PRIVY COUNCIL.

ATAR SINGH
v.
THAKAR SINGH.

P. C.
1908
June 17.
July 16.

[On appeal from the Chief Court of the Punjab.]

Hindu law—Alienation by father—Ancestral and self-acquired property—Onus of proof—Suit to set aside alienation as being made without legal necessity—Conjecture and positive proof.

In a suit to set aside a deed of sale of immoveable property executed by the plaintiff's father, who had succeeded to it (*inter alia*) as the next reversionary heir on the death of the widow of the last male owner, the plaintiff alleged that the land sold was ancestral property, and that the alienation had been made without legal necessity and was therefore void.

The evidence showed that the last male owner had acquired some lands in the district by purchase and others on abandonment by collateral relatives, but there was no evidence defining the boundaries of these portions respectively, that being merely a matter of conjecture.

Held, that the onus was on the plaintiff to show that the property alienated was not self-acquired in the hands of the last male owner; and that in seeking to discharge such onus he could not, under the circumstances, be assisted by conjectures, however reasonable, in place of positive proof.

APPEAL from a decree (26th May 1903) of the Chief Court of the Punjab, which reversed a decree (30th March 1899) of the Court of the District Judge of Amritsar.

The defendants were appellants to His Majesty in Council.

The main question involved in this appeal was whether and to what extent a deed of sale executed on 7th May 1894 by one Dyal Singh, the respondent's father, was or was not binding on the respondent, the plaintiff in the suit.

The property sued for consisted of land and a house situate in the village of Tungbala, and seven houses situate in the city of Amritsar, which was at one time the property of one Sirdar Dhanna Singh and on his death passed to his widows. On 13th

* *Present:* Lord Robertson, Lord Atkinson, Lord Collins, Sir Andrew Scoble, and Sir Arthur Wilson.

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April 1879 Rajind Kaur, one of the widows, made a gift of certain other properties to her daughter Khem Kaur, and on 15th October 1891, Rajind Kaur made a gift of the properties in suit to Gurdit Singh, the son of Khem Kaur.

Dyal Singh, who was the next reversioner to Dhanna Singh's estate on the death of Rajind Kaur, was unable from want of funds to take any action to establish his rights in connexion with the above and other alienations of Dhanna Singh's estate made by the widows: and after various unsuccessful efforts to obtain money by sharing the property with the lender, Dyal Singh, on 27th October 1891, entered into an agreement with the appellants Man Singh, Kharak Singh, and Harnam Singh, by which he was to give them "$\frac{6}{16}$ths share of each and every alienated property, for cancellation of the alienations of which a decree may be passed by the Courts concerned, in lieu of the expenses, which may be incurred by the said persons in Courts, the help, which they may give and the labour and time which they may expend in the prosecution of the case relating to the said alienation." The expenses to be paid were not to include pleader's fees, as to which Dyal Singh on the same date entered into a separate agreement with the appellant Atar Singh to give him a $\frac{3}{16}$th share in each property recovered by the exertions of the pleader in lieu of any payment for his services.

In pursuance of the agreements a suit was at once brought against Gurdit Singh, and on 26th April 1895 a final decree was made by the Chief Court of the Punjab declaring that the deed of gift dated 15th October 1891 was inoperative after the death of Rajind Kaur. That lady died on 27th April 1894 and on 7th May 1894, Dyal Singh executed the deed of sale, which it was sought to set aside in the suit, out of which this appeal arose, and by which a $\frac{3}{64}$th share in the properties in suit was conveyed to the appellants and other members of their family.

The suit was brought on 16th October 1897, on behalf of the two sons of Dyal Singh, then minors, Thakar Singh and Kehr Singh, the latter of whom died pendente lite. The plaint alleged that the sale was without legal necessity, and that the property in suit was ancestral property, and therefore not liable to alienation by Dyal Singh except for necessity, and it was prayed that

the sale be declared not binding on the reversionary interests of the plaintiffs.

Dyal Singh, who was made a defendant, alleged that he had received no consideration for the deed and had executed it under the influence of liquor. The vendee defendants pleaded that the property was not ancestral, that Dyal Singh had full power of alienation, that the alienation was for necessity, and that the plaintiff Thakar Singh, having been born after 27th October 1891, had no locus standi to challenge the sale.

Issues were raised, of which the only one now material was, whether the property in suit was ancestral or self acquired. Both Courts in India found that Thakar Singh was born on 7th March 1893; and that the houses in Amritsar were not ancestral; and the only dispute on appeal was as to the land and house in the village of Tungbala.

As to this the District Judge held that the property in dispute situated in Tungbala was not ancestral estate; and on that ground made a decree dismissing the suit. He concluded his finding as to the property not being ancestral as follows:—

"In the absence of reliable evidence, or reliable evidence showing clearly what was the area of the original Tungbala, how much of this was taken up in the Rakh Shikargarh, and how much joined on to the City of Amritsar, which became nazul or Crown lands, and how much was restored back by the Sikh Raj to the Sardar, and whether this was out of Tung lands, or out of other lands included in the Rakh, or partly out of both, it appears to me to be absolutely hopeless to be able to decide that the true character of the land is ancestral so far as plaintiff, Thakar Singh, is concerned.

"A very difficult task was laid on plaintiff to perform, viz., to prove positively that the land in suit was ancestral. The plaintiff had conjectures to help him, as I have already described, and very reasonable conjectures, too—but after all, only conjectures—whereas absolute certainty was demanded. The nature of the Sardar's rights in the village was decidedly peculiar; prima facie, they were acquired rights, that is, by self acquisition; for all individual rights were lost by the confiscation by the Sikh Raj, and had it not been for the Sardar, the lands then taken would have still formed part of Rakh Shikargah, as the other lands of other villages then included. Under these circumstances I have come to the conclusion that plaintiff has failed to establish affirmatively that the land in suit is ancestral. I have come to this conclusion the more readily, as the Sardar had 1,197 ghumaos of land, and all the land has been sold by his widows, so that what the Sardar got from the common ancestor, Ghaur Singh, and from his collaterals, may well be regarded as included in that sold by the widows, and that the land now in dispute is self-acquired. It is said, with some show of reason, that the original land of

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the old village of Tung is that included in Chhambwala well where all the Tung Jats have proprietary rights, so it might reasonably be supposed that the Sardar's ancestral lands were also in the lands of this well, and, if so, no part of the lands of this well is in dispute."

The Chief Court of the Punjab (*Mr. J. A. Anderson* and *Mr. F. A. Robertson*), on appeal held that the property was ancestral; that the sum of Rs. 5,480 was properly incurred for legal necessity; and that Rs. 3,500 had been received by the defendants as the value of certain shops sold in Amritsar. In accordance with these findings the Chief Court made a decree, declaring that the plaintiff was not affected by the deed of sale, except to the extent of Rs. 1,980, which amount remained charged on the land.

The material portion of the judgment was as follows:—

The next point to consider is whether or not the property was ancestral and whether Thakar Singh has any locus standi to sue. It was suggested in general terms that the conditions of the agreements are so monstrous that the question of locus standi is in some remote way affected by the fact, but no serious ground was put forward, upon which it would be possible to admit that the plaintiff has any locus standi or could obtain the relief sought; unless it be held that the property is ancestral. However unfair the agreements may be, and however much one of them may or may not be open to animadversion, we are clear that, unless the property be held to be ancestral, the suit must fail. We therefore proceed at once to what is the main point in the case and what has been the crucial point throughout, *i.e.*, is the property in suit 'ancestral' in whole or in part in the sense in which that term is understood under the customary law. 'Ancestral property' for the purposes of this suit means property, which was held by an ancestor, who is the common ancestor of the parties. In this case, therefore, it would mean property held by any direct ancestor of Dyal Singh and of Dhanna Singh.

Extracts from the remarks recorded on the pedigree tables of Mauza Tungbala at the Settlement records of 1865 and 1892-93 are on the record and from them there appears to be no doubt that the village was originally founded by a Tung Jat, who was the common ancestor of the defendants, Dyal Singh and Dhanna Singh. In the pedigree table prepared at settlement, Dyal Singh and Dhanna Singh are shown as descended from one Harji. No doubt in the Sikh times the stronger members of a family got more than their shares and we find from the remarks recorded in 1892-93 that the entire land had practically come into the hands of Dhanna Singh. Lands given up by other co-sharers and coming to Dhanna Singh in virtue of his relationship and of the fact that the land had been held by a common ancestor of the absconder and Dhanna Singh would clearly be held to be ancestral. Some portions may have been derived from other proprietors of their holdings only by purchase or simple acquisition in their absence, but the main portions would appear to have been left by the other Tung relatives

to come into Dhanna Singh's hands. It is noted in the pedigree table that 'Most of the co-sharers of the village being in straitened circumstances, absconded or absented themselves. Out of the proprietary body Sardar Dhanna Singh alone remained in possession of the entire land. It would appear, therefore, clear that the village had been acquired practically in its entirety by Dhanna Singh in consequence of the abandonment of his relatives and collaterals. In regard to such land it has been laid down in Punjab Record No. 31 of 1894 that it should be considered ancestral. At page 88 of that judgment it is remarked 'Considering that this was a portion of the family ancestral holding, and fell to Sham Singh owing to its abandonment by a near relative we think that this portion of the estate should be held to be governed as regards alienations, by the same rule as that which applies to that part of the estate, which is admittedly ancestral.' We think that this particular land is not removed from the category of ancestral property, merely because it came to Sham Singh owing to the abandonment thereof by a near relative rather than by simple inheritance. These principles are in no way traversed in the judgment in Punjab Record No. 81 of 1901, which is by a single Judge, the circumstances in that case being quite different from those in this. We think, therefore, that it must be presumed that the land in Dhanna Singh's hands before the village was evacuated in order that Kanwar Nau Nihal Singh might make a garden of it, must be considered to have been then ancestral. It is impossible to differentiate between the portions, which came from relatives and co-sharers and the portions which may have, in some instances, been purchased.

"It appears, however, that Kanwar Nau Nihal Singh 'about fifty years ago (i.e., about 1842) caused the village to be evacuated, for he intended planting a garden there.' These are the words on this point in the pedigree table of 1892-93. It does not appear how far this intention was ever carried out, or whether the depopulation and evacuation went beyond the village site. It appears that, when Sardar Nau Nihal Singh wished to start his garden, Sardar Dhanna Singh started another village site—abadi—on the lands of the hunting ground known as Shikargah and that abadi remained as the village site of Tungbala—the old site, which had been destroyed or depopulated to make room for the garden being included as nazul property in Amritsar. It does not appear whether Sardar Nau Nihal Singh ever intended to, or ever did, take up the cultivated lands of Tungbala, which would have made a very large garden. The word used in connection with the garden is 'tamir' which suggests the idea that a walled and enclosed garden was intended. The idea was not carried out, but the new abadi for Tungbala, which Dhanna Singh had started, remained as the abadi of Tungbala and the old one was incorporated in Amritsar. It does not appear whether or not Dhanna Singh was ever dispossessed of any part of the culturable lands; if he was, apparently, they were almost immediately restored intact. Some neighbouring villages were destroyed to make the hunting ground of Maharaja Kharak Singh, but this was not the case with Tungbala, and we are quite unable to find from the record that there was any such confiscation and break of ownership in regard to Tungbala as would bring the case within the purview of the ruling in *Ram Nundun Singh* v. *Janki Koer*(1). Even if the land was taken up by Sardar Nau Nihal Singh

(1) (1902) I. L. R. 29 Calc. 828 : L. R. 29 I. A. 173.

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for a short period, which is by no means established, it appears to have been restored intact, and there was no such break of continuity as to deprive the property of its ancestral character. We hold, therefore, on a full consideration of all the facts disclosed by the record that that part of the property must be classed as ancestral.

"This being so, Thakar Singh clearly had the necessary locus standi to contest the alienation and it can only be maintained in so far as it may be found to be for necessity, as regards the interests of the plaintiff. As regards Dyal Singh himself, of course, the matter appears to be at an end."

On this appeal, which was heard ex parte :—

De Gruyther, *K.C.*, for the appellants contended that the property in suit was not ancestral: the Chief Court was in error in deciding that it was. The onus of proving that it was ancestral property was on the respondent, and he had not succeeded in doing so. Even if the property descended, as the Chief Court assumed, it would not be ancestral property either in law or in fact. The cases referred to by the Chief Court were distinguishable from the present case, and the evidence did not show that any ancestral property, that Dhanna Singh may have held, was the property in suit. The boundaries of the self-acquired property and what may have been ancestral were not defined, and it was therefore, as the District Judge remarked, impossible to give positive proof that the property, the alienation of which the respondent sought to set aside, was ancestral property. Conjectures, however reasonable, were insufficient. Reference was made to Mayne's Hindu Law, 7th ed., page 343, para. 275 and *Ram Nundun Singh* v. *Janki Koer*(1).

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The judgment of their Lordships was delivered by

LORD COLLINS. This is an appeal from a decree of the Chief Court of the Punjab varying a decree of the District Judge of Amritsar. The suit was brought by Thakar Singh and his brother, Kehr Singh, minors, by their mother acting as next friend, to set aside a deed of sale made on the 7th May 1894 by their father Dyal Singh to the appellants and certain other persons as purchasers, on the ground that the lands, the

(1) (1902) I. L. R. 29 Calc. 828; L. R. 29 I. A. 178.

subject-matter of the sale, were, in the view of the Hindu law, ancestral, and that the sale was not necessary, and was for a fictitious consideration and in fraud of the rights of the plaintiffs' father, Dyal Singh, as next heir and reversioner on the death of the widow of Dhanna Singh, the deceased owner. Kehr Singh died, while the suit was pending. The only question in dispute on this appeal is whether the lands were ancestral. The District Judge has held that they were not, the Chief Court has reversed his decision and held that they were.

It is not disputed that the onus on this issue is on the plaintiffs, and it is because in the opinion of the District Judge they failed to discharge this onus, that the suit was dismissed.

It is through their father, as heir of the above-named Dhanna Singh, that the plaintiffs claimed, and unless the lands came to Dhanna Singh by descent from a lineal male ancestor in the male line, through whom the plaintiffs also in like manner claimed, they are not deemed ancestral in Hindu law. Therefore, if the plaintiffs cannot show that they were not self-acquired lands in the hands of Dhanna Singh, the suit fails. Now, as the District Judge points out, there is really no evidence that the lands in question came to Dhanna Singh by descent at all. There is evidence that he acquired some lands in the district by purchase from the owners, and there is a probability that he acquired others by the abandonment of other persons, who may have been collateral, and, in that way, may have become possessed of lands which, by the custom of the Punjab, would be regarded as ancestral. But there is no evidence whatever defining the boundaries of these portions of land respectively. Indeed, the learned Judges of the Chief Court themselves say: "It is impossible to differentiate between the portions, which came from relatives and co-sharers and the portions, which may have, in some instances, been purchased." But it is by reason of this impossibility that the plaintiffs failed to prove their case. The learned District Judge also points out that, since the death of Dhanna Singh, large portions of the land held by him have been sold by his widow, and it is quite possible that all the ancestral land, if he had any, was embraced in these sales, and that the sale of the lands in question embraced exclusively

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self-acquired lands. Their Lordships agree that, when the onus lies, as it does in this case, on the plaintiffs in seeking to set aside on such grounds a solemn deed executed by their father, conjectures cannot be accepted as a substitute for proof. With the greatest respect to the Judges of the Chief Court their Lordships venture to think that they have hardly given sufficient weight to this consideration. Their Lordships agree with the conclusion and reasoning of the learned District Judge, and will humbly advise His Majesty that the appeal be allowed and the decree of the Chief Court set aside with costs. The respondent must pay the costs of this appeal, except so far as they may have been increased by the delay, which has taken place in the prosecution of the appeal.

Appeal allowed.

Solicitors for the appellants : *Watkins & Lempriere.*

J. V. W.