PRIVY COUNCIL.

KIDAR NATH

v.

MATHU MAL.

P.C.*
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Feb. 14.

[ON APPEAL FROM THE CHIEF COURT OF THE PANJAB, AT LAHORE.]

Hindu Widow—Alienation—Setting aside alienation—Compensation to defendant for improvements—Evidence of relationship—Statement in will of widow—Conjectural suggestions as to will in argument in lieu of evidence—Suggestions never made in cross-examination of writer of will.

The respondent on the death of a Hindu widow brought a suit as the next heir of her husband to set aside an alienation, made by the widow in favour of the appellant, of property consisting of a house and compound at Delhi. The respondent, who was the son of a daughter of the husband by a former wife (though this was denied by the appellant), produced a will, made by the widow five years before the suit, in which she stated "I have no issue or any near relative. Mathu Mal (the respondent) is related to me as a daughter's son (*rishte men nawasa*) and Khairati Lal as my husband's younger brother. These are my relatives on my husband's side." The oral evidence as to the respondent's title was found by their Lordships to be meagre and conflicting.

Held (affirming the decision of the Chief Court), that the statement in the will was, under the circumstances, conclusive of the respondent's relationship. The widow was the proper person to make such a statement of fact, which was within the scope of her own knowledge; she put forward the respondent in the will as the first person in the order of choice for the performance of the funeral ceremonies; her statement was corroborated by the other relative mentioned in the will, who was a witness in the case, and whose evidence on the matter was against his own interest; and the statement was uncontradicted by any reliable evidence.

Mere conjectural suggestions made in argument, that the will had been executed for the purpose of supporting a future claim to be made by the respondent, could not be entertained by their Lordships in lieu of evidence, especially when the writer of the will was himself a witness in the case, and

* *Present*: LORD SHAW, LORD MOULTON, SIR JOHN EDGE AND MR. AMEER ALI.

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no such conjectural considerations were suggested to him in cross-examination.

In case of the respondent succeeding, the appellant claimed the value of improvements made by him to the property while he was in possession of it, which included a temple (Rs. 2,700), a well (Rs. 300), an upper storey to the house (Rs. 2,500), and repairs to the house (Rs. 1,500), the whole amounting to Rs. 7,000.

Held (affirming the decision of the Chief Court and for the reasons given by it), that Rs. 1,400, which represented half the expenditure by the appellant on the well and the upper storey to the house, should be allowed as compensation for the improvements. The real question was, had they enhanced the market value of the property ? It was doubtful whether the erection of the temple had done so, and it had not been contended that it had.

APPEAL from a judgment and decree (7th July 1906) of the Chief Court of the Panjab, which reversed a judgment and decree (7th September 1905) of the District Judge of Delhi.

The defendant was the appellant to His Majesty in Council.

The suit which gave rise to this appeal was brought by the respondent for possession of a house and compound situated in Delhi. The main question in dispute was whether the plaintiff had proved his title to the property in suit.

The plaint, filed on 8th March 1905, stated that the plaintiff's maternal grandfather, Bishan Lal, was twice married. By his first wife he had a daughter, Musammat Parbati, the mother of the plaintiff : by his second wife, Musammat Munia, he had no issue. The first wife died in the lifetime of Bishan Lal who died about 1855. On his death Musammat Munia succeeded to his estate for the usual life tenure of a Hindu widow. By a deed of sale, dated 3rd March 1866, she conveyed her interest in the property in suit to one, Rammi Mal, the father of the defendant, for Rs. 4,650, and put the vendee in possession, on whose death the defendant, his son, took possession. Musammat Munia

died on 29th September 1904, and on her death the defendant failing to deliver up the property, the present suit was instituted.

The defendant admitted that Musammat Munia was Bishan Lal's widow, but denied that the plaintiff was the grandson of Bishan Lal by another wife, and that Musammat Parbati was Bishan Lal's daughter. He also contended that among Kyasths (the caste to which the plaintiff belonged) a daughter's son did not succeed, and that a widow had full powers over the property she inherited. He also contended that the suit was barred by limitation, inasmuch as Musammat Munia had abandoned worldly affairs by becoming a *fakir* some 40 years before suit, and had thus forfeited or lost her interest in the property as effectually as if she had then died; that the sale had been effected for necessity and was therefore valid and binding; and finally alleged that he had spent considerable sums on the improvement of the property, which, if the plaintiff was held entitled to succeed, should be refunded to the defendant.

As to the plaintiff's right to the property, Musammat Munia had left a will, dated 22nd November, 1899, in which she stated, "I have no issue or any near relative. Hardeo Sahai *alias* Mathu Mal is related to me as daughter's son, and Lala Khairati Lal, son of Lala Sham Lal, as my husband's younger brother. These are my relatives on my husband's side." The questions for decision were stated in the judgment of the Chief Court as follows:—(i) whether Musammat Parbati was the daughter of Bishan Lal; (ii) whether Bishan Lal had a son by Musammat Munia who survived him; (iii) whether the suit was barred by limitation; (iv) whether the sale was for necessity; and (v) to what, if any, compensation is defendant entitled if it be held that plaintiff has proved his heirship to Bishan Lal.

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On these questions the District Judge had found question (ii) in the negative; on (iii) that though Musammat Munia had become a *fakir*, she had not in any way abandoned worldly affairs, or lost her civil rights; on (iv) that no necessity for the sale had been established; and on (v) that the defendant had certainly spent money on the improvement of the property, and that if the plaintiff had been otherwise entitled to a decree, the grant of such decree should have been made conditional on the payment to the defendant of a sum of Rs. 7,000 as compensation. The District Judge, however, dismissed the suit, on the ground that the plaintiff, though proved to be the son of Musammat Parbati, had not established his allegation that Musammat Parbati was the daughter of Bishan Lal.

The plaintiff's appeal to the Chief Court was heard by Mr. H. A. B. RATTIGAN and Mr. C. W. CHITTY, Judges of the Court, who, on question (i), after saying that considering the time that had elapsed since the deaths of Bishan Lal and Parbati Lal "it was not surprising that the oral evidence produced by the plaintiff was not of a very convincing character, and that the witnesses' statements were mostly hearsay," continued :—

"But Musammat Munia herself must undoubtedly have known the true facts of the case, and the witness Khairati, who is over 70 years of age, and a first cousin of the deceased Bishan Lal, may also be reasonably credited with an intimate knowledge of the affairs of the family. This being so, it is, we think, a very strong point in plaintiff's favour that Musammat Munia, in the will executed by her, on 22nd November, 1899, speaks of the plaintiff as a relative on her husband's side, and as related to her as a sort of daughter's son (*rishte men nawasa*). The District Judge regards the expression as curious, and thinks that it indicates some qualification of the relationship of grandson. It certainly does, but the qualification is perfectly reasonable and correct. Musammat Munia was obviously aware of the fact that plaintiff was not her own daughter's son, and, equally naturally, she did not describe him as such. But if he was (as he alleges)

the son of her husband's daughter by a former wife, she would not unnaturally refer to him as 'a kind of daughter's son' when she speaks of her husband's relatives. At all events, we have her clear admission that plaintiff was, 'in a sense', her daughter's son, and she knew that she had herself no daughter. The only inference, therefore, that can in reason be drawn, is that plaintiff is the son of a daughter of Bishan Lal by another wife, and that Musammat Munia recognised him as such. In our opinion, this admission on her part is a very weighty piece of evidence in favour of plaintiff, and in addition to it we have the express evidence of Khairati Lal, the only other near relative of Bishan Lal. This man was Bishan Lal's first cousin, and if plaintiff did not stand in his way he would be the heir to the property left by the deceased. But, despite this fact, we find him admitting that plaintiff's mother was the daughter of Bishan Lal, and this admission, which was against his own interest, must clearly carry great weight. We have thus the only two members of the family whose statements are on record in the case supporting plaintiff's claim as the son of Bishan Lal's daughter, and we have, on the other hand, no evidence worthy of the name to the contrary. Under these circumstances, we are justified in holding that plaintiff has fully established his contention that he is the daughter's son of Bishan Lal."

On the question (ii) as to whether Bishan Lal had a son who survived him by Musammat Munia, the Chief Court, after discussing the evidence, said:—

"In our opinion, and the District Judge came to the same conclusion, it has not been satisfactorily proved that Bishan Lal had a son by Musammat Munia; but even if he had, we can find no proof that that son survived Bishan Lal."

On questions (iii) as to limitation, and (iv) as to the existence of necessity for the sale, the Chief Court agreed with the decisions of the District Judge.

On question (v) the Chief Court concluded their judgment thus:—

"The last question is whether the defendant is entitled to any, and if so to what, compensation for improvements alleged to have been made by him. The District Judge finds that Musammat Parbati, plaintiff's mother, in no way acquiesced in defendant's treatment of the property, and that plaintiff himself only acquired an active interest in the property when his mother died in 1889. But he holds that if plaintiff is to get a decree, it must be on the condition of paying a sum of Rs. 7,000 by way of compensation to defendant, because, even if plaintiff did not consent to the buildings and

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repairs made by defendant, he did not object to the same. The learned Judge admits that defendant has for many years had the benefit of his expenditure on the house, but we hold that it is only equitable that plaintiff if he is to succeed, should pay something of this expenditure.

"The alleged improvements effected by defendant are as follows:—(i) The building of a temple in the compound The value of this temple is estimated at Rs. 2,700; (ii) the building of a well, said to have cost Rs. 300; (iii) the building of an upper storey to the house, valued at Rs. 2,500; and (iv) repairs to the house, valued at Rs. 1,500.

"There is no evidence whatever to show that plaintiff knew of, or acquiesced in, the making of any of these so-called improvements, and as defendant had purchased from a widow, whose estate he must be taken to have known was of a limited nature, it is not unreasonable to hold that any improvements effected by him were done at his own risk. Nor is it easy to understand why plaintiff should be compelled to pay for the erection of a temple in the compound of the house, an erection which he himself may regard as detracting from, rather than adding to, the value of the house. The repairs, again, were effected some 15 years before suit, and we cannot agree that plaintiff should be made to pay the full amount said to have been expended by defendant in effecting these repairs. For all these years defendant has had the benefit of the property and of the repairs made by him, and a very considerable deduction would have to be made for depreciation by reason of ordinary wear and tear. Upon the whole, we think that if plaintiff is made to pay a reasonable sum as compensation to the defendant for his expenditure upon the upper storey and the well (*i.e.*, a sum of, say, Rs. 1,400, which represents half the expenditure thereon by defendant), no further demand can reasonably be made upon him. As regards the temple, we think that upon the principle laid down in *Premji Jivan Bhate* v. *Cassum Juma Ahmed* (1), defendant is at most entitled to remove the materials but cannot ask for compensation in money."

On this appeal,

Ross K. C. and *Arthur Grey*, for the appellant, contended that the respondent had failed to prove his title to the property. There was no proof that Parbati was the daughter of Bishan Lal, or that the respondent was the son of Parbati. But even if that were proved, it was submitted that the caste to which the respondent belonged was governed, not by Hindu law, but by

(1) (1895) I. L. R. 20 Bom. 298.

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custom; and the custom set up here was that a daughter's son was not in the line of succession. If that were not so, and Hindu law governed the case, the evidence showed that Bishan Lal had a son who survived him by Munia, so that even by Hindu law the respondent was not the next heir of Bishan Lal, and therefore was not entitled to maintain the present suit. The statement in the will of Munia was not sufficient to prove that the respondent was the daughter's son of Bishan, as held by the Chief Court. It was suggested also that the will might have been made for the purpose of supporting any future claim of the respondent to the property. Reference was made to the Evidence Act (I of 1872) section 76; and the Registration of Births, Marriages, and Deaths Act (VI of 1886) section 21, as to the value as evidence of certificates of death.

But if the respondent were held entitled to the property, it was contended that compensation for improvements should be allowed to the appellant. The Chief Court had erred in setting aside the findings of the District Judge as to the nature and value of the improvements made by the appellant on the property in dispute, and in allowing only a sum of Rs. 1,400 as compensation. That sum, was, it was submitted, inadequate on the evidence and under the circumstances of the case.

De Gruyther K.C. and *G. C. O'Gorman*, for the respondent, were not called upon.

The judgment of their Lordships was delivered by

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LORD SHAW. This is an appeal from a judgment and decree of the Chief Court of the Panjab. The decree was dated the 7th of July, 1906. It reversed a decree of the District Judge of Delhi. The respondent, as plaintiff, sued the appellant for possession

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of a house and compound in Delhi. The first Court dismissed the suit, and on appeal the Chief Court gave the plaintiff a decree for possession of the property on certain terms.

Nine issues were raised, and evidence was adduced with regard to them in the Court of first instance; the questions have now, however, been limited to the issues upon which the Chief Court proceeded, and which are now to be referred to.

The first of those questions is, has the relationship of the plaintiff, which is in issue in this suit, been proved? The proof is denied. One Bishan Lal, the former owner of the property, was twice married; by his first wife the allegation is that he had a daughter who was the mother of the plaintiff, Mathu Mal. The oral evidence upon the point is meagre and conflicting.

Under these circumstances the Chief Court looked for assistance to any deeds or documents under the hand of the second wife, Munia, of the plaintiff's grandfather. That second wife executed a will, and the particular provisions of that will are to be found on pages 15 and 16 of the record. The will was executed on the 22nd of November, 1899. In that will this lady, who, of all people, was the person to make a statement of fact with regard to her husband's history, his relationships, and his succession, at two different parts of the document declares that she has no issue nor any near relative. She says: "Hardeo Sahai, *alias* Mathu Mal, is related to me as my daughter's son." Then after mentioning a further relative, she says: "These are my relatives on my husband's side." She repeats the statement, to a similar effect, in the same document, and she puts forward Mathu Mal, so related to her husband, as the person who is first in order of choice for performing the funeral religious ceremonies of *kirya karam*, that

circumstance being one, in regard to these Indian relationships, of great value.

In this situation their Lordships are of opinion that, in the most solemn form, this lady had declared facts which must have been within the scope of her own knowledge; and, if her version of the facts be sound, there can, in their Lordships' view, be no doubt that the judgment appealed from is correct. Their Lordships put to the learned counsel, who argued the case with conspicuous moderation, the point whether, if this lady, being alive, had testified in a Court of law in the same sense as this will declared, there could have been any answer; and it was admitted that such testimony, unshaken in cross-examination, would have been conclusive on this matter of fact.

Their Lordships are accordingly of opinion that the Chief Court was justified in attaching great weight to the contents of this will, and that the conclusion, upon this matter of fact, reached by them, is a conclusion which now cannot be successfully assailed.

Their Lordships desire to add that they do not think it is open to this Board to entertain, in lieu of evidence, a suggestion to the effect that this will—made five years before her death—was part of a scheme which was to emerge in favour of one party to the present suit, after that suit was brought. These were conjectural efforts made in argument, but they do not amount to anything which would weigh with the judgment of the Board on the point of evidence. Their Lordships conclude their judgment upon this portion of the case by remarking that the person who drew this document was himself a witness. He was open to cross-examination, and no suggestion in favour of these conjectural considerations was made while the witness was in the box.

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There now only remains one question to be determined, and that is as to the amount of the allowances which are to be made as a condition of taking possession of this house and compound. It appears that in the course of the possession of the last holder a temple was erected upon the ground, and other expenditure was incurred to a considerable amount. The Chief Court assessed the sum of Rs. 1,400 as a fair sum to the extent of which the property, as a vendible subject, has been enhanced in value by the operations of the last holder. Their Lordships are of opinion that the grounds upon which the Chief Court proceeded are sound. In such a case it is always to be borne in mind that the amount of the expenditure made has occasionally very little to do with the real issue; and that that issue is, to what extent has enhancement of the subject been produced? Their Lordships agree with the Chief Court in thinking that it has been produced to the extent of Rs. 1,400. But with regard to the difference between that sum and the Rs. 7,000 claimed, a large part of that difference stands to the account of the erection of the temple upon the land. It has not been contended in argument before the Board that the erection of the temple would of itself add to the selling value of the property, and the real question is, was the property, as a marketable subject, enhanced in value or not? Their Lordships are of opinion that it was enhanced, but only to the extent stated in the judgment appealed from.

Their Lordships will therefore humbly advise His Majesty that this appeal should be dismissed, and that the decree of the Court below should be affirmed. The appellant must pay the costs of the appeal.

Appeal dismissed.

Solicitors for the appellant: *Soutter & Fox.*

Solicitors for the respondent: *T. L. Wilson & Co.*

J. V. W.