APPELLATE CIVIL

Before Mr. Justice Bisheshwar Nath Srivastava, Acting Chief Judge and Mr. Justice G. H. Thomas

BHAGAT AND OTHERS (DEFENDANTS-APPELLANTS) *v.* MADHO PRASAD AND OTHERS, PLAINTIFFS, AND OTHERS, DEFENDANTS (RESPONDENTS)* 1934 *August*, 14

Family arrangement—Arrangement based upon family custom, whether in recognition of pre-existing rights—Non-establishment or abandonment of custom, effect of—Registration Act (XVI of 1908), section 17(b)—Record of family arrangement, if compulsorily registrable—Limitation Act (IX of 1908), section 22(2)—Suit for possession instituted within time—Some defendants made plaintiffs after expiry of limitation—Suit, if barred by limitation.

Where a family arrangement is based upon a family custom it is an arrangement in recognition of pre-existing rights. The fact that the custom is not established to the satisfaction of the trial court or was abandoned is of no consequence as the validity of a family arrangement cannot be determined on the basis of the finding arrived at in respect of the custom. It is enough that there were disputes between the parties which were settled on the basis of a *bona fide* belief in the existence of the custom.

If such a document is a record of a family arrangement its registration is not compulsory because it is based on a recognition of a pre-existing right and cannot be regarded as creating any new title. *Satrohan Lal* v. *Nageshwar Prasad* (1), relied on. *Sakharam Krishnaji* v. *Madan Krishnaji* (2), *Bageshwari Charan Singh* v. *Jagar Nath Kuari* (3), *Sitla Baksh Singh* v. *Jang Bahadur Singh* (4), *Baldeo Singh* v. *Udal Singh* (5), *Bakhtawar* v. *Sunder Lal* (6), *and Gharib Lal* v. *Mukh Lal Rae* (7), referred to.

Where a suit for possession was within time on the date when it was instituted but subsequently some of the defendants were made plaintiffs when more than 12 years had expired after the date of the accrual of the cause of action, the suit cannot be held as barred by limitation as the case is fully covered by the provisions of section 22, clause (2) of the Limitation Act.

*Second Civil Appeal No. 309 of 1932, against the decree of Pandit Shyam Manohar Nath Shargha, District Judge of Gonda, dated the 14th of September, 1932, reversing the decree of M. Mahmud Hasan Khan, Subordinate Judge of Gonda, dated the 31st of March, 1931.

(1) (1916) 19 O.C., 76.
(2) (1881) I.L.R., 5 Bom., 252.
(3) (1931) L.R., 59 I.A., 130.
(4) (1935) I.L.R., 8 Luck., 694.
(5) (1920) I.L.R., 43 All., 1.
(6) (1925) I.L.R., 48 All., 213.
(7) (1927) I.L.R., 50 All., 31.

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Messrs. *Mohammad Ayub* and *Siraj Husain*, for the appellants.

Mr. *M. Wasim*, for the respondents.

SRIVASTAVA, A.C.J. and THOMAS, J.:—This is an appeal by defendants Nos. 1, 3, 4 and 5 against the decree, dated the 14th of September, 1932, of the learned District Judge of Gonda reversing the decree, dated the 31st of March, 1931, of the learned Subordinate Judge of that place. It arises out of a suit for possession of certain zamindari shares.

The facts of the case so far as they are material for the purpose of this appeal may briefly be stated as follows:

One Thakur Din Pandey owned the entire mahal Mahadei in village Ramwapur Gobindapur and a 2 annas 8 pies share in mahal Mohammad Bakhsh in village Meipathak in the Gonda district. He died on the 24th of September, 1882, leaving two widows Musammat Mahadei and Musammat Dilbasa. Musammat Dilbasa predeceased Musammat Mahadei and the latter died on the 16th of March, 1918. It is admitted before us that defendants 1 to 5 were the nearest reversioners of Thakur Din Pandey on the date of Musammat Mahadei's death. In the mutation proceedings following the death of Musammat Mahadei a large number of persons, who were the collaterals of Thakur Din Pandey, laid claim to mutation on the ground of an oral agreement by which the various branches of the family were, in accordance with the family custom, assigned shares in the property of Thakur Din Pandey. For reasons with which we are not concerned the alleged agreement was not given effect to by the Revenue Court which ordered mutation in the names of defendants 1 to 5. The collateral relations above referred to instituted the suit which has given rise to the present appeal claiming shares in the property in suit on the basis of the oral agreement mentioned above which is said to constitute a family arrangement. They also set

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up a family custom to the effect that when a person or his widow dies without issue all the collaterals who had the nearest common ancestor with the deceased (if a male) or with the husband of the deceased (if a widow) inherit the property *per stirpes*. The defendants Nos. 1 to 5 resisted the suit on the ground that it was time-barred. They also denied the alleged family arrangement and custom.

The trial court held that the family custom was not proved but accepted the defendants' contention about the family arrangement and dismissed the plaintiffs' suit. On appeal the learned District Judge held in agreement with the trial court that the suit was within time but disagreed with its finding on the question of family arrangement.

The only two questions raised on behalf of the appellants are as regards limitation and as regards family arrangement. The question as regards limitation may be disposed of very shortly. Two persons Babu Ram defendant 8 and Gomti defendant 10 were subsequent to the institution of the suit made plaintiffs. It is conceded before us that on the date when the suit was instituted it was within time. But it is argued that as Babu Ram and Gomti were made plaintiffs more than twelve years after the death of Musammat Mahadei the claim of these two persons was barred by limitation. The argument is fully answered by the provisions of section 22, clause 2 of the Limitation Act. We accordingly dismiss the contention.

Next as regards the family arrangement. The learned District Judge has found that after the death of Musammat Mahadei the parties to the present suit arrived at a verbal family arrangement dividing inheritance *per stirpes* subject to a few variations. After the completion of this arrangement the parties, on 4th June, 1918, filed an application for mutation (exhibit 3) in respect of Meipathak and a compromise (exhibit 5) in respect of Ramwapur Gobindapur. On the same date

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they also executed two agreements exhibits 1 and 2. The learned District Judge further holds that reading together all the four documents (exhibits 1, 2, 3 and 5), which were executed on one and the same date, it is clear that they are not records of the family arrangement reached at by the various claimants but only intimations to the Revenue Court as to the manner in which, according to a previous oral agreement, mutation of names was to be effected by that Court. Relying on a Full Bench decision of the Allahabad High Court in *Ramgopal* v. *Tulshi Ram* (1), he has decided that in the circumstances the family arrangement having as a matter of fact been made orally no question of registration of exhibits 1, 2, 3 and 5 arises.

The learned counsel for the appellants has strenuously argued that the conclusion of the learned District Judge that the documents exhibits 1, 2, 3 and 5 were not intended to constitute a record of the family arrangement was incorrect. He maintained that exhibits 1 and 2 in particular could not be treated as an intimation to the Revenue Court inasmuch as they were drawn up in the form of a deed of agreement. The argument is not without force. But having given our careful consideration to the matter we feel that it is not possible for us to go behind the finding of the learned District Judge on this point. In the Full Bench case to which reference has been made above their Lordships of the Allahabad High Court observed as follows:

> "Whether the terms have been 'reduced to the form of a document' is a question of fact in each case to be determined upon a consideration of the nature and phraseology of the writing and the circumstances in which and the purpose with which it was written."

The finding of the learned District Judge in the present case is based upon a careful consideration of the oral evidence of the witnesses who deposed to the family

(1) (1928) I.L.R., 51 All., 79.

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arrangement and of the circumstances in which the documents in question came into existence as deposed to by the witnesses. He has also discussed the nature of the documents. In fairness to him it should be pointed out that exhibits 1 and 2 were both filed in the mutation case and contain a mere partial record of the terms of the arrangement. In fact none of the four documents contains a complete record of all the terms of the agreement relating to the entire property. Under the circumstances we think that we must accept the finding as binding upon us in second appeal.

The learned counsel for the respondents in supporting the judgment of the lower appellate court also relied on *Satrohan Lal* v. *Nageshwar Prasad* (1). His argument was that even if exhibits 1, 2, 3 and 5 were treated as records of the family arrangement they were not liable to compulsory registration because they were based on a recognition of a pre-existing right and could not be regarded as creating any new title. The learned counsel for the appellants did not accept the correctness of the decision contained in *Satrohan Lal* v. *Nageshwar Prasad* (1). The decision is based to a great extent upon the meaning attached to the word "declare" as used in section 17, clause (*b*) of the Registration Act, by Justice WEST in *Sakharam Krishnaji* v. *Madan Krishnaji* (2). It may be pointed out that the interpretation placed upon the word "declare" by Justice WEST has received the approval of their Lordships of the Judicial Committee in *Bageshwari Charan Singh* v. *Jagar Nath Kuari* (3). The decision in *Satrohan Lal* v. *Nageshwar Prasad* (1) has been followed by this Court in a string of cases referred to in *Sitla Bakhsh Singh* v. *Jang Bahadur Singh* (4) to which one of us was a party. It has also been followed by the Allahabad High Court in *Baldeo Singh* v. *Udal Singh* (5); *Bakhtawar* v. *Sundar Lal* (6) and *Gharib Rai* v. *Mukh Lal Rai* (7). If we may say

(1) (1916) 19 O.C., 76.
(2) (1881) I.L.R., 5 Bom., 232.
(3) (1931) L.R., 59 I.A., 130.
(4) (1933) I.L.R., 8 Luck., 694.
(5) (1920) I.L.R., 43 All., 1.
(6) (1925) I.L.R., 48 All., 218
(7) (1927) I.L.R., 50 All., 31.

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so with respect, we are in entire agreement with the view expressed in *Satrohan Lal* v. *Nageshwar Prasad* (1). It is clear from the evidence in the case which has been accepted by the learned District Judge that the family arrangement in this case was based upon a family custom. It must therefore be held to be an arrangement in recognition of pre-existing rights. The fact that the custom was not established to the satisfaction of the trial court or was abandoned in the lower appellate court is of no consequence as the validity of the family arrangement cannot be determined on the basis of the finding arrived at in respect of the custom in this suit. It is enough that there were disputes between the parties which were settled on the basis of a *bona fide* belief in the existence of the custom. Thus we are of opinion that even if the documents filed in the mutation court were regarded as the record of the family arrangement their registration was not compulsory. The result therefore is that the appeal fails and is dismissed with costs.

Appeal dismissed.

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Before Mr. Justice Bisheshwar Nath Srivastava, Acting Chief Judge and Mr. Justice G. M. Thomas

BABU NARENDRA BAHADUR SINGH (JUDGMENT-DEBTOR-APPELLANT) *v.* OUDH COMMERCIAL BANK, LTD., FYZABAD (DECREE-HOLDER-RESPONDENT)*

Civil Procedure Code (Act V of 1908), section 48, schedule III, section 11, order XX, rule 11 and order XXI, rule 2—Limitation Act (IX of 1908), sections 19, 20 and 29—Execution of decree—Application of execution made 12 years after expiry of date of original decree but within 12 years of amended decree, whether time-barred—Property sought to be sold included in previous execution application—Decree-holder not temporarily

*Execution of Decree Appeal No. 69 of 1932, against the order of M. Ziauddin Ahmad, Subordinate Judge of Fyzabad, dated the 26th of November, 1932.

(1) (1916) 19 O.C., 76.