

APPELLATE CIVIL.

*Before Sir Shadi Lal, Chief Justice and Mr. Justice
Dalip Singh.*

CHARAN DAS (PLAINTIFF) Appellant

versus

MST. JAMNA DEVI AND OTHERS (DEFENDANTS)
Respondents.

1928

June 13.

Civil Appeal No. 1804 of 1924.

Specific Relief Act, 1 of 1877, section 42—Declaratory suit—after death of testator—regarding bequest of immoveable property—whether maintainable without consequential relief, i.e., cancellation of the will.

The testator, made one will devising a house to his wife (the defendant) for her lifetime only, and then another will conferring upon her the power to alienate, which after his death she exercised. The plaintiff thereupon sued for a declaration that the alienation was invalid.

Held, that as the defendant was still alive and hence entitled to possession under the first will which was not impeached, the plaintiff was not bound to sue for possession of the property.

Held further, however, that as the second will which was impeached had lost its ambulatory character and had become operative, the plaintiff was bound to ask for consequential relief in the shape of the cancellation of the will and pay court-fee accordingly.

Hukam Singh v. Mst. Ganga Devi (1), followed.

First appeal from the decree of Pandit Kundan Lal, Senior Subordinate Judge, Jullundur, dated the 1st April 1924, dismissing the plaintiff's suit.

FAKIR CHAND and CHANDRA GUPTA, for Appellant.

GOBIND RAM KHANNA and V. R. SETHI, for Respondents.

1928

JUDGMENT.

CHARAN DAS

v.
MST. JAMNA
DEVI.

SHADI LAL C.J.

SIR SHADI LAL C. J.—On the 9th of April, 1917, one Chuni Lal made a will by which he devised, *inter alia*, a house and a shop to his wife, *Mussammat* Jamna Devi, for her maintenance, and directed that after her death the property should be inherited by his three grandsons Daulat Ram, Rakha Ram and Charan Das. On the 12th of April, 1917, Chuni Lal made another will by which he conferred on his wife the power of alienating the property.

It appears that after the death of Chuni Lal, *Mussammat* Jamna Devi, in exercise of the authority vested in her by the second will, made a gift of the shop and one half of the house to her son Gondi Ram, and that the latter in his turn sold the shop to Hari Singh.

On the 9th of February, 1923, the plaintiff Charan Das brought the present action impeaching the gift as well as the sale; and asked for a declaration that “the will, dated the 12th of April, 1917, is ineffectual and null and void,” because the testator had no power to make an alienation of the property belonging to the joint family consisting of himself and his three grandsons. The learned Subordinate Judge held that the plaintiff was entitled to ask for possession of the property and that a suit for a mere declaration did not lie. He accordingly directed the plaintiff to amend the plaint and to convert the suit into one for possession; and upon the latter refusing to comply with that direction, the learned Judge has dismissed the suit.

It is true that, upon the allegation that the testator was not authorised to alienate the immoveable property belonging to the Hindu coparcenary, the

plaintiff would be entitled to claim possession of the property, but he does not wish to impeach the will of the 9th of April, 1917, by which *Mussammât Jamna Devi* was given the right to hold the property for her lifetime, and no Court can compel a plaintiff to impeach a transaction if he does not wish to do so. The plaintiff impeaches only the latter will which empowered the devisee to alienate the property, and it is clear that, as long as *Mussammât Jamna Devi* is living, he is not entitled to recover possession of the property. The trial Judge was not, therefore, justified in holding that the plaintiff should sue for possession of the property.

It is, however, common ground that the testator died in May 1917, and the will, challenged by the plaintiff, has lost its ambulatory character and has become operative. He is, therefore, bound to ask for consequential relief in the shape of the cancellation of the will and he must pay court-fee on that relief. The present case is similar to *Hukam Singh, etc. v. Mussammât Gāṅgā Devi, etc.* (1).

I would accordingly accept the appeal and remit the case to the trial Judge for redecision with the direction that he should afford the plaintiff a reasonable opportunity of amending the plaint and revaluing his relief. I leave the parties to bear their own costs in this Court.

DALIP SINGH J.—I agree.

N. F. E.

DALIP SINGH J.

Appeal accepted.

Case remitted.

1928

CHARAN DAS

v.

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