APPELLATE CIVIL

Before Mr. Justice Ziaul Hasan and Mr. Justice A. H. deB. Hamilton

1939 *September* 26,

PATIPAL SINGH AND OTHERS (PLAINTIFFS-APPELLANTS) *v* RAMPAL SINGH AND OTHERS (DEFENDANTS-RESPONDENTS)*

Hindu Law—Widow in possession of her husband's brother's estate for over twelve years—Possession by prescription, whether gives title to absolute estate or widow's estate—United Provinces Land Revenue Act (III of 1901), section 233(h)—Partition of mohal—Question of title not raised in partition proceedings—Same question if can be subsequently raised in civil court.

Mere possession by a Hindu widow of property to which she is not legally entitled is not sufficient to create an absolute title in her. The criterion is her own intention and conduct and the question whether she prescribed to an absolute estate or to a limited estate must be decided on the facts and circumstances of each case.

Where a Hindu widow obtained mutation of the property of her husband's brother in the teeth of opposition of the other heirs and there was absolutely nothing to show that she claimed to be in possession as a limited estate holder, she should be held to have prescribed to an absolute estate and not to a limited estate. *Deo Datt* v. *Raj Bali* (1), *Chandra Shekhar Singh* v. *Jagjiwan Bakhsh Singh* (2), *Sant Bakhsh Singh* v. *Bhagwan Bakhsh Singh* (3), *Hubraji* v. *Chandrabali Upadhiya* (4), *Uman Shankar* v. *Mst. Aisha Khatun* (5), *Chaudhri Satgur Prashad* v. *Kishore Lal* (6), *Sham Koer* v. *Dah Koer* (7), *Lajwanti* v. *Safa Chand* (8), *Thakur Gaya Bakhsh Singh* v. *Deo Singh* (9), *and Mst. Ram Raji* v. *Balbhaddar* (10), referred to.

If a question of title affecting the partition of a mohal which might have been raised in the partition proceedings is not raised and the partition is completed, section 233(*h*) of the United Provinces Land Revenue Act debars the parties to the partition from raising the question subsequently in a civil court. *Rai Bajrang Bahadur Singh* v. *Rai Beni Madho Bakhsh Singh* (11), followed.

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*Second Civil Appeal No. 122 of 1936 against the order of Pundit Tika Ram Misra, District Judge of Hardoi, dated the 17th March, 1936.

(1) (1928) 5 O.W.N., 653. (2) (1929) A.I.R., Oudh, 215.
(3) (1931) I.L.R., 6 Luck., 365. (4) (1931) 8 O.W.N., 6.
(5) (1923) I.L.R., 45 All., 729. (6) (1919) L.R., 46 I.A., 197.
(7) (1902) L.R., 29 I.A., 132. (8) (1924) L.R., 51 I.A., 171.
(9) (1934) I.L.R., 9 Luck., 484. (10) (1926) 95 I.C., 432.
(11) (1938) LL.R., 13 Luck., 508.

Messrs. *M. Wasim* and *Ali Hasan,* for the appellants.

Mr. *Hyder Husain,* for the respondent.

ZIAUL HASAN and HAMILTON, JJ.:—This is a plaintiffs' second appeal against a decree of the learned District Judge of Hardoi upholding the decree of the learned Civil Judge of that place by which the plaintiffs' suit for possession of property left by one Mst. Parbati was dismissed.

Mst. Parbati who died on the 3rd March, 1931, was the widow of one Jutta Singh, who had a separated brother, Dal Singh. Jutta Singh died about the year 1910 but some eight years before his death he had executed and got registered a will in respect of his property by which he bequeathed all his property in equal shares to five legatees, namely,

(1) His wife Mst. Parbati,

(2) His daughter Mst. Tejni,

(3) His brother Dal Singh's daughter's son Subedar Singh,

(4) Dal Singh's other grandson Ajrail Singh, and

(5) Kundan Singh a cousin of Subedar and Ajrail's father Puran Singh.

The will provided that Mst. Parbati would hold the property for her life and that after her death the remaining four legatees would be entitled to the entire property in equal shares. Of the five legatees Mst. Tejni and Subedar died in the lifetime of the testator but when Jutta Singh died his widow Mst. Parbati somehow or other came into possession of the entire property. On Dal Singh's death his property came into the possession of his widow, Mst. Jitni and when the latter died in 1914, some of the collateral relations of Dal Singh including Sumer Singh father of one of the present plaintiffs-appellants, applied for mutation of names Mst. Parbati also claimed the property left by Dal Singh and the Revenue Court ordered mutation in her favour, so that she remained in possession of Dal Singh's property also without any attempt on the part of the collaterals to dispossess her.

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On the 14th November, 1930, Mst. Parbati executed two deeds of gift in favour of Rampal Singh and Banke Singh, defendants-respondents, and some others. After her death in 1931 two suits were brought in the court of the Civil Judge of Hardoi for possession of the property left by Parbati against the present defendants-respondents. One of the suits, i.e. No. 57 of 1934, was brought by the present appellants and the other No. 77 of 1934, by some others. As both the sets of the plaintiffs claimed to be reversionary heirs of Jutta Singh and Dal Singh, the suits were consolidated and the plaintiffs in each suit made defendants in the other.

As between the two sets of plaintiffs, the learned Civil Judge held that the present appellants were the reversioners of Jutta Singh and Dal Singh but both the suits were dismissed on the ground that Mst. Parbati was in possession of the property not as a Hindu widow but that she held the property left by Jutta under the will and the property left by Dal Singh as an absolute owner by adverse possession. The plaintiffs in both the suits appealed to the learned District Judge but he dismissed both the appeals so far as it related to possession of the property in suit. The plaintiffs in suit No. 77 have submitted to the decree of the learned Judge but those of suit No. 57 have filed this appeal.

So far as the property left by Jutta Singh is concerned, it is argued that Parbati was in possession of the property merely as a Hindu widow and not in pursuance of Jutta Singh's will. It may be mentioned that the plaintiffs-appellants' case in the court below was that Jutta Singh had revoked his will and that the will was never acted upon. Both the pleas were however repelled by both the courts below and the evidence produced by the appellants disbelieved. The findings that the will was not revoked and that it was acted upon are findings of fact and as such binding on this Court. It was, however, argued that the Courts below have not given full weight to Ex. 33, which is a copy of a *goshwara* relating

to the mutation case that arose on Jutta Singh's death and showing that it was a case of mutation of *wirasat,* but we find that the learned Judges of both the courts below have considered this document but have rejected it as evidence of the allegation that Parbati succeeded to the property as heir to her husband and not on his will. We are of opinion that the lower courts were right in their view. In first civil appeal No. 74 of 1932 decided by this Court on the 4th February, 1935, also the entry of *wirasatan* in a similar register was not accepted as proof of mutation having been made as heir. Moreover, there was in the present case the statement of Puran Singh, father of Ajrail Singh, made in the mutation court to the effect that he on behalf of his minor son Ajrail Singh and Kundan Singh, the other surviving legatee, had consented to the property being mutated in favour of Parbati alone and the learned Judge finds that as both Puran Singh and Kundan Singh were well off, they could well afford to let the widow remain in possession of the entire property for her life. It was conceded that so far as the shares of the legatees who survived Jutta Singh, namely Ajrail Singh and Kundan Singh were concerned, the plaintiffs can lay no claim to them and that they can only claim the remaining one-third of the property. The learned counsel for the appellants finally relied on section 105 of the Indian Succession Act and argued that so far at least as the shares of Tijni and Subedar Singh were concerned, they must be deemed to have reverted to the estate of the testator and to have been left intestate by him. No doubt section 105 lays down that if the legatee does not survive the testator, the legacy shall ordinarily lapse and form part of the residue of the testator's property but we have seen that in the present case the legacy bequeathed to all the five legatees was in equal shares so that on Jutta Singh's death, the entire property left by him went to the three remaining legatees in three equal shares. We not only accept the lower court's finding but are

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ourselves of opinion that Parbati was in possession of Jutta Singh's property under the latter's will and this being so, her own share of the property must on her death go to the surviving legatees according to the terms of the will. Therefore the plaintiffs-appellants' claim to Jutta Singh's property cannot succeed.

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As regards Dal Singh's property, it was argued that merely from the fact that Parbati remained in possession of that property, it cannot be presumed that she prescribed to an absolute estate and it was urged that she prescribed only to a limited estate and the property must on her death pass to the reversioners. It is true that mere possession by a Hindu widow of property to which she is not legally entitled is not sufficient to create an absolute title in her. The criterion is her own intention and conduct and the question whether she prescribed to an absolute estate or to a limited estate must be decided on the facts and circumstances of each case.

In *Deo Datt* v. *Raj Bali* (1) it was held that it cannot be laid down as a rule that in no case can the possession of a Hindu female without title mature into absolute ownership and that the determination of the question must be based upon the circumstances of each case.

In *Chandra Shekhar Singh* v. *Jagjiwan Bakhsh Singh*, (2) it was held that it is a settled rule of law that the possession of a Hindu female, in respect of the property to which she has come into possession, but is not entitled to it by way of inheritance under the Hindu law, must be deemed to be adverse to the reversioners and cannot be considered to be that of a mere life estate holder, unless an arrangement or an agreement to that effect is proved to have been arrived at between her and reversioners or unless she has herself declared that she held only as a limited owner possessed of a life estate and that the mere fact that a Hindu female declares that she is in possession of such property by way of in-

(1) (1928) 5 O.W.N., 653. (2) (1929) A.I.R., Oudh, 215.

heritance does not show that she declares herself to be in possession as a limited owner and the real view in such a case would be that she not being entitled to possession by way of inheritance, her possession must be deemed to be that of a trespasser and consequently adverse against the reversioners, unless they prove that it was with their consent.

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Similarly in *Sant Bakhsh Singh* v. *Bhagwan Bakhsh Singh* (1) a Bench of this Court held that when a widow not entitled to anything more than maintenance out of her husband's estate is given possession of her husband's share, her possession would be *prima facie* adverse unless it can be shown that it was the result of any arrangement with the reversioners or that she took possession of the property prescribing only for the limited estate of a Hindu widow.

In *Hubraji* v. *Chandrabali Upadhiya* (2) also it was held that where mutation in favour of a widow is not proved to have been effected with the consent of the other members of the family with a view to console her and she remains in continuous possession of the property for more than twelve years without any right whatever, her acts and the circumstances attending the possession showing that she intends to hold the property as of right, she acquires title to the property by adverse possession and further that property acquired by a Hindu female by adverse possession becomes her *stridhan* and must go to her *stridhan* heirs.

The Allahabad High Court in *Uman Shankar* v. *Mst. Aisha Khatun* (3) held that where a Hindu widow took possession of the shares of her deceased husband, had her own name recorded in respect thereof and dealt with the property for a series of years as if it were her own absolute property, then in the absence of any admission on the part of the widow that her possession was no more than that of the widow of a separated Hindu in possession as such her possession must be taken to be adverse to the surviving brothers.

(1) (1931) I.L.R., 6 Luck., 365. (2) (1931) 8 O.W.N., 6.
(3) (1923) I.L.R., 45 All., 729.

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In the case of *Chaudhri Satgur Prashad* v. *Kishore Lal* (1) the widow of one of two joint brothers after the death of the surviving brother and his widow, successfully applied for mutation of names in respect of the property of which she was in possession alleging that she was owner of it as heir to her husband's separate property. Subsequently she put forward the same claim in suits and she also made a gift of part of the property to religious uses. It was held by their Lordships of the Judicial Committee that the above mentioned acts were public assertions by the widow of a right to exclusive possession and ownership and made her possession adverse within Schedule II, Article 144 of the Indian Limitation Act. The case would we think be still stronger when the widow comes into possession of the separate property of her husband's brother.

In *Sham Koer* v. *Dah Koer* (2), their Lordships of the Judicial Committee held that a possession as of right by the widow and daughter-in-law of a member of an undivided Mitakshara family of a portion of the undivided estate for twelve years bars the heirs of the deceased unless they can show that the possession was permissive.

In the present case so far from Parbati's possession over Dal Singh's property being permissive or proceeding by consent of the heirs, she obtained mutation in the teeth of opposition by the father of one of the present appellants and there is absolutely nothing to show that she claimed to be in possession as a limited estate holder. We are therefore of opinion that Parbati prescribed to an absolute estate and not to a limited estate in the present case.

The learned counsel for the appellants relies on the case of *Lajwanti* v. *Safa Chand* (3), in which it was held that a title acquired through adverse possession by a widow who claims and holds a widow's estate insures to the estate of her deceased husband and descends upon her

(1) (1919) L.R., 46 I.A., 197. (2) (1902) L.R., 29 I.A., 132.
(3) (1924) L.R., 51 I.A., 171.

death accordingly, but we have already said that there is nothing in the present case to show that Parbati claimed Dal Singh's property, or held it, as a widow. Reliance was also placed on behalf of the appellants on *Sant Bakhsh Singh* v. *Bhagwan Bakhsh Singh* (1) but in that case Mst. Lachhmin widow of Pancham Singh obtained mutation in respect of property left by her husband's brother Bahadur Singh on the statement made in the mutation court by Baldeo Singh the surviving brother that he and Mst. Lachhmin were entitled as heirs to equal shares in Bahadur Singh's property which means that she came into possession by consent of Baldeo Singh. Reference was also made in this case to the case of *Lajwanti* v. *Safa Chand* (2) and the learned Judges remarked:

> "In *Lajwanti* v. *Safa Chand* it was held that title acquired through adverse possession by a widow who claims and holds a widow's estate inures to the estate of her deceased husband and descends upon her death accordingly. In *Deo Datt* v. *Raj Bali* (3) one of us discussing the decision of their Lordships just quoted held that it could not be regarded as authority for the broad proposition that in every case whenever a Hindu widow is found in possession of property without title her possession must be regarded as that of a widow's estate but that the determination of the question as regards adverse possession must be based upon the circumstances of each case. In the present case we find that when Bahadur Singh died, Baldeo Singh was the person legally entitled to succeed to the estate. However, mutation was made in his name as well as in the name of Mst. Lachhmin at his request and with his consent . . . When Baldeo Singh stated that Mst. Lachhmin succeeded to a moiety share as an heir he could not possibly mean anything else than that she was to hold it as a limited owner. It is further to be noted that Mst. Lachhmin herself in the deed of gift Ex. 1 refers to her possession both with regard to the share which came in her possession on her husband's death as well as in regard to the share which she obtained on the death of Bahadur Singh as possession as an heir. This seems to us to show beyond all doubt that she never regarded herself as in possession of an absolute estate."

(1) (1931) I.L.R., 6 Luck., 365. (2) (1924) L.R., 51 I.A., 171.
(3) (1928) 5 O.W.N., 653.

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This quotation from the judgment in *Sant Bakhsh Singh's* case clearly shows that the decision in that case proceeded on facts entirely different from what we have in the case before us.

The learned counsel for the appellant also relies on the cases of *Thakur Gaya Bakhsh Singh* v. *Deo Singh* (1) and *Mst. Ram Raji* v. *Balbhaddar* (2) but we do not think these cases lay down any rule contrary to what we have stated above and which was laid down in the cases referred to above

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We are therefore definitely of opinion that Mst. Parbati cannot in the present case be held to have prescribed to a limited estate only.

For reasons given above the plaintiffs-appellants' claim fails in regard to both the properties. There is however another ground on which their claim is barred. It appears that during the pendency of the plaintiffs' appeal in the court of the District Judge certain co-sharers applied to the revenue court for partition of the mohals in which the property in suit is situated and that the appellants were impleaded in that partition case. They however failed to put up any claim in the partition court and the partition was confirmed in 1938. The plaintiffs' claim is now barred under section 233(*k*) of the United Provinces Land Revenue Act. In the case of *Rai Bajrang Bahadur Singh* v. *Rai Beni Madho Bakhsh Singh* (3) their Lordships of the Judicial Committee held that if a question of title affecting the partition of a mohal which might have been raised in the partition proceedings is not raised and the partition is completed, section 233(*k*) of the United Provinces Land Revenue Act debars the parties to the partition from raising the question subsequently in a civil court and that the word "partition" is not used in the Act in the narrow sense of mere arrangement into units of area but that it imports and includes the distribution of rights in the units among the sharers. It is true that at the time when the partition suit was brought

(1) (1934) I.L.R., 9 Luck., 484. (2) (1926) 95 I.C., 432.
(3) (1938) I.L.R., 13 Luck., 508.

the appellants' suit had been dismissed by the trial court but this did not relieve the appellants of the necessity of putting forward their claim in the partition court. Had they put forward their claim in the partition court, partition would probably have been stayed till final decision of their suit in the civil court. In any case as the plaintiffs' claim title to the property it was incumbent on them to bring a claim in the partition case to which they were parties but not having done so. their claim is barred by section 233(*k*) of the Land Revenue Act. We have allowed the respondents to file papers relating to the partition case in this Court, as they are papers that were not in existence and could not therefore be filed in the trial court.

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The result is that the appeal fails and is dismissed with costs.

Appeal dismissed.

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EWAZ MOHAMMAD, HAJI, AND ANOTHER (PLAINTIFFS-APPELLANTS) *v.* NAGESHWARI PRASAD AND ANOTHER (DEFENDANTS-RESPONDENTS)*

1939 *September* 28.

Under-proprietary right—Grove-land—Under-proprietors' right in grove—Superior proprietor holding decree for one-fourth produce of grove—Injunction restraining under-proprietor from cutting trees, whether can be allowed to superior-proprietor.

An under-proprietor has a heritable and transferable interest in the land and is to all intents and purposes proprietor of the land with the only restriction that he is liable to pay rent to the superior proprietor. Where, therefore, a decree entitled a superior-proprietor to one-fourth of the produce of the fruit trees growing in an orchard he cannot get an injunction against the under-proprietor of the grove restricting his use of the trees. The trees of the grove are the property of the under-proprietor and there is no reason why he should be

*Second Civil Appeals Nos. 258 and 259 of 1936, against the order of S. M. Ahmad Karim, Esq., District Judge, Fyzabad, dated the 14th July, 1936.