APPELLATE CIVIL.

Before Mr. Justice Addison and Mr. Justice Bhide.

KISHAN CHAND (PLAINTIFF) Appellant

versus

NARINJAN DAS AND OTHERS (DEFENDANTS) Respondents.

1928

June 11.

Civil Appeal No. 436 of 1924.

Indian Succession Act, XXXIX of 1925, section 131, illustration (ii) and section 180—Election—Hindu will—bequest of ancestral property—subject to proviso that if any of the heirs disputes testator's competency in this respect, he is to forfeit his legacy in the self-acquired property—legality of—Civil Procedure Code, Act V of 1908, section 11, Explanation IV—Res Judicata—*Will—previous suit contesting validity of will as a whole—whether bars subsequent suit contesting validity of the proviso.*

The testator, a *Khatri* governed by Hindu Law, left a will purporting to dispose of his ancestral (as well as self-acquired) immoveable property with a proviso to the effect that in the event of any of his heirs claiming his share in the ancestral property so disposed of, he should forfeit the self-acquired property bequeathed to him under the will. The plaintiff, being one of the heirs of the testator, claimed that the above-mentioned proviso in the will was null and void in law, and in the alternative stated that he elected to retain possession of the self-acquired property. The will also provided for funeral expenses as a charge upon the testator's entire immoveable property. In a previous suit between the parties the plaintiff had pleaded that the will was the result of undue influence and was therefore null and void, but had not specifically raised any objection to the above-mentioned proviso.

Held, that as the claim in the previous suit was confined to a share in the funeral expenses, and that claim could only have been defeated by showing that the will as a whole, or at any rate the provision in the will relating to the sharing of the funeral expenses, was null and void, and as the provision

1928

KISHAN CHAND v. NARINJAN DAS.

with regard to 'election', even if it were held to be inoperative, could not have rendered the whole will null and void or affected in any way the claim with regard to the share of the funeral expenses, the plaintiff's present objection to the applicability of the ' doctrine of election ' was not *res judicata*.

Held further, that it is the *nature* of the interest of the coparcener in Hindu Ancestral Property which renders its disposition by will ordinarily *ultra vires*, and that the bar to such disposition is not a part of the 'general law' of the country based upon public policy, but is dependent upon private rights under the personal law of the parties concerned The provision contained in the will giving to the heirs the right of 'election' was therefore valid and binding upon them.

Mangaldas v. *Ranchod Das Bhavanidas* (1), *Appan Patra Chariar* v. *Srinivasa Chariar* (2), *Brijraj Singh* v. *Sheodan Singh* (3), *Subbarami Reddi* v. *Rammama* (4), *Bhikhabhai* v. *Purshottam* (5), *Mohan Lal* v. *Niranjan Das* (6), *Cooper* v. *Phibbs* (7), In Re *Beale's Settlement* (8), In Re *Wright* (9), In Re *Nash* (10), *Cooke* v. *Turner* (11), Jarman on Wills, 6th Edition, Volume I, page 532, Mayne's Hindu Law, 9th Edition, paras. 404, 412 and 417, and Gaur's Law of Transfer in British India, 5th Edition, page 321, referred to.

In Re Oliver's Settlement (12), distinguished.

Held also, that there was no force in the argument that the proviso in the will was null and void on other grounds, *viz.*, (*a*) because it was an attempt to divert the order of succession under Hindu Law, or (*b*) because the provision was opposed to an antecedent recital in the will conferring on the plaintiff absolute ownership in respect of certain self-acquired property of the testator, or (*c*) because the provision was in the nature of what is known in English Law as a condition ' *in terrorem*.'

Mohan Lal v. *Niranjan Das* (6), distinguished.

Cooke v. *Turner* (11), followed.

(1) (1890) I.L.R. 14 Bom. 438.
(2) (1917) I.L.R. 40 Mad. 1122.
(3) (1913) I.L.R. 35 All. 337, 346 (P.C.).
(4) (1920) I.L.R. 43 Mad. 824.
(5) (1926) I.L.R. 50 Bom. 558.
(6) (1921) I.L.R. 2 Lah. 175.
(7) (1867) L.R. 2 H.L. 149, 170.
(8) (1905) 1 Ch. 256.
(9) (1906) 2 Ch. 288.
(10) (1909) 2 Ch. 450.
(11) (1846) 71 R. R. 808.
(12) (1905) 1 Ch. 191, 197.

1928

KISHAN CHAND v. NARINJAN DAS.

Section 131, illustration (*ii*) of the Indian Succession Act, referred to.

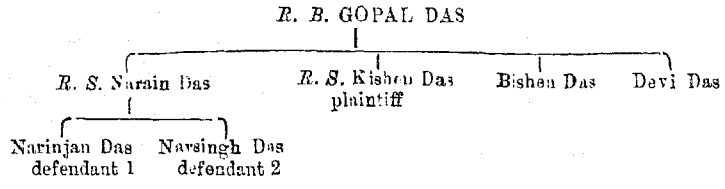
First appeal from the decree of Mir *Ghulam Yazdani, Subordinate Judge, 1st Class, Lahore, dated the 5th January 1924, dismissing the plaintiff's suit.*

MEHR CHAND MAHAJAN, ANANT RAM KHOSLA, and JAGAN NATH AGGARWAL, for Appellant.

MOTI SAGAR, W. CHANDRA DATT, BADRI NATH and S. L. PURI, for Respondents.

JUDGMENT.

BHIDE J. BHIDE J.—The pedigree table of the parties concerned is as follows :—



On the 9th July 1912, *Rai Bahadur Lala* Gopal Das died at the ripe old age of about 80, leaving a will, dated 12th January 1912, by which he made a complete and final disposition of all his property, ancestral as well as self-acquired. The will was apparently carefully drawn up with the help of a lawyer ; but soon after his death it became unfortunately the subject-matter of litigation amongst his heirs which, in one form or another, has lasted to this day.

The suit out of which the present appeal arises was lodged on the 21st April 1921, and was for possession of 1/4th share in certain shops situated at Lahore and Amritsar and a large area of land with a right of occupancy situated in the Jhelum Canal Colony in the Sargodha District. The parties are

1928

KISHAN CHAND v. NARINJAN DAS.

BHIDE J.

Khatris and are governed by Hindu Law. There had been a disruption of the joint family and plaintiff was living separate from his father for several years before his father's death. The shops in dispute were, however, admittedly ancestral property and had not been partitioned. The land in the Sargodha Canal Colony had been acquired by *Rai Bahadur* Gopal Das as a grant from Government in recognition of his services. By the will, the shops in dispute were allotted to defendants Nos. 1 and 2 who used to live with *Rai Bahadur* Gopal Das and manage his property and were apparently his favourites. According to Hindu Law, *Rai Bahadur* Gopal Das had no right to make a disposition of the ancestral property by will and he had foreseen the possibility of objections being raised to the will on that ground. But he had made a provision in the will for that contingency by giving a right of 'election' to his heirs in the matter, on the lines of what is known in English Law as the 'Doctrine of election.' The provision was as follows:—

"If any of my heirs claims a right in the said property on the ground that it is ancestral property and does not act upon this my will, then the arrangement to be followed shall be this, that he shall have to give back all the self-acquired property to be taken by him as detailed above to my two grandsons Narinjan Das and Narsingh Das and that he shall be entitled to get only his share out of this ancestral property according to Hindu Law. My descendants shall have title to my self-acquired property according to the conditions set forth above only in case they abide by my will in regard to the ancestral property and if they challenge my power of making a

will with respect to the ancestral property they shall not be entitled to any of my self-acquired property and the will so far as it relates to the self-acquired property bequeathed to them as above shall be considered as cancelled and that property shall also go to my grandsons, *viz.*, Narinjan Das and Narsingh Das after my death."

Plaintiff's allegation in the plaint was that the above provision in the will was null and void in law and equity and was not binding on him. He, however, stated in paragraph 17 of the plaint that if the Court held the provision to be valid and binding, he elected to retain possession of the self-acquired property.

The land in the Sargodha Colony was not mentioned in the will. The defendants pleaded that *abadkari* rights in this land had been granted to *Rai Bahadur* Gopal Das in 1905, but the *Rai Bahadur* relinquished those rights and got the land transferred to defendant 1 with the sanction of the Financial Commissioner. The land was accordingly mutated in the name of defendant No. 1 on the 14th September 1907, and he had been in possession ever since the transfer. Plaintiff disputed the genuineness as well as the validity of this transfer. His contentions were that the transfer had been fraudulently obtained by defendant No. 1 without the knowledge or consent of *Rai Bahadur* Gopal Das and was also void as it was not sanctioned by the Financial Commissioner in the manner required by law.

A large number of other pleas were raised giving rise to as many as 24 issues, but it is unnecessary to go into them for the purpose of this appeal. The learned Senior Subordinate Judge found the material issues against the plaintiff and dismissed the suit.

1928

KISHAN CHAND v. NARINJAN DAS.

BHIDE J.

Plaintiff has appealed and the two main points for decision in appeal may be stated as follows :—

(*i*) Is the provision in the will relating to the disposition of the ancestral property with the option of 'election' given to the plaintiff as between the self-acquired and ancestral property null and void and not binding on the plaintiff?.

(*ii*) Was the transfer of the land in the Sargodha Colony in favour of defendant No. 1 void for any reason and is plaintiff entitled to claim 1/4th share in it?

As regards the first point, it was contended on behalf of the respondents that the validity of the will had already been the subject-matter of litigation between the parties and the matter was therefore '*res judicata*.' It appears that in the year 1916, defendants Nos. 1 and 2 sued the plaintiff for recovery of Rs. 737-12-2½ on account of his share of the funeral expenses of his father and mother on the basis of a provision in the will to the effect that those expenses were to be shared by his sons and grandsons and were to be charged on his entire immoveable property. In that suit, plaintiff pleaded *inter alia* that the will was the result of undue influence and therefore, null and void, but did not specifically raise any objection to the provision in the will now under consideration. The contention of the learned counsel for the respondents is that owing to his failure to raise the objection in the previous suit, plaintiff is now precluded from raising it on account of Explanation IV to section 11, Civil Procedure Code. This contention does not appear to me to be sound. The claim in the previous suit was confined to a share of the funeral expenses, and that claim could only have been defeated by showing that the will as a

whole or at any rate the provision in the will relating to the sharing of the funeral expenses was null and void. The provision with regard to 'election' even if it were held to be inoperative, could not have rendered the whole will null and void or affected in any way the claim with regard to the share of the funeral expenses. In the circumstances I feel no hesitation in holding that the matter is not *res judicata* and the question must therefore be decided on its merits.

The doctrine of 'election' is an equitable rule of English law. It is now incorporated in Chapter XXII of the Indian Succession Act, 1925, which applies to Hindus. But, even before, the doctrine was held to be applicable to Hindu wills *Mangaldas* v. *Ranchhod Das Bhavanidas* (1) That doctrine has been stated by Jarman as follows:—"That he who accepts a benefit under a deed or will must adopt the whole contents of the instrument conforming to all its provisions and renouncing every right inconsistent with it. If, therefore, a testator has affected to dispose of property which is not his own and has given a benefit to the person to whom that property belongs the devisee or legatee accepting the benefit so given to him must make good the testator's attempted disposition; but if on the other hand he choose to enforce his proprietary rights against the testator's disposition, equity will sequester the property given to him for the purpose of making satisfaction out of it to the person whom he has disappointed by the assertion of his rights.' (*Vide* Jarman on Wills, Vol. I, page 532, 6th Edition).

It will appear from the above that the option given to the plaintiff in the will in the present case

(1) (1890) I. L. R. 14 Bom. 438.

1928

KISHAN CHAND v. NARINJAN DAS.

BHIDE J.

as regards choice between the ancestral and self-acquired property was in conformity with the equitable doctrine of 'election' as stated above. The learned counsel for the appellant has not attempted to challenge the applicability of that doctrine to Hindu wills generally but has argued that the doctrine is inapplicable in the present instance, as the provision with regard to 'election' is 'illegal.' In support of this argument he has relied upon the decision of Farwell J. in '*Re Oliver's Settlement* (1), in which the following passage occurs :—

" The doctrine of election is a rule of equity by virtue of which the Court of Equity compels a recipient of the testator's bounty to conform to all the legal provisions of the will. It is somewhat startling that this Court should be asked to extend it to illegal provisions, and to apply its doctrines for the purpose of enabling a testator to evade a rule of law founded on public policy. Lord Northington puts it somewhat strongly. After referring to the various attempts that had been made at law to evade the rule against perpetuity, he says: " It seems to me most surprising, that after these puerile attempts had been made upon the narrow, fettered and technical reasonings of Courts of law, and been rejected and exploded with contempt and derision, that it could ever have entered into the head of man to think, that he could subvert the fundamental principles of property, by the aid of this Court." And Sir Richard Arden M. R. in *Mainwaring* v. *Baxter* where another attempt at evading the rule against perpetuities was made, said that he adopted Lord Northington's words. Kekewich J. has said, and it is the basis of his judgment, that it is immaterial whether

(1) (1905) 1 Ch. 191, 197.

the appointment fails because it offends some rule of law, or because it offends the construction of the power. With all deference to him, the difference appears to me to be vital. In the one case the testator openly and avowedly breaks the general law, and asks the Court of Equity to participate in his illegal act by giving effect to it ; in the other he merely attempts to exceed the limits set to his power by the donor thereof in the particular case—limits which the donor might have extended without any breach of general law. Thus, limitations which infringe the rule against perpetuity are void on the face of the will but a devise of Blackacre by a testator who has no interest therein is not illegal nor is it void on the face of the will, but depends on an inquiry into the testator's title."

"It is the well-known distinction pointed out by Lord Westbury in *Cooper* v. *Phibbs* between the general law of the country, for ignorance of which no one is excused, and private rights which depend on the ascertainment of particular facts."

The contention of the learned counsel for the appellant is that an attempt to dispose of 'ancestral property' under Hindu Law is 'illegal' in the same sense as an attempt to dispose of property against the rule of perpetuities under English Law. This contention is not, I think, well founded. The passage quoted above shows that the Court refused to give effect to the doctrine of 'election' in '*Re Olivers Settlement*' because the testator had attempted to evade a rule based on *public policy*. The learned Judge referred in this connection to the distinction between 'general law of the country for ignorance of which no one is excused and private rights which depend upon ascertainment of parti-

1928

KISHAN CHAND v. NARINJAN DAS.

BHIDE J.

cular facts', which was pointed out by Lord Westbury in *Cooper* v. *Phibbs* (1), while discussing the maxim '*Ignorantia juris haud excusat.*' The point for decision, therefore, is whether the rule according to which a person governed by Hindu Law has no power to dispose of joint 'ancestral property' by will falls under the former category. I think it does not. The rule appears to be simply a result of the peculiar nature of joint ancestral property under Hindu Law, according to which the members of the family are co-parceners with an undefined interest therein—which accrues on birth and passes by survivorship on death. As a matter of fact there does not appear to be any specific rule of Hindu Law prohibiting disposition by a co-parcener of joint ancestral property by will. But the very nature of the interest of the co-parcener in the property renders such disposition *ultra vires*. But apart from this, no principle of public policy or equity appears to be involved in the rule. In fact Courts of justice have stepped in to modify the rigidity of Hindu Law in this respect and although 'wills' were originally unknown to Hindu Law, testamentary power to a limited extent has now come to be recognised as a result of judicial decisions of the High Courts and the Privy Council (*cf.* paras 404, 412 and 417 of Mayne's Hindu Law, 9th edition). It is now well established that a Hindu may bequeath his self-acquired property and if there are no co-parceners at all, there would be apparently nothing to prevent him from disposing of even his ancestral property by will (*vide* Mayne's Hindu Law, para. 417, 9th Edition). In a Madras case *Appan Patra Chariar* v. *Srinivasa Chariar* (2), it has been held on the

(1) (1867) L. R. 2 H. L. 149, 170. (2) (1917) I. L. R. 40 Mad. 1122.

1928

KISHAN CHAND v. NARINJAN DAS.

BHIDE J.

basis of an *obiter dictum* of their Lordships of the Privy Council in *Brijraj Singh* v. *Sheodan Singh* (1). that a disposition of co-parcenery property by a Hindu can be upheld if the consent of all the co-parceners, being adults, has been obtained. This would imply that the disposition is not absolutely void, but only voidable at the instance of the other co-parceners. The correctness of this decision has been doubted in some subsequent rulings, *vide Subbarami Reddi* v. *Ramamma* (2), *Bhikhabhai* v. *Purshottam* (3), but howsoever that may be, it seems clear that the bar to the disposition of ancestral property by will under Hindu Law is not based on public policy and cannot be said to be a part of the 'general law' of the country of which ignorance cannot be excused. The question is merely one of private rights under the personal law of the parties concerned.

The English rule against perpetuities, on the other hand, was evolved by the Courts of equity to frustrate attempts to create unbarrable entails by means of bequests which were opposed to common law and is a part of the general law of England. It is founded purely on public policy. 'A perpetuity' said Lord Guilford 'is a thing odious in law and destructive to the common wealth ; it would put a stop to commerce and prevent the circulation of the riches of the kingdom and therefore not to be countenanced in equity.' (*Vide* Commentary at page 321 of Gour's Law of Transfer in British India, 5th Edition.) When, therefore, it was found that the doctrine of 'election' was being abused to create estates prohibited by law on grounds of public policy, Courts refused to give effect to it.

(1) (1913) I.L.R. 35 All. 337, 346 (P.C.). (2) (1920) I.L.R. 43 Mad. 824. (3) (1926) I. L. R. 50 Bom. 558.

1928

KISHAN CHAND v. NARINJAN DAS.

BHIDE J.

The case-law in India on the subject of 'election' seems to be rather meagre. No ruling of any High Court in India dealing with the precise point raised, *viz.*, the scope of the rule laid down in '*Re Oliver's Settlement*' (1), was cited. That rule appears to have been followed in some later English cases—see *e.g.*, *In Re Beale's Settlement* (2), *In Re Wright* (3) and *In Re Nash* (4). In the first two cases, the doctrine of election came into conflict with the rules against perpetuities as *In Re Oliver's Settlement* (1), and it was not given effect to. *In 'Re Nash'* (4), the provision as to 'election' came into conflict with another rule of the same category based on public policy, the rule against 'double possibilities' and was, therefore, held to be void. It would thus appear that in England the rule laid down in '*Re Oliver's Settlement*' (1) has been followed only where the doctrine of 'election' came into conflict with a rule of general law of the country based on public policy. A bequest of 'ancestral property' may not be permissible under Hindu Law; but, as stated already, no infringement of any rule of equity or public policy seems to be involved therein. Such a bequest, even if it be void, will not therefore be 'illegal' within the meaning of the rule laid down in '*Re Oliver's Settlement*' (1). The bequest of joint ancestral property by a person governed by Hindu Law seems to stand on precisely the same footing as a bequest by a person of property not belonging to him along with his own—which is the typical case falling within the scope of the 'doctrine of election.' The bequest of property belonging to another person is also void in law but not 'illegal' in the above

(1) (1905) 1 Ch. 191, 197.
(2) (1905) 1 Ch. 256.
(3) (1906) 2 Ch. 388.
(4) (1909) 2 Ch. 450.

1928

KISHAN CHAND v. NARINJAN DAS.

BHIDE J.

sense. I, therefore, hold that the rule in ' *Re Oliver's Settlement* ' (1), does not apply to the present case.

It was next urged by the learned counsel for the appellant that the provision in the will with respect to ' election ' was null and void on other grounds, *viz.*, firstly, because it was an attempt to divert the order of succession under Hindu Law, secondly, because the provision was opposed to an antecedent recital in the will conferring on the plaintiff absolute ownership in respect of certain self-acquired property of the testator and lastly, because the provision was in the nature of what is known in English Law as a condition ' *in terrorem.*' None of these contentions seems to have any force. The first contention only relates to another aspect of the question whether a Hindu testator is entitled to dispose of ancestral property by will and needs no further discussion. In support of the second contention *Mohan Lal* v. *Niranjan Das* (2) was cited as an authority ; but that ruling appears to have no bearing on the facts of this case. In that case, absolute ownership was conferred on a widow in respect of certain property and it was then provided that if she did not alienate the property during her lifetime the property would pass to certain reversioners. It was held that this provision, which was in the nature of a gift over of what might remain at the widow's death, was void for uncertainty and, therefore, inoperative. No such question arises in the present case. The will must obviously be read as a whole and the ownership of the house conferred on the plaintiff in the earlier part of the will must be taken to be subject to the condition that he did not claim any share in the ancestral property bequeathed to defendants Nos. 1 and 2. There was no uncertainty in the disposition so far as the testator was concerned, nor could any uncer-

(1) (1905) 1 Ch. 191, 197. (2) (1921) I. L. R. 2 Lah. 175.

1928

KISHAN CHAND v. NARINJAN DAS.

BHIDE J.

tainty arise by the action of third parties. It was for the plaintiff himself to decide whether he would or would not take the self-acquired property of the testator on the condition specified in the will. Unless he accepted the condition the property could not vest in him at all. No question of 'uncertainty' or 'divesting' of a 'vested' estate appears, therefore, to arise. As to the last contention, *viz.*, that the condition was merely '*in terrorem*' there is nothing in the will to indicate that the condition was inserted merely to 'frighten' away objectors and was not really intended to be acted upon. The testator in fact made a suitable provision for the contingency of an objection being raised and this indicates that he really expected the contingency to occur. In *Cooke* v. *Turner* (1), a condition of this nature was held to be perfectly valid and operative in law. In India also its validity appears to be recognized in section 131 of the Indian Succession Act, (*cf.* illustration 2 to that section.).

I, therefore, hold that the provision relating to 'election' under discussion is valid and binding on the plaintiff. He has stated in the plaint that if this provision is binding on him he will retain the self-acquired property of the testator which was bequeathed to him and of which he is in possession. Consequently he is not entitled to claim any share in the ancestral property in possession of the defendants.

* * * * * *

(The remainder of the judgment is unnecessary for the purposes of this report. Ed.)

* * * * * *

ADDISON J.

ADDISON J.—I agree.

N. F. E.

Appeal dismissed.

(1) (1846) 71 R. R. 808.