Privy Council Appeal No. 97 *of* 1934

Allahabad Appeal No. 21 *of* 1933

Muhammad Husain Khan and others - - - - *Appellants*

v.

Babu Kishva Nandan Sahai,
minor through Babu Deva Nandan Sahai - - - *Respondent*

FROM

THE HIGH COURT OF JUDICATURE AT ALLAHABAD

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 7TH MAY, 1937.

Present at the Hearing :

LORD MAUGHAM.
SIR SHADI LAL.
SIR GEORGE RANKIN.

[*Delivered by* SIR SHADI LAL.]

This is an appeal from a decree of the High Court of Judicature at Allahabad, dated the 23rd January, 1933, which reversed a decree of the Subordinate Judge of Banda, dated the 17th January, 1929, and allowed the plaintiff's claim for possession of a village called Kalinjar Tirhati with mesne profits thereof.

One Ganesh Prasad, a resident of Banda in the Province of Agra, was the proprietor of a large and valuable estate, including the village in dispute. He died on 10th May, 1914, leaving him surviving a son, Bindeshri Prasad, who was thereupon recorded in the Revenue Records as the proprietor of the estate left by his father.

In execution of a decree for money obtained by a creditor against Bindeshri Prasad the village of Kalinjar Tirhati was sold by auction on 20th November, 1924; and the sale was confirmed on 25th January, 1925. Bindeshri Prasad then brought the suit, which has led to the present appeal, claiming possession of the property on the ground that the sale was vitiated by fraud. He died on the 25th December, 1926, and in March, 1927, his widow, Giri Bala, applied for the substitution of her name as the plaintiff in the suit. She was admittedly the sole heiress of her deceased husband, and this application was accordingly granted. She also asked for leave to amend the plaint on the ground that under a will made by his father-in-law, Ganesh Prasad, on 5th April, 1914, her husband got the estate only for his life, and that on the latter's death his life interest came to an end, and the devise in her favour became operative, making her absolute owner of the estate including the village in question.

She accordingly prayed that, even if the sale be held to be binding upon her husband, it should be declared to be inoperative as against her rights of ownership.

The Trial Judge made an order allowing the amendment, and on 28th May, 1927, recorded reasons to justify that order. But in July, 1927, when the defendants in their additional pleas again objected to the amendment, the learned Judge framed an issue as to the validity of the amendment. He was, thereafter, transferred from the district; and his successor, who decided the suit, dismissed it on various grounds, and one of these grounds was that the amendment of the plaint changed the nature of the suit and should not have been allowed. The High Court, on appeal by the plaintiff, has dissented from that conclusion, and held that the amendment was necessary for the purpose of determining the real questions in controversy between the parties.

On behalf of the defendants, who are the appellants before their Lordships, it is contended that, while Giri Bala could continue the suit on the cause of action which accrued to her husband, she was not entitled to add to it an alternative cause of action which accrued to her in her personal capacity. It is, however, clear that the suit has been tried on the amended plaint, and that the parties have adduced all the evidence relating to both the causes of action. Their Lordships do not think that, even if there is any substance in the objection raised to the amendment of the plaint, it should now be allowed to prevail, and all the time and labour expended on the trial of the suit should be thrown away. To prevent the mischief which may be caused by the reversal of the decree in a case of this kind, section 99 of the Code of Civil Procedure, 1908, provides that no decree shall be reversed or substantially varied, nor shall any case be remanded in appeal, on account of any misjoinder of parties or causes of action, or any error, defect or irregularity in any proceedings in the suit, not affecting the merits of the case or the jurisdiction of the Court. Now, the High Court has decided that the trial of the suit on the alternative causes of action is sanctioned by the law, and it is not suggested that the alleged misjoinder of the causes of action has affected the merits of the case or the jurisdiction of the Court. The issue is now narrowed down to the simple point whether, even if there was a misjoinder, their Lordships should, on that ground, reverse the decree granted by the High Court. The provisions contained in the Civil Procedure Code do not regulate the procedure of their Lordships in hearing appeals from India, but there can be no doubt that the rule embodied in section 99 proceeds upon a sound principle, and is calculated to promote justice; and their Lordships are not prepared to adopt a course which would merely prolong litigation. Assuming that the High Court has erred in over-ruling the objection to the amendment and in upholding the trial on both the causes of action, they do not think that the trial should be rendered abortive, when the alleged misjoinder has affected neither the merits of the case nor the jurisdiction of the Court.

The next question for determination is whether Giri Bala has established her title to the village in dispute, and the answer to that question depends upon the *factum* and the validity of the will alleged to have been made, on the 5th April, 1914, by her father-in-law, Ganesh Prasad, upon which she founds her claim. Now, it may be stated at the outset that the original will has been lost, and its contents are proved by two copies, the authenticity of which has not been challenged. But before examining the terms of the will, it is necessary to give a brief history of certain circumstances which are said to have led to its execution. It appears that in 1898 Ganesh Prasad applied to the Government of his province to take over the management of his estate. In compliance with his request the Court of Wards took charge of the estate and continued to manage it until his death in May, 1914. During the last four years of his life he made several attempts to get his estate released from the management of the Court of Wards, but these attempts were unsuccessful. He had only one son, Bindeshri Prasad, but his relations with the son were strained. The father was displeased with the son because of his unsatisfactory character and extravagant habits. Accordingly he made a will at Allahabad on the 4th August, 1911, and got it registered there on 5th August. By this will he dedicated the whole of his estate to certain charitable and religious purposes, and appointed seven persons to be the executors of the will and the trustees to carry out the trusts. One of these seven persons was the Collector of his own district, Banda, and, at that time, the Collector was one Mr. Swan, a member of the Indian Civil Service. A copy of the will was sent by the testator to Mr. Swan, who was, therefore, cognizant of the execution as well as of the contents thereof.

By this will the testator not only deprived Bindeshri Prasad of inheritance, but made no provision for his daughter-in-law, Giri Bala, or for any children who might be born to her.

In the beginning of 1914 there was an outbreak of bubonic plague at Banda, and Ganesh Prasad, therefore, left that place to live in Motihari, one of the villages comprised in his estate. He was at that time ill and was attended by a physician. While he was living there, the will relied upon by the plaintiff is said to have been executed by him on 5th April, 1914. It revoked the previous will of 1911 and made various devises which will be discussed hereinafter. Thereafter, when there was an abatement in the epidemic, he returned to Banda and died there on 10th May, 1914.

Thereupon, the Collector, Mr. Swan, took immediate steps to guard the rooms in which the deceased used to keep his valuables and important documents. In compliance with the direction of the Collector, one Pandit Ram Adhin Shukla, a Deputy Collector and Magistrate of Banda, went to the house of the deceased on the afternoon of 10th May, and locked up both the rooms in that house which contained

several locked boxes and valuable properties belonging to the deceased. On the following day he submitted his report in writing to the Collector.

The trustees appointed by the will of 1911 were, at that time, ignorant of the fact that it had been revoked by a subsequent testament, and considering that it became operative on the death of the testator, four of them made an application, on 3rd June, 1914, to the High Court at Allahabad for probate of the will. They filed with their application a certified copy of that will, and stated that the original will was probably among the papers of the deceased in his house, of which the Collector had taken charge. On the 29th June, 1914, the High Court ordered citations to issue, and directed the Collector of Banda to transmit the original will to the Registrar of the Court. In the meantime the Collector, who knew of the application for probate pending in the High Court, had sent a Deputy Collector, Pandit Hari Har Nath Mutto, to the house of the deceased, and asked him to examine the papers in the rooms which had been locked on 10th May, 1914. The Deputy Collector opened the locks of the rooms on the 28th June, and made a search for the will of 1911. That will was not found there, but another will, dated the 5th April, 1914, was found by him. Upon that will he made an endorsement mentioning the exact place from which it was recovered, and also the names of the persons in whose presence it was found. He sent this will with his report to the Collector.

It must be stated here that the Collector was fully acquainted with the hand-writing of the deceased, who had been working under him as an Honorary Magistrate for many years, but he did not, on examining the signatures of the testator on the will, suspect their genuineness. Indeed, he wrote to the Registrar of the High Court on 11th July, 1914, a letter stating that the will of 1911 could not be found among the papers of the deceased, but that a later will was found, revoking the earlier will. On the 15th July, he sent the original will of 1914 to the Government Advocate at Allahabad and instructed him to oppose the grant of probate of the will of 1911, and to produce the will of 1914 in the probate proceedings then pending in the High Court. On the same date he wrote to the Commissioner of the Division, to whom he was subordinate, and also to the Legal Remembrancer to the Local Government, informing them of what he had written to the Government Advocate. He also stated that " there is no reason whatever to doubt the authenticity of the later will ".

As instructed by the Collector of Banda, the Government Advocate produced the original will in the High Court on 27th July, 1914, when the probate case came on for hearing. The High Court directed the Registrar to take charge of the will pending further orders.

In the meanwhile, Bindeshri Prasad had, not only lodged a caveat in the High Court against the grant of probate of the will of 1911, but also applied to the Revenue Officer for mutation, in respect of the property left by his

father, to be effected in his favour, on the ground that the estate was ancestral and that he was entitled to it by right of survivorship. On 5th October, 1914, a compromise was effected in the course of the mutation proceedings between Bindeshri Prasad on the one side and the trustees under the will of 1911 on the other. One of the trustees, who was a resident of Allahabad, had died; and there were, at that time, five trustees who belonged to Banda, and the Collector, who was an *ex-officio* trustee. These five trustees stated that the second will was genuine and bore the signatures of Ganesh Prasad, and they agreed to let Bindeshri Prasad remain in proprietary possession of the estate of his father " as provided in the second will of the 5th April, 1914 ". They also undertook to apply to the High Court to dismiss their application for probate. At the same time, Bindeshri Prasad agreed to be responsible for all the debts of his father, and to create a trust of a house comprised in the estate to be used as a dharamsala, and also to pay Rs.300 per annum to defray the expenses of the Ram Lila festival at Banda.

On the 12th October, 1914, the trustees asked the Collector to transmit to the High Court their application embodying the compromise and praying that their application for probate of the will of 1911 might be dismissed, on the ground that it had been revoked by the later will of 1914. They also stated in their application that they were " completely satisfied that the second will of the 5th April, 1914, is perfectly genuine ", and that it bears the signatures of Ganesh Prasad and the two attesting witnesses.

On the 7th November, 1914, the High Court accordingly dismissed the application for probate, and this order of dismissal was followed in December by an order of the Revenue Officer sanctioning mutation of immovable property in favour of Bindeshri Prasad instead of his father. On the conclusion of the proceedings in the High Court, Mr. Malcomson, the Government Advocate, applied to the High Court for the return of the original will of 1914; and it was made over to him on the 13th January 1915. There is no doubt that the will was delivered by the High Court to Mr. Malcomson, but there it no evidence to show what happened to it thereafter. The plaintiff has proved that a search was made for the original document, but it has not been discovered.

On these facts it must be held that the original will of 1914 has been lost, and the plaintiff is, therefore, entitled to produce secondary evidence of its contents. The secondary evidence consists of two certified copies of the original document, one copy was made when the original was in the custody of the Collector, and the second copy was obtained from the High Court. Neither the genuineness nor the accuracy of these copies has been challenged, but they prove only the contents of the document which purported to be the will executed by Ganesh Prasad on the 5th April, 1914. It is obvious that they cannot prove that the original, of which they are copies, was executed by the testator.

What is the evidence to prove its execution by Ganesh Prasad? That evidence is furnished by the testimony of the scribe Mahabir Prasad. This witness was, in 1914, acting as the agent of Ganesh Prasad in his village Motihari, and he states that Ganesh Prasad, who had come to live there in the beginning of 1914 owing to the outbreak of plague at Banda, gave him a draft of the will which he intended to execute, and asked him to make a fair copy of it. The witness accordingly prepared a fair copy, which was then signed by Ganesh Prasad and attested by two persons, Jugal Kishore, who was his physician and was treating him in his illness, and Piare Lal Dube, who was his tenant. These persons having died could not be examined as witnesses; but the Deputy Collector, who recovered the original will in June, 1914, satisfied himself after taking down their statements that it was the will of Ganesh Prasad.

The certified copies show that the will bore two signatures of the testator, one in clearly legible handwriting, and the other in running hand; but there is nothing suspicious in that fact, as even the admittedly genuine will of 1911 was signed by him twice.

There is also evidence of several witnesses, who saw the original document immediately after its recovery and had no difficulty in recognising both the signatures of the testator on it. It is significant that these witnesses included some of the persons who were trustees under the will of 1911, and there is no reason to impeach their veracity. Indeed, in their application submitted to the High Court on the 12th October, 1914, they, as stated above, had declared in unequivocal terms that they were familiar with the handwriting of Ganesh Prasad, and had satisfied themselves that the signatures of the testator on the will of 1914 were genuine. The learned Judges of the High Court have repelled the suggestion that the trustees were actuated by improper motives when they accepted the genuineness of the will; and their Lordships, after examining the evidence to which their attention has been invited, concur in their conclusion.

Mr. Swan, the Collector of Banda, who was familiar with the handwriting of Ganesh Prasad, also recognised his signatures on the will when it was sent to him by the Deputy Collector; and he informed all the persons concerned of the recovery of the document and of its genuineness. He also asked them to take steps in conformity with its provisions. This circumstance must be regarded as an important corroboration of the direct evidence in support of the genuineness of the will.

It is true that unfortunately the relations between the father and the son were strained, and to prove that fact the appellants desired to produce in evidence certain documents which were on the record of the Court of Wards. They asked the Court of Wards for an inspection of those documents, but their request was refused. An application has

been made to their Lordships that they should direct the Court of Wards to transmit to the Registrar of the Privy Council the desired documents, or remit the case to India for the reception of the additional evidence. The refusal of the Court of Wards was perhaps not justified, but their Lordships do not think that any useful purpose would be served by postponing the determination of this appeal, as the enmity between the father and the son, which was sought to be proved by the additional evidence, cannot be seriously disputed. Indeed, it was this enmity which led the father to make the will in 1911, which, as stated, made no provision for either the son or the son's wife, or even his own mistress. It was obviously an improvident will, and when he fell ill, he probably thought that he should, before dying, make suitable provision for his relatives and dependents. There is also evidence to show that the son was with his father shortly before the latter's death, and that there was a reconciliation between them.

Whether there was a complete reconciliation with the son or not, it was only to be expected that the deceased would realise the gravity of the harm which would be caused by the will of 1911. It would, not only disinherit his only son, but also leave his daughter-in-law, for whom he had a great regard and sympathy, without any provision. There was also his mistress, Jairaj Kuar; and it was only fair that a suitable maintenance should be provided for her. Moreover, he could not be unmindful of the fact that, if his daughter-in-law gave birth to a son or adopted a boy, there would be no property which he could inherit. In these circumstances it was only natural and right that he should make another will providing for all the persons who had claims upon his affection or bounty. The will in question did what a person in the position of Ganesh Prasad might be expected to do. It gave only a life interest to Bindeshri Prasad, which, while enabling him to realise the income of the estate during his lifetime, prevented him from disposing of the property. It also provided that, on the death of Bindeshri Prasad, the estate should devolve upon the latter's son, natural or adopted and that, in the absence of any such son, it should become the absolute property of his daughter-in-law. But the holder of the estate for the time being was directed to pay Rs.50 a month to the mistress of the testator.

No reasonable objection could be taken to these provisions of the will, and it is noteworthy that in 1914, when the will was recovered from the house of the deceased, there was no suggestion made by any person that it was a forged document. Indeed, the persons, who now condemn it as a forgery, have not made any attempt to prove their allegation or to rebut the evidence, direct as well as circumstantial, led by the plaintiff to establish its execution by Ganesh Prasad. Their Lordships, therefore, agree with the High Court that the issue as to the *factum* of the will must be decided in favour of the plaintiff.

The validity of the will is challenged on the ground that the testator had no authority to dispose of the property,

as it belonged to a Hindu coparcenary consisting of himself and his son. It is common ground that the property was inherited by Ganesh Prasad from his maternal grandfather, Jadu Ram; and the question arises whether it was ancestral in his hands in the sense that his son acquired therein an interest by birth jointly with him. There is a diversity of judicial opinion upon this question in India vide, *inter alia*, *Karuppai* v. *Sankaranarayanan*, I.L.R. 27, Mad. 300; *Jamna Prasad* v. *Ram Partap*, I.L.R. 29 All. 667; *Bishwanath* v. *Ganjadhar*, 3 Pat. L.J. 168. But the matter is of considerable practical importance, and their Lordships think that it should not be left in a state of uncertainty.

The learned Counsel for the appellants argues that the property inherited by a daughter's son from his maternal grandfather is ancestral property, and he relies, in support of his argument, upon the expression "ancestral property" as used in the judgment of this Board in *Raja Chelikani Venkayyamma Garu* v. *Raja Chelikani Venkataramanayyamma*, 29 I.A. 156, in describing the property which had descended from the maternal grandfather to his two grandsons. It is to be observed that the grandsons referred to in that case were the sons of a daughter of the propositus, and constituted a coparcenary with right of survivorship. On the death of their mother they succeeded to the estate of their maternal grandfather, and continued to be joint in estate until one of the brothers died. Thereupon, the widow of the deceased brother claimed to recover a moiety of the estate from the surviving brother. The question formulated by the Board for decision was, whether the property of the maternal grandfather descended, on the death of his daughter, to her two sons jointly with benefit of survivorship, or in common without benefit of survivorship. This was the only point of law which was argued before their Lordships, and it does not appear that it was contended that the estate was ancestral in the restricted sense in which the term is used in the Hindu law. Their Lordships decided that the estate was governed by the rule of survivorship, and the claim of the widow was, therefore, negatived. The brothers took the estate of their maternal grandfather at the same time and by the same title, and there was apparently no reason why they should not hold that estate in the same manner as they held their other joint property. The rule of survivorship, which admittedly governed their other property, was held to apply also to the estate which had come to them from their maternal grandfather. In these circumstances it was unnecessary to express any opinion upon the abstract question of whether the property, which a daughter's son inherits from his maternal grandfather, is ancestral property in the technical sense that his son acquires therein by birth an interest jointly with him. This question was neither raised by the parties nor determined by the Board. It appears that the phrase "ancestral property", upon which reliance is placed on behalf of the appellants, was used in its ordinary meaning, namely, property which devolves upon a person from his ancestor, and not in the restricted

sense of the Hindu Law which imports the idea of the acquisition of interest on birth by a son jointly with his father.

There are, on the other hand, observations in a later judgment of the Board in *Atar Singh and others* v. *Thakar Singh,* 35 I.A. 206, which are pertinent here. It was stated in that judgment that unless the lands came " by descent from a lineal male ancestor in the male line, they are not deemed ancestral in Hindu law ". This case, however, related to the property which came from male collaterals, and not from maternal grandfather; and it was governed " by the custom of the Punjab ", but it was not suggested that the custom differed from the Hindu law on the issue before their Lordships.

The rule of Hindu law is well-settled that the property which a man inherits from any of his three immediate paternal ancestors, namely, his father, father's father and father's father's father, is ancestral property as regards his male issue, and his son acquires jointly with him an interest in it by birth. Such property is held by him in coparcenary with his male issue, and the doctrine of survivorship applies to it. But the question raised by this appeal is whether the son acquires by birth an interest jointly with his father in the estate, which the latter inherits from his maternal grandfather. Now, Vijnānesvara, the author of Mitākshara, expressly limits such right by birth to an estate which is paternal or grand-paternal. It is true that Colebrooke's translation of the 27th sloka of the first section of the first chapter of Mitākshara, which deals with inheritance, is as follows: " It is a settled point that property in the paternal or ancestral estate is by birth." But Colebrooke apparently used the word " ancestral " to denote grand-paternal, and did not intend to mean that in the estate, which devolves upon a person from his male ancestor in the maternal line, his son acquires an interest by birth. The original text of the Mitākshara shows that the word used by Vijnānesvara, which has been translated by Colebrooke as " ancestral ", is *paitāmaha* (पैतामह) which means belonging to *pitāmaha* (पितामह). Now, *pitāmaha* ordinarily means father's father, and, though it is sometimes used to include any paternal male ancestor of the father, it does not mean a maternal male ancestor.

Indeed, there are other passages in Mitakshara which show that it is the property of the paternal grandfather in which the son acquires by birth an interest jointly with, and equal to that of, his father. For instance, in the 5th sloka of the fifth section of the first chapter, it is laid down that in the property " which was acquired by the paternal grandfather . . . the ownership of father and son is notorious; and, therefore, partition does take place. For, or because, the right is equal, or alike, therefore, partition is not restricted to be made by the father's choice, nor has he a double share." Now, this is the translation of the sloka

by Colebrooke himself, and it is significant that the Sanskrit word, which is translated by him as " paternal grandfather ", is *pitāmaha* (पितामह). There can, therefore, be no doubt that the expression " ancestral estate " used by Colebrooke in translating the 27th sloka of the first section of the first chapter was intended to mean grand-paternal estate. The word " ancestor " in its ordinary meaning includes an ascendant in the maternal, as well as the paternal, line; but the " ancestral " estate, in which, under the Hindu law, a son acquires jointly with his father an interest by birth, must be confined, as shown by the original text of the Mitakshara, to the property descending to the father from his male ancestor in the male line. The expression has sometimes been used in its ordinary sense, and that use has been the cause of misunderstanding.

The estate, which was inherited by Ganesh Prasad from his maternal grandfather, cannot, in their Lordships' opinion, be held to be ancestral property in which his son had an interest jointly with him. Ganesh Prasad consequently had full power of disposal over that estate, and the devise made by him in favour of his daughter-in-law, Giri Bala, could not be challenged by his son or any other person. On the death of her husband, the devise in her favour came into operation and she became the absolute owner of the village Kalinjar Tirhati, as of the remaining estate; and the sale of that village in execution proceedings against her husband could not adversely affect her title.

For the reasons above stated, their Lordships are of opinion that the decree of the High Court should be affirmed, and this appeal should be dismissed with costs. They will humbly advise His Majesty accordingly.

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In the Privy Council.

MUHAMMAD HUSAIN KHAN
AND OTHERS

v.

BABU KISHVA NANDAN SAHAI,
MINOR THROUGH
BABU DEVA NANDAN SAHAI

DELIVERED BY SIR SHADI LAL.

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