APPELLATE CIVIL

Before Mr. Justice Bisheshwar Nath Srivastava, Chief Judge, and Mr. Justice Ziaul Hasan

1936
October 21

DURGA BAKHSH SINGH AND ANOTHER (DEFENDANTS-APPELLANTS) *v.* CHANDRAPAL SINGH AND OTHERS (PLAINTIFFS, AND ANOTHER DEFENDANTS RESPONDENTS)*

Wajib-ul-arz—Construction of documents—Provision in Wajib-ul-arz that after husband's death widow will get her husband's assets ('malika' tarka shauhari hogi) *if she lives in husband's house—Widow, whether becomes absolute owner—*"Malika", *meaning of—Custom, proof of—One instance, if sufficient to prove custom in derogation of Hindu Law.*

Where a wajib-ul-arz provides that in case of non-existence of male issue, the legally married wife, provided she remains at the house of her deceased husband, shall get the assets of her husband (*malika tarka shauhari hogi*), *held*, that the proper construction to be put on it is that issueless widows succeed to the property of their husbands subject to the condition mentioned in the wajib-ul-arz and to Hindu Law.

The word "*malika*" is taken to mean absolute owner only where there is nothing to the contrary either in the context of the document in which the word "*malika*" occurs or in the surrounding circumstances. Where, however, the provision about the widow succeeding to her husband's property is made subject to the condition that she should stay at her husband's house, the condition is wholly inconsistent with the widow's absolute ownership of the property. *Durga* v. *Lal Bahadur* (1), referred to.

Held, that the proper construction to be placed upon a wajib-ul-arz is that which is compatible with the rules of Hindu Law. *Dhondhe Singh* v. *Sant Bakhsh Singh* (2), and *Sant Bakhsh Singh* v. *Bhagwan Bakhsh Singh* (3), relied on.

Held further, that only one instance is not by itself sufficient to establish a custom in derogation of the general Hindu Law.

Messrs. *M. Wasim* and *B. P. Misra*, for the appellants.

Mr. *Radha Krishna Srivastava*, for the respondents.

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*First Civil Appeal No. 59 of 1934, against the decree of Thakur Surendra Vikram Singh, Civil Judge of Partabgarh, dated the 29th of March, 1934.

(1) (1928) I.L.R., 4 Luck., 138. (2) (1900) 3 O.C., 181.
(3) (1930) I.L.R., 6 Luck., 365.

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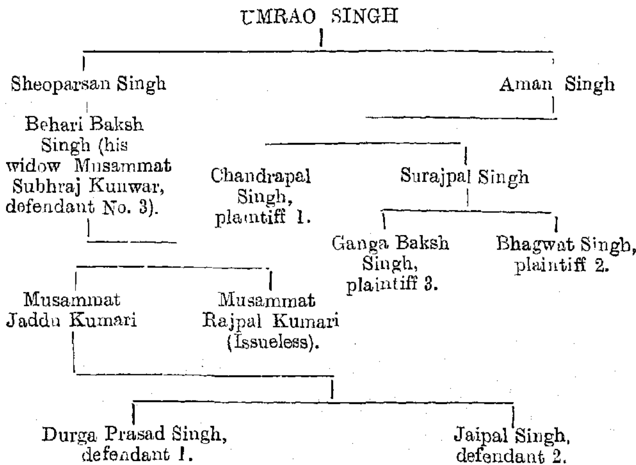
SRIVASTAVA, C.J. and ZIAUL HASAN, J.:—This is a first appeal against a decree of the learned Civil Judge of Partabgarh decreeing the plaintiffs-respondents' suit for a declaration that a gift made by defendant No. 3 in favour of her daughter's sons, defendants 1 and 2, is void and not binding on them after the death of defendant No. 3. The following pedigree will show the relationship between the parties:



It will be seen that while Chandrapal Singh plaintiff No. 1 is cousin of Behari Bakhsh Singh, husband of defendant No. 3, the other plaintiffs are nephews of Chandrapal Singh.

The dispute in the case relates to the property of Behari Bakhsh Singh, who died on the 22nd of April, 1933, leaving his widow Musammat Subhraj Kunwar, defendant No. 3, and two daughters, Musammat Jaddu Kumari and Musammat Rajpal Kumari. The appellants are the sons of Musammat Jaddu Kumari. The deed of gift in their favour was executed by defendant No. 3 on the 26th of July, 1933. The plaintiffs and Behari Bakhsh Singh are Besain Thakurs and the plaintiffs' allegation was that according to the custom of their tribe and family, daughters are totally excluded from inheritance.

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The defendants did not admit that the plaintiffs were the reversionary heirs of Behari Bakhsh Singh, but that position has been given up now. They also denied the custom alleged by the plaintiffs and set up another custom of the family by which a widow became full owner of the property inherited by her from her husband. The defendants therefore pleaded that Musammat Subhraj Kunwar was perfectly entitled by this custom to make a gift of the property in dispute to defendants 1 and 2. It was further alleged that the gift had been made by Subhraj Kunwar in accordance with the oral will of her husband. It was also pleaded that that gift was at best an acceleration of succession in favour of defendants 1 and 2 and could not therefore be impugned by the plaintiffs.

The learned Civil Judge framed seven issues on the pleas raised by the defendants and deciding all of them in favour of the plaintiffs decreed the suit.

The learned counsel for the appellants raised only two points in arguments before us, namely, (1) that according to the custom of the family Subhraj Kunwar became absolute owner of the property that devolved on her from her deceased husband and that therefore she was quite competent to make the gift in favour of the appellants, and (2) that daughters and daughters' sons were not excluded from inheritance by any custom of the family or tribe.

We take up the question of the alleged exclusion of daughters first. The property in dispute is situated in the village of Kandhauli. It appears however from the history of the Besain Thakurs given in the wajib-ul-arz of Kandhauli (exhibit 6), and the fact is not disputed, that the Besain Thakurs inhabiting the villages of Kandhauli, Parmai Sultanpur and Kashipur are descended from a common ancestor and belong to the same stock. The plaintiffs-respondents have filed wajib-ul-araiz of all these three villages and all of them emphatically lay down that daughters will not be entitled to

inheritance in any case. This plea was, in fact, not pressed by the learned counsel for the appellants and we decide, in agreement with the learned Civil Judge, that among Besain Thakurs of Kandhauli there is a custom of the exclusion of daughters from inheritance.

We also agree with the court below that the defendants have failed to prove that widows among Besain Thakurs become absolute owners of the property left by their husbands. Reliance is placed on clause (4) of the wajib-ul-araiz, exhibits 6, 11 and 12. In exhibit 6 the words are—

> "In case of non-existence of male issue, the legally married wife, provided she remains at the house of her deceased husband, shall get the assets of her husband (*malika tarka shauhri hogi*)."

In exhibit 11 the relevant portion of paragraph 4 is as follows:

> "In case any son died without leaving any issue, his legally married wife, provided she remains at her husband's house, shall be absolute owner (*malika kamilá*) of the property of the deceased."

Exhibit 12 says—

> "If there is no male issue, his legally married wife, if she remains at the house of her husband, shall get the assets of her husband (*tarka shauhri pawegi*)."

Stress is laid on the word "malika" used in exhibits 6 and 11 and it is argued that according to the pronouncements of their Lordships of the Judicial Committee, the word "malika" should be taken to mean absolute owner. This is however so only where there is nothing to the contrary either in the context of the document in which the word "malika" occurs or in the surrounding circumstances. In the present case we find that in all the three wajib-ul-araiz the provision about the widow succeeding to her husband's property is made subject to the condition that she should stay at her husband's house. This condition appears to us to be wholly inconsistent with the widow's absolute

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ownership of the property. In view of the words used, we cannot accept the interpretation put upon the proviso by the learned counsel for the appellants, namely, that the widow should not have deserted her husband during his lifetime. The plain and clear meaning of the words is that a widow would lose her right to her husband's property if she should leave his house for good. There is also force, in our opinion, in the argument that, looking to the mentality of Thakurs and to the total exclusion of daughters from inheritance, it cannot reasonably be held that it was intended to confer absolute rights on widows, for the principle underlying the exclusion of daughters is the desire that property should not go out of the family and this object will be completely frustrated if the widows are held to be absolute owners. Moreover, we are in complete agreement with what was held not only by a Bench of the late Court of the Judicial Commissioner of Oudh in *Dhondhe Singh* v. *Sant Bakhsh Singh* (1) but also by this Court in *Sant Bakhsh Singh* v. *Bhagwan Bakhsh Singh* (2), namely, that the proper construction to be placed upon a wajib-ul-arz is that which is compatible with the rules of Hindu Law; but to hold that the wajib-ul-araiz in question provide for the absolute ownership of widows is completely inconsistent with Hindu Law. Further, though we agree that every wajib-ul-arz should be construed on its own terms we may point out that in the wajib-ul-arz that was before this Court in the case of *Durga* v. *Lal Bahadur* (3) it was provided not only that the widow of an issueless proprietor became owner of his assets but also that she possessed power of transfer and yet the learned Judges who decided the case held that the power of transfer referred to should be interpreted as power of transfer in accordance with Hindu Law. We are therefore of opinion that on a proper construction of the wajib-ul-

(1) (1900) 3 O.C., 181. (2) (1930) I.L.R., 6 Luck., 365.
(1) (1928) I.L.R., 4 Luck., 133.

araiz before us it must be held that issueless widows succeed to the property of their husbands subject to the condition mentioned in the wajib-ul-araiz and to Hindu Law.

It was argued that in none of the wajib-ul-araiz was there any provision for devolution of property after the widow's death and that this was because widows were made full owners of the property. This omission, however, does not present any difficulty to our minds. In the first place there is also no provision in the wajib-ul-araiz that after the widow's death the property will devolve on her heirs, and in the second if, as we hold, it was meant that widows should succeed as Hindu widows only, there was no necessity of mentioning who should succeed after the widow.

Stress was also laid on the word " kamila " occurring in exhibit 11 and on the fact that in exhibits 11 and 12 the same expression is used with regard to the widow's rights, as to those of the sons but in view of the fact that men of the education and culture of Settlement officials like patwaris and qanungos were generally responsible for the phraseology of these wajib-ul-araiz we do not think it would be correct to treat the wording used in wajib-ul-araiz as one would treat the wording of a document prepared by a lawyer. Moreover, it is agreed by the learned counsel for parties that all the three wajib-ul-araiz before us record the same custom, so that no great reliance can be placed on the use of the word "kamila" in exhibit 11.

As instances of transfers by widows in proof of the widows' absolute rights, the learned counsel for the appellants referred us to some documents on record but at last he conceded that the only instance that he could press was that of one Musammat Bishun Kunwar executing a deed of gift on the 2nd of August, 1886, of property in Kandhauli in favour of her daughter's son, but this instance is not of much value, for even if we do not believe the evidence of P. W. 1 (Chandrapal

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Singh, plaintiff) that this transfer was made with the consent of the reversioners, we have it from one of the defendants' own witnesses that it was the slender means of the reversioners that prevented them from recovering the property. Moreover, one such instance by itself is not sufficient to establish a custom in derogation of the general Hindu Law.

We are therefore of opinion that the learned Civil Judge was right in his finding that the defendants have failed to prove the custom of widows' absolute ownership set up by them. The result is that the appeal fails and is dismissed with costs.

Appeal dismissed.

REVISIONAL CIVIL

Before Mr. Justice Bisheshwar Nath Srivastava, Chief Judge, and Mr. Justice Ziaul Hasan

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BALDEO PRASAD (APPLICANT) *v.* AJUDHYA PRASAD (OPPOSITE-PARTY)*

Stamp Act (II of 1899), sections 35 and 48—Agreement insufficiently stamped—Deficiency ordered to be made good under section 35 by civil court—Agreement admitted in evidence and decree passed inadvertently—Deficiency in stamp and penalty, if could be realised by civil court under section 35—Collector's power to realise deficiency in stamp and penalty under section 48.

Section 35 of the Stamp Act which is the only provision by which a civil court is authorised to realise deficiency in stamp is intended to apply before a document is admitted in evidence. Where, however, an agreement is admitted in evidence and a decree passed on it through an oversight without the deficiency in stamp and the requisite penalty having been realised section 35 is wholly inapplicable. Such amount can, however, be then recovered by the Collector under section 48 of the Stamp

*Section 115 Application No. 15 of 1935, against the order of S. Shaukat Husain, Civil Judge of Unao, dated the 3rd of January, 1935.