other rule than that of the Mitakshara. In the case before us, on the other hand, there have already been two litigations which have clearly established that the family with which we are concerned is not governed by

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the Mitakshara in matters of inheritance. As mentioned above, it was not pleaded by the present appellant that his family was governed by the Mitakshara. In these circumstances the judgment relied upon can be no guide for the decision of this case.

For the reasons given above, we dismiss this appeal with costs.

FULL BENCH

Before Mr. Justice Bennet, Mr. Justice Ismail and Mr. Justice Verma

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SHIVA PRASAD GUPTA (DECREE-HOLDER) *v.* GOKUL CHAND AND OTHERS (JUDGMENT-DEBTORS)*

U. P. Encumbered Estates Act (Local Act XXV of 1934), sections 2(a), 16—"Debt"—Money directed to be paid, upon partition of joint family property, by one coparcener to another by way of owelty for making up equal lots or shares —Whether "debt"—Section 7(1)(a)—Stay of execution—Recall of certificate transferring the decree for execution by another court outside the province—Whether the Act is operative as regards rights and properties outside the province.

Upon a partition of joint family property consisting of various kinds of items the decree directed, by way of adjusting the shares of the several members and in order to make distribution of the property in lots or shares of equal value, that one of the members to whom some particular items had been allotted should pay a certain sum of money to another member to whom some other items had been allotted:

Held, that the amount decreed did not come within the word "debt" as defined in section 2(*a*) of the U. P. Encumbered Estates Act. The amount was in no sense a loan, either in its nature or its origin; it was in fact a portion of the joint family property which was allotted to one member of the family as a part of his share. Having regard to the intention and the scheme of the Act, it is clear that the Act was not at all intended to apply to the subject of partition among the members of a joint family, and there was no reason why the Act should be introduced in order to give one member of the

*First Appeal No. 209 of 1938, from a decree of Ratan Lal, Civil Judge of Allahabad, dated the 10th of October, 1936.