Privy Council Appeal No. 42 *of* 1947

Kanda and others - - - - - - - - - *Appellants*

v.

Waghu - - - - - - - - - - - *Respondent*

FROM

THE HIGH COURT OF JUDICATURE AT LAHORE

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL DELIVERED THE 6TH DECEMBER, 1949

Present at the Hearing:

LORD SIMONDS
SIR JOHN BEAUMONT
SIR LIONEL LEACH

[*Delivered by* SIR LIONEL LEACH]

The parties in this appeal are Dadra Rajputs, an agricultural tribe of the Montgomery District of the Punjab. The appeal arises out of a suit brought by the appellants in the Court of the Subordinate Judge, Montgomery, challenging the validity of a deed of gift, executed on the 17th December, 1938, by Mussammat Rajan, the first defendant, in favour of her grandson, the second defendant, who is the respondent in the appeal.

The first defendant is the widow of one Amira, who died in or about the year 1913. The respondent is the son of a daughter of Amira and the first defendant. On the execution of the deed of gift the respondent applied for mutation of names in the records kept by the land revenue authorities, but the Assistant Collector refused the application on the ground that "a female has, under no circumstance, a right to alienate property by sale or by way of charity under a will, oral or in writing", and his decision was upheld by the Collector on appeal. Thereupon the respondent filed a suit in the Court of the Subordinate Judge, Montgomery, for a decree for the possession of the land. The only defendant was the donor and on the 9th November, 1939, with her consent, the court passed a decree in the terms of the prayer in the plaint.

Two days later the appellants, who are collateral members of the respondent's family, filed in the Subordinate Judge's court the suit which has given rise to this appeal. The appellants pleaded that the land was ancestral, that the gift of it to the respondent was contrary to custom, that the mutation of names had been rightly refused and that the respondent had obtained by fraud the decree passed in his favour on the 9th November, 1939. They asked for a decree declaring that the deed of gift was null and void as against them and, therefore, did not affect their reversionary rights. The respondent filed a written statement, in which he denied that the land was ancestral. He alleged that the parties were governed by Mohammedan law, under which there were no restrictions

on the donor's powers of alienation, that the revenue officers had erred in refusing mutation of names, and that the decree in the previous suit was good. In a separate written statement the donor supported the respondent's case.

After the evidence had been closed and the case had been adjourned for the hearing of the arguments the first appellant applied for leave to file certified copies of two extracts from public records, which were said to have bearing on the question whether the land was ancentral. Order XIII, rule 1, of the Code of Civil Procedure, requires the parties or their pleaders to produce at the first hearing of the suit all documentary evidence on which they intend to rely, and rule 2 provides that no documentary evidence in the possession or power of a party, which should have been, but has not been, produced in accordance with the requirements of rule 1, shall be received at any subsequent stage of the proceedings, unless good cause is shown to the satisfaction of the court for its non-production. The court receiving such evidence must record the reasons for so doing. The Subordinate Judge rejected the application on the ground that it was no stage to accept additional evidence when the defendant had closed his rebuttal and the case had been adjourned for the hearing of arguments.

In his judgment which was delivered later, the Subordinate Judge held that the appellants had failed to prove the custom alleged by which a widow could not give her deceased husband's property to her daughter's son, that the land was not ancestral, that in the absence of custom Mohammedan law governed the case and that under such law the gift was valid. In accordance with these conclusions he dismissed the suit with costs. The appellants appealed to the District Court. In addition to challenging the findings of the Subordinate Judge they said that he had erred in refusing to admit the further evidence. The District Judge held that the Subordinate Judge was perfectly justified in refusing to admit the documents at the time when the court had only to hear the arguments, and that no case had been made out for their admission in appeal. He also agreed with the Subordinate Judge's finding that the land was not ancestral, but he held that the parties were governed by custom in the matter of alienation and he sent the case back to the trial court for decision on a further issue which he framed in these words:—

> "The land in suit having been found to be non-ancestral, do the collaterals exclude the daughter's son according to the custom of the parties and is the gift, therefore, invalid?"

This issue did not arise on the pleadings.

Both sides appealed to the High Court at Lahore. The appeals were heard by Bhide J., who held that the Subordinate Judge had been right in not admitting the two documents in evidence, but that the District Judge had erred in framing a new case for the appellants, and in remanding the suit for trial on the new issue. He agreed that the land was non-ancestral. The result was that the learned Judge dismissed the appellants' appeal and accepted that of the respondent.

The appellants then filed an appeal under the Letters Patent of the High Court. This appeal was decided by Din Mohammad and Mehr Chand Mahajan JJ., who upheld the judgment of Bhide J.

In their appeal to His Majesty in Council the appellants maintain that the Subordinate Judge wrongly refused to admit the additional evidence and that the District Judge was right in framing the new issue and in remanding the case to the trial court for further hearing. They ask that leave be granted to them to amend the plaint in order to cover the new issue.

On the question whether the Subordinate Judge erred in refusing to admit the two documents, Mr. Parikh laid stress on the case of *Gopika Raman Roy* v. *Atal Singh and others*, 56 I.A., p. 119, where Sir John Wallis, in delivering the judgment of the Board, said that where the rules of exclusion apply and the documents cannot be filed without leave

of the court, that leave should not ordinarily be refused where the documents are official records of undoubted authenticity, which may assist the court to decide rightly the issues before it. It would be erroneous to read these observations as implying that there is no discretion left in a trial court when it is a matter of admitting public records at a late stage. The court has a discretion and while generally speaking it will be a wise exercise of the discretion to admit such evidence, the question must be decided in each case in the light of the particular circumstances.

The only reason disclosed by the appellants in their application for the admission of the documents at that late stage was that they had no knowledge of them before. The District Judge in his judgment pointed out that apparently neither the appellants nor their counsel had consulted the Revenue records before filing the suit and ignorance of entries therein would not provide a sufficient excuse for the delay in making the application. Three appellate courts in India had held that the Subordinate Judge exercised a wise discretion in refusing to admit additional evidence and their Lordships are not prepared to say they were wrong in so holding.

Their Lordships agree with the learned Judges of the High Court that the District Court erred in framing the new issue and in sending the case back to the trial court for further hearing. As already indicated the question embodied in the additional issue was not raised in the pleadings. The appellants founded their claim on the ground that the land was ancestral and it was on that ground that they challenged the right of the widow to make the gift. Not once during the proceedings in the trial court did they suggest that even if the land was found to be non-ancestral, the widow would still be incompetent to dispose of it. In *Eshenchunder Singh* v. *Shamachurn Bhutto*, XI Moore's Indian Appeals, p. 7, at p. 20, Lord Westbury described it as an absolute necessity that the determinations in a cause should be founded upon a case to be found in the pleadings or involved in or consistent with the case thereby made. The course decided upon by the learned District Judge offended against this principle and their Lordships consider that he was rightly overruled.

In asking the Board to allow the plaint to be amended at this stage attention has been drawn to the provisions of section 153 and Order VI, rule 17, of the Code of Civil Procedure. The powers of amendment conferred by the Code are very wide, but they must be exercised in accordance with legal principles, and their Lordships cannot allow an amendment which would involve the setting up of a new case. The judgment of Lord Buckmaster in *Ma Shwe Mya* v. *Maung Mo Hnaung*, 48 I.A. 217, is directly in point. It was there held that it was not open to a court under section 153 and Order VI, rule 17, to allow an amendment which altered the real matter in controversy between the parties. The application for leave to amend is rejected.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed. The appellants will bear the costs.

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In the Privy Council

KANDA AND OTHERS

v.

WAGHU

DELIVERED BY SIR LIONEL LEACH

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