

Privy Council Appeal No. 111 of 1925.

Bhagwan Singh and others - - - - - *Appellants*
v.
Ujagar Singh - - - - - *Respondent*

FROM

THE HIGH COURT OF JUDICATURE AT LAHORE.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 2ND DECEMBER, 1927.

Present at the Hearing:

VISCOUNT SUMNER.
LORD SINHA.
SIR JOHN WALLIS.
SIR LANCELOT SANDERSON.

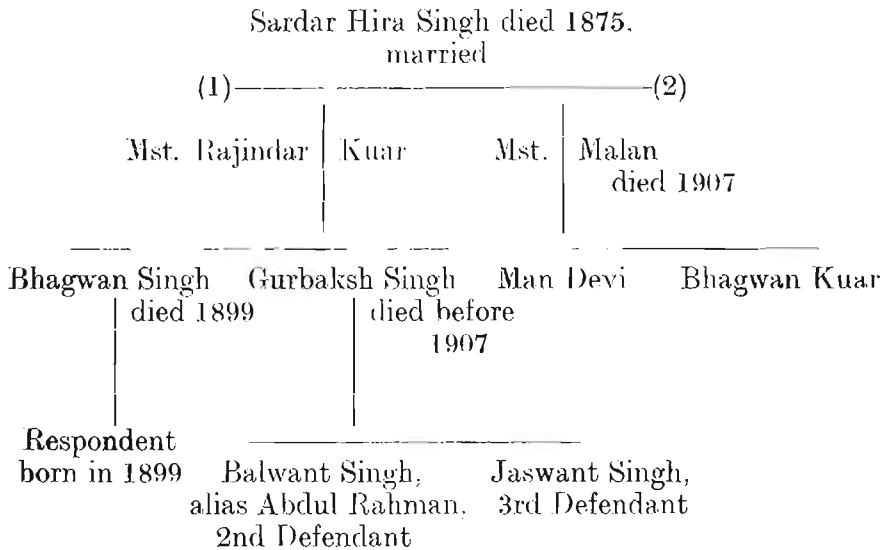
[*Delivered by* SIR LANCELOT SANDERSON.]

This is an appeal by the legal representatives of Bishen Singh, who was the defendant No. 1 in the suit, against the judgment and decree of the High Court of Judicature at Lahore, dated the 22nd July, 1923. The High Court's judgment reversed the judgment and decree of the learned Subordinate Judge, who tried the suit.

The suit was brought in July, 1917, by the plaintiff, Ujagar Singh, against Bishen Singh and two other defendants, viz., Abdul Rahman Khan, sometimes called Balwant Singh, and Jaswant Singh, sons of Gurbaksh Singh, to recover possession of the land mentioned in the plaint, situate in the Gujranwala district, which was alleged by the plaintiff to have been part of the ancestral property of Hira Singh, the grandfather of the plaintiff.

The plaintiff alleged that the defendants 2 and 3 had a half-share in the said property, but that, by reason of a private partition, they had taken other lands in exchange for their share in the suit land, that consequently they had no further interest therein, and that they have recognised the claim of the plaintiff to the lands in suit, which had been held by Mussamat Malan.

The defendant, Bishen Singh, was in actual possession of the lands in suit, and relied upon a mortgage executed on the 6th May, 1896, by Mussamat Malan, who was one of the widows of Hira Singh. A pedigree of the family is included in the respondent's case in this appeal, and is as follows :



The plaintiff alleged that Mussamat Malan had no power of alienation of the land in dispute and that he was in no way bound by the mortgage.

The defendant, Bishen Singh, then put in a further pleading, alleging that Mussamat Malan mortgaged the land for valid necessity, for payment of debts, and for expenses incurred in connection with the marriages of her daughters.

The defendant further stated that if the mortgage money, interest and costs were paid he had no objection to release the land.

The learned Subordinate Judge held that Mussamat Malan had limited powers of alienation but that the mortgage was executed for valid necessity, and that it was binding on the plaintiff. He held further that the suit was barred by the Indian Limitation Act.

In the ordinary course the plaintiff's suit would have been dismissed, but the learned Judge said that

" Having regard to the fact that the case has been dragged on for pretty long time, and the defendant No. 1 is not disinclined to redeem the lands provided he is paid his charges and the costs of improvements, I think the plaintiff may be allowed to redeem the lands in this case."

He accordingly made a decree in the plaintiff's favour for possession of the land in dispute, provided the plaintiff paid Rs. 8,734,4,0 in addition to the cost of buildings to be determined thereafter which had been built by the defendant, Bishen Singh; and he directed that the parties should bear their own costs.

Both the plaintiff and the defendant, Bishen Singh, appealed to the High Court; the two appeals were heard together, and disposed of by one judgment on the 22nd July, 1923.

The learned Judges of the High Court were of opinion that no necessity whatever had been proved for the mortgage, they therefore allowed the plaintiff's appeal, and gave the plaintiff a decree for possession of the land in suit without any payment.

The defendant's cross-appeal was dismissed, and it was directed that his representative should pay the plaintiff's costs in both appeals and in the Trial Court.

The High Court did not deal with the question of Limitation ; but this is now of no importance in view of the fact that the learned counsel who argued this appeal on behalf of the appellants stated that he did not rely on that point.

In the first place the question of necessity may be dealt with.

The learned Judges of the High Court came to the conclusion that Mussamat Malan had ample funds to meet the expenses of the marriages of her daughters, and that the defendant No. 1 had failed to establish any necessity whatever for borrowing money.

This opinion was largely based upon the interpretation which the learned Judges placed upon what is referred to in the judgment as "the estimate."

Their Lordships were informed that the so-called "estimate" is contained in a statement made by one Amir Shah before a Munshi in certain proceedings in which Bishen Singh was the decree holder and Mussamat Malan was the judgment debtor. The learned Judges said that—

"At the time, therefore, that the money was borrowed the income of the widow, far from having been Rs. 1,921, as shown in the estimate, must have been approximately Rs. 3,350, thus leaving a margin over and above her ordinary expenditure of over Rs. 1,300 per annum."

It was argued on behalf of the appellants that the above-mentioned "estimate" did not show the widow's income to be Rs. 1,921, as stated by the learned Judges, but that it appeared from the statement that the income available to the widow, Mussamat Malan, in respect of the lands referred to therein was Rs. 420-5-2 only, and that her expenses amounted to about Rs. 396.

It was admitted by the learned counsel, who appeared for the plaintiff respondent, that in this respect the learned Judges of the High Court had made a slip, and that he could not support the finding of the High Court on this point on the grounds stated in the judgment.

The hearing was adjourned in order that the learned counsel should consider whether the finding of the High Court on the issue of necessity could be supported on other materials in the record.

Having heard the learned counsel further their Lordships are of opinion that no sufficient ground has been shown for interfering with the finding of the learned Subordinate Judge on this question, viz., that the income from the lands at the material time was hardly sufficient to meet the ordinary expenses of the family, that Mussamat Malan had no alternative and was compelled to resort to borrowing in order to meet the extraordinary expenses of the marriages of her daughters, and that the mortgage deed was executed for consideration and valid necessity.

It was, however, further argued by the learned counsel for the plaintiff-respondent that, even assuming the finding of the

learned Subordinate Judge on the question of necessity to be correct, that did not dispose of the case, and that the plaintiff was entitled to hold the decree, which he obtained in the High Court, on other grounds.

It appears that Hira Singh died in 1875, leaving two widows, viz., Mussamat Rajindar Kaur and Mussamat Malan; two sons by the first-named wife, viz., Bhagwan Singh and Gurbaksh Singh; and two daughters by Mussamat Malan.

On the 17th December, 1887, an agreement was entered into by Gurbaksh Singh, Mussamat Malan, Mussamat Rajindar Kaur, and Rainian Singh, as guardian for Bhagwan Singh, who was then a minor.

It was recited that Hira Singh, deceased, owned the lands therein described, that they were then entered in the names of Gurbaksh Singh and Bhagwan Singh in the official papers, that for settlement of mutual disputes and to make arrangements for maintenance and expenses the parties had agreed to divide the entire estate into the following shares, viz. :—

Gurbaksh Singh one-fourth share, Bhagwan Singh (minor) one-fourth share, Mussamat Malan with her daughter till death, without power of alienation one-fourth share, and Mussamat Rajindar Kaur till her death, without the power of alienation one-fourth share.

It was agreed that the lands in dispute were part of the one-fourth share allotted by the agreement to Mussamat Malan.

The agreement further stated as follows :—

“As for the marriage of the daughter of Mussamat Malan, which is yet to be celebrated, a mutual settlement in regard to the expenses thereof shall at the time of the marriage be made through a panchayet.”

The agreement was executed “by way of a deed of mutual partition,” so that no dispute might arise.

It was argued on behalf of the plaintiff-respondent that Mussamat Malan had not the estate of a Hindu widow, that no question of necessity for alienation arose, but that she had merely a one-fourth share in the estate for her life, with no power of alienation whatever, and that, therefore, the mortgage which she executed in favour of Bishen Singh was invalid and of no effect.

One answer set up on behalf of Bishen Singh to this case was that, after the death of Hira Singh, entry as to ownership was made in the Revenue papers according to the aforementioned shares, that he had no knowledge of the agreement, and that such agreement was never acted upon.

The defendant further alleged that the plaintiff's father and the defendants 2 and 3 admitted by their acts and conduct that no such agreement existed, and that, if there was one, it was cancelled.

Issues were raised at the trial in respect of this point, viz. :
4 (a) Did the plaintiff's father attest the deed (*i.e.*, the mortgage deed), and by so doing, was he estopped from challenging its validity, and was the plaintiff for this reason estopped from contesting it?

4 (b) Did the plaintiff's father and defendants 2 and 3 acquiesce in the alienation in favour of defendant No. 1 by their conduct ?

The learned Subordinate Judge decided these issues against the plaintiff, and held that the plaintiff was debarred from contesting the validity of the mortgage.

The High Court held that the evidence given on behalf of the defendant was not sufficient to establish the genuineness of the signature of the plaintiff's father on the mortgage deed.

Evidence on this point was given by Bishen Singh, the defendant, who said that Bhagwan Singh (the father of the plaintiff) asked him to get the deed written and that he would attest it and get it registered, and that the mortgage deed was executed with the consent of the plaintiff's father, and that it was attested by him.

Amir Shah, a patwari, confirmed this evidence, and said that Bhagwan Singh signed the mortgage deed in his presence, that Mussamat Malan and Bhagwan Singh consulted together, and that in order to pay off debt they mortgaged the lands.

The learned Subordinate Judge had the opportunity of seeing these witnesses give their evidence, and he accepted it.

The learned Judges of the High Court, who did not see the witnesses, rejected their evidence as insufficient to establish the genuineness of Bhagwan's signature on the mortgage deed, for the reasons stated in this judgment.

Their Lordships are unable to agree that the reasons given by the High Court are sufficient to justify the over-ruling of the finding of fact arrived at by the learned Subordinate Judge on this point, and they are of opinion that the signature of Bhagwan Singh as a witness to the mortgage deed must be taken to be a genuine signature for the purposes of this case.

This does not conclude the matter, for attestation of a deed by itself estops a man from denying nothing whatever except that he witnessed the execution of the deed, and by itself it does not show that he consented to the transaction which the document effects.

In this case, however, in their Lordships' opinion, there is abundant evidence, in addition to the fact that Bhagwan Singh attested the deed, to show that he consented to and acquiesced in the execution of the mortgage by Mussamat Malan. There is the evidence, to which reference has already been made, which goes to show that Bhagwan Singh not only consented to the transaction, but took an active part in the consultations which resulted in the mortgage of the lands by Mussamat Malan.

Further, there is the significant fact that in June, 1896, *i.e.*, a month after the mortgage was executed, Bhagwan Singh entered into an agreement with Bishen Singh, whereby in effect he obtained an option to have the mortgage transferred to him.

On the consideration of all the evidence their Lordships are of opinion that Bhagwan Singh not only witnessed the execution

of the mortgage by Mussamat Malan, but also that he, in his capacity of managing member of the joint family, consented to and acquiesced in the mortgage being given, and that this appeal must be decided upon the basis of that finding.

The learned counsel for the plaintiff-respondent further contended that, even if Bhagwan Singh would have been estopped from denying the validity of Mussamat Malan's mortgage, the plaintiff is not so estopped, because the plaintiff does not claim through his father, but as a member of a joint Hindu family to which the Mitakshara law applies, and he cited the cases of *Wasantrao v. Anandrao Ganpatrao*, 6 Bom. L. Reporter, 925 and 9 Bom. L. Reporter, 595, and *Beer Kishore Suhye Singh v. Hur Bullub Narain Singh*, 7 Weekly Reporter, 502.

These decisions are not applicable to the facts of this case. It appears from the plaint that the plaintiff was only five months old at the time when Bhagwan Singh died, viz., in 1899. The mortgage was executed in May, 1896 ; it is therefore clear that the plaintiff was not born at the time when the mortgage was executed ; so that even if the Mitakshara law applies without any qualification, the plaintiff is not entitled to contest the validity of the mortgage, for at the time when it was executed the plaintiff had no interest in the family property, and Bhagwan Singh acquiesced in the execution thereof, and in the circumstances of this case it is clear that he was acting not only on behalf of himself, but also on behalf of all the members of the family who were alive at that time.

The result is that the plaintiff's claim fails and that the appellants are entitled to possession under the mortgage, and such consequential relief as can be given under S. 144 of the Code of Civil Procedure.

Their Lordships, therefore, will humbly advise His Majesty that this appeal should be allowed, that the judgment and decree of the High Court, dated the 22nd July, 1923, should be set aside, that the plaintiff's suit should be dismissed, and that the plaintiff should pay the costs of the appellants in this appeal and the costs of the defendant Bishen Singh and his legal representatives in both the Courts in India.

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In the Privy Council.

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DELIVERED BY SIR LANCELOT SANDERSON.

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