Mahipat and Others Vs Bhim Singh and Others

Court: High Court Of Punjab And Haryana At Chandigarh

Date of Decision: March 27, 1979

Citation: AIR 1980 P&H 196

Hon'ble Judges: S.S. Sandhawalia, C.J; S.S. Dewan, J

Bench: Division Bench

Judgement

S.S. Dewan, J.
This judgment will dispose of two Letters Patent Appeals Nos. 30 and 29 of 1975 filed by Mahipat and others against

Bhim Singh and others which are directed against the judgment of the learned single Judge dated November 7, 1974 whereby the learned Judge

reversed the judgment of the Additional District, Judge, Rohtak dated February 25, 1972 and allowed Regular Second Appeal No. 889 of 1972

filed by Bhim Singh and as a consequence dismissed Regular Second Appeal No. 975 of 1972 preferred by Mahipat and others.

2. Following pedigree table of the parties wilt be of assistance in understanding the facts of the case out of which the appeals have arisen:--

(See pedigree table)

Khubi

_____

| | |

Her Nand Ghasi Hari Singh (died issueless testator)

_____| |

| | |

Mahipat Birkha Ohandgl

| _____|_____

| | | | | | |

| Bhim Jage Bisal SinghPirthi Tara Darya Singh

| Singh

| (legatee)

_____|_____

Mst Nathan Bisal Savitri Sumitra Murti

(widow of Singh (daughter)(daughter)(daughter)

Birkha)

3. Hari Singh died issueless on June 30, 1965.On Oct 26, 1964 he execute a will masked Exhibit D. 1. whereby he bequeathed his entire property

including the agricultural lands, which are the subject matter of present litigation commenced by Mahipat and Birkha, in favour of Bhim Singh, a

grandson of his real brother namely Ghasi in lieu of services rendered by him during his lifetime.

4. Parties are Jats by tribe and belong to Rohtak tehsil in the district of Rohtak and are admittedly governed by custom.

5. Claiming to. be the reversioners of Hari Singh, the testator and hence entitled to the property left by him in preference to Bhim Singh, the

legatee, Mahipat and Birkha sons of Har Nand brought a suit against him for the possession of agricultural lands described in the plaint alleging

inter alia that they were ancestral in the hands of Hari Singh and that according to the custom which ruled, he had no power to make a will in

respect of them. It was, therefore, pleaded that the will made by him did not confer any right in the lands on Bhim Singh and was inoperative and

ineffective against their reversionary interest therein. Bhim Singh repudiated all the allegations. It may be stated that Birkha died during the

pendency of the suit and his legal representatives were impleaded as plaintiffs. The trial court settled a number of issues including those relating to

the character of the lands, ancestral or otherwise, and the competency of Hari Singh to make a will in respect of them. The trial court found that the

lands were ancestral in the hands of Hari Singh. As to the custom turning upon the power of male proprietor to make a testamentary disposition of

his property, the plaintiffs relied upon the entry in the Riwaj-i-Am of Rohtak tehsil compiled in the year 1909 Exhibit P. 8 which prohibits without

exception such a disposition and further states that if one is made, it cannot be acted upon. The defendants on the other hand relied upon the

custom recorded in the Riwaj-i-Am of tae year 1879 copy of which is Exhibit D. 2, which relates clearly to alienations only by a sonless

proprietor. It provides that if he alienates his property by sale, mortgage or gift, the reversioners are not entitled to object to any such transfer. On

its basis it was sough to be contended on behalf of the defendants that the unrestricted power so conferred would also include the power to make

a will in respect of the same. The trial court for the reasons stated by it found that the custom regarding testamentary dispositions as contained in

Riwaj-i-Am of 1909 would govern the case and consequently held that the will in question was invalid and inoperative against the reversionary

interests of the plaintiffs in the land and decreed the suit filed by them in toto.

6. On appeal by Bhim Singh, the learned Additional District Judge, Rohtak agreed with the view of the trial court so as to hold that as far as a

testamentary disposition was concerned, the par ties were governed by the custom recorded in the Riwaj-i-Am of 1909. He; however, held that

the prohibition on the power to make a will covered within its ambit only the ancestral property. On the evidence he found that a portion of the

land in dispute was self-acquired an t to that extent the will made by Hari Singh was opined to be valid. He further found that the plaintiffs were

entitled. only to half of the ancestral land left by Hari Singh, that being the share of their inheritance in it in view of the presence of a co-heir namely

Shaloo, a son of the sister of Hari Singh. The decree granted by the Court of first instance was accordingly modified and the appeal filed by Bhim

Singh partially allowed. Aggrieved thereby both the par ties appealed to this Court.

7. In this appeal, R. S. A. No. 889 of 1972, Bhim Singh challenged the finding arrived at by the tower courts that by custom Hari Singh had no

power to make the will. Mahipat and others through their appeal (R. S. A. No. 975 of 1972) questioned the correctness of the findings of the

lower appellate Court holding that a part of the lands was not ancestral and that they were entitled to inherit only a half of the ancestral lands. The

appeals came up for hearing before the learned single Judge. It was contended by the learned counsel for Bhim Singh that there was e clear

averment in the written statement that the will in his favour was in lieu of services and that such disposition of property was allowed by the

customary law of Punjab. The learned counsel for Mahipat and others opposed the contention asserting that there was no specific issue on the

point whether the property had been bequeathed favour of Bhim Singh in lieu of services and whether there was any custom sanctioning such a

bequest. The learned single Judge observed that though issue No. 3 as framed was comprehensive enough to enable Bhim Singh to lead evidence

on the contentions raised before him, yet he felt inclined to take the view that a specific issue on them was called for and proceeded to strike the

following issue by order dated Feb. 27, 1974:--

Whether the will dated October 26, 1984, executed by Hari Singh in favour of Bhim Singh (defendant No: 6) was in lieu of services and if so,

what is its effect ? (onus on the defendants).

The learned single Judge directed the trial court to record evidence on the issue and submit his report through the District Judge who in turn was

required by the order to record his views. On evidence produced by the parties the trial court found that the fact that Bhim Singh had rendered

services to Hari Singh, had not been established and that no such custom as had been contended for could be held proved. The learned District

Judge on appreciation of the evidence recorded the opinion that Bhim Singh had rendered services to Hari Singh during the lifetirne but, in his

opinion, the fact of rendering the services had no effect whatsoever as far as the power to make a will was concerned. In other words, in his view

the customary law bearing on such power made no distinction whether the will was made in lieu of services or otherwise.

8. After the receipt of reports made by the two Courts below and hearing arguments advanced on behalf of the parties, the learned single Judge on

appreciation of evidence affirmed the finding of the learned District Judge and held that Bhim Singh had rendered services to Hari Singh end

proceeded to examine two question--(1) whether or not under the customary law governing the parties Hari Singh was empowered to make a will

in lieu of the services and (ii) whether or not the custom recorded subsequently in the year 1909 which prohibits a sonless male proprietor to make

a will was reasonable, a question which was raised for the first lime before him.

9. Relying on the custom incorporated in the Riwaj-i-Am of year 1879 Exhibit D. 2 of which mention has been made above, the learned single

Judge has concluded that Jats of Rohtak tehsil can by virtue of it competently make a testamentary disposition o! ancestral property. Reasons for

the conclusion, as stated, can be summed up thus; ""The custom as recorded confers unrestricted powers on a male proprietor to deal with hie

property as he chooses. He can alienate it in the absence o! valid necessity and dispose it of by making a gifts. In substance there is hardly any

difference between a gift and a wilt. Where as a gift operates as a transfer of property in Praesenti, the will takes effect after the death of the

testetor Therefore a male proprietor has the power to make a will.

10. The contention on behalf of the appellants is that the custom recorded in the Riwaj-i-Am of 1909 Exhibit P. 8 which expressly prohibits

testamentary disposition had to be preferred and given effect to was turned down by the learned single Judge, in this behalf, the learned single

Judge expressed doubt if a custom later in point of time could be preferred to the earlier and proceeded to observe that as an essential prerequisite

a custom should be ancient and certain which implied that an earlier statement of custom, unless it is modified by judicial opinion or the community,

itself should be preferred. With this reasoning, the learned single Judge declined to give effect to the custom recorded in the Riwaj-i-Am of 1909

and gave reflect to the one recorded in the Riwaj-i-Am 1879 Exhibit D. 2 and on its basis upheld the validity of the will. executed by Hari Singh.

11. On the question of reasonableness of the custom prohibiting testamentary disposition, the learned single Judge has held that it in unreasonable

and consequently unenforceable. In the view of the learned single judge it is unreasonable because of the likelihood of practical difficulties which a

sonless male proprietor wishing to retain his property till the end o! his life may have to face on account of the absence of power to make a will.

According to the learned single Judge a male proprietor requiring assistance of a dose relation in cultivation or his lends or other matters may have

to sell it with a view to compensate him out of the sale proceeds and yet the relation se compensated may not render assistance and thus deceive

him. But if there was a power to make a will, the changes of deception, observes the learned single Judge, will be eliminated for in that event the

relation in whose favour testamentary disposition is assured will stand by the testetor. As a result of the aforesaid findings, the learned single Judge

accepted R. S. A. No. 889 of 1972 filed by Bhim Singh and rejected the appeal (R. S. A. No. 975 of 1972) submitted by Mahipat and others

without examining its merits.

12. The views o! the learned single Judge on both the questions have been vehemently assailed by Shri Pitam Singh Jain the learned counsel for the

appellants. The learned counsel contended that the custom recorded during the settlement of year 1909 which expressly denied to a male

proprietor the right to make a will would govern the decision of the case to the exclusion of the case recorded during the settlement of the year

1879. He maintained that the custom recorded in the year 1879 could not be so read as to include it within the power of testament. He further

contended that the custom which Prohibits alienation by will could not be held to be unreasonable and that the reasons assigned by the learned

single Judge so as to declare it to be unreasonable were not relevant to an inquiry into the reasonableness of a custom.

13. Before I examine the contentions raised, it appears necessary to point out that in his written statement Bhim Singh did not plead that there

existed a custom in his tribe according to which a sonless male proprietor could competently make a valid will in favour of a relation in lieu of

services rendered by him during his lifetime. Consequently an investigation into the question of the existence of such a custom and the fact whether

or not Bhim Singh had rendered services which was ordered by the learned single Judge was not called for. It may be observed that the rendering

of the services by Bhim Singh to Hari Singh during his lifetime which has been held established by the learned single Judge will, be a factor of no

relevance in considering the competence of Hari Singh make a will on the basis of the statement of custom recorded in the year 1879.

14. I propose to consider first the question of reasonableness of the custom which expressly inhibits testamentary disposition. There is and can be

no dispute that amongst other attributes, a custom to be followed and enforceable must be reasonable. In other words, it must not be against

reason. What then is the reason on the basis of which a custom can be declared judicial to he unreasonable is the question ? Evidently enough, it

cannot be each and every reason. In the case of Mahamaya Debi v. Haridas Haldar reported as ILR (1915) Cal 455 in which reasonableness of a

custom which sanctioned transfer of Palas (turn of worship) was brought into question. A Division Bench of the Court held the custom to be

reasonable and stated the reasons relevant in judging the reasonableness of a custom in these terms:--

It is indisputable that it a custom be against reason, it has no force in law: but as explained in Co. Litt., 62a, the reason here referred to is not to be

understood as meaning every unlearned man"s reason, but artificial and legal reason warranted by authority of law or, as Blackstone puts it,

(Commentates, Vol. I, p. 77) it is sufficient if no good Iega1 reason can be assigned against it, when, however, it is said that a custom is void

because it is unreasonable, nothing more is meant that that the unreasonable character of the alleged custom conclusively proves that the usage,

even though it may have existed from time immemorial, must have resulted from accident or indulgence and not from any right conferred in ancient

times, Salisbury v. Gladstone, (1861) 9 HLC 691, 700, 701. It is also well settled that the period for ascertaining, whether a particular custom is

reasonable or not, is the time of its possible inception, this is in accord with the observation in the Tanistry case, (1608) Dav. Ir. 28 (29, 32) ""the

commencement of a custom (for every custom hath a commencement although the memory of man doth not extend to it, as the river Nile hath a

spring although geographers cannot find it) ought to be upon reasonable ground and cause, for if it was unreasonable in the original, no usage or

continuance can make it good; Quod ab initio non valet, in tractu temporis non convalescent."" When tested in the light of these principles, no good

ground can be assigned why the custom should be condemned as reasonable (at pages 473-474).

15. The Supreme Court in the case of Ram Dhan Lal and Others Vs. Radhe Sham and Others, , also referred to one such reason as forming the

basis for decision in case a custom is challenged as unreasonable and repelled the challenge made to a custom laying down deep stream rule for

settlement of disputes arising between the riparian proprietors and observed thus:--

It is urged by the learned counsel for the appellants that such custom is unreasonable and should for that reason be held to be unenforceable in

taw. It cannot be denied that the application of the deep stream rule might work injustice in certain cases as the gain or loss of property is made to

depend upon accidental and uncertain phenomena or mere caprice of nature; but on the other hand, the custom affords a convenient and effective

way of avoiding boundary disputes which might otherwise be a fruitful source of strife and contention between riparian proprietors. A custom must

not certainly be against reason, but the reason referred to here is not to be understood as meaning every unlearned man''s reason but artificial and

legal reason warranted by authority of law; Vide Coke on Littleton 62(a). It la sufficient if no good legal reason can be assigned against it.

Prevention of quarrels and disputes between contiguous villages and estates is certainly an object beneficial to the community and judged by this

test, the custom of Dhar Dhura cannot be held to be unreasonable. It may be pointed out in this connection that in some shape or other this deep

stream rule has been recognised in India from very early times as a convenient mode of settling boundary disputes. and Brihaspati, the Hindu Smriti

writer, enunciates the rule in almost identical terms which has been referred to in the writings of later commentators as po3nted out by Lal Mohan

Dass in his Tagore Law Lectures on the Law of Riparian Rights: Vide Dash on the law of Riparian Rights page 178. The first contention of the

appellant, therefore, cannot be accepted. (at page 213 para 9).

16. Judged by the principles as enunciated it is not possible to hold that the long standing custom of immemorial antiquity prohibiting a will in regard

to the ancestral property, fully evidenced by answer to question No. 93-A in the Riwaj-i-Am of Rohtak District by E-Joseph I. C. S. (1911

Edition) in the tribe amongst the Jats, to which the parties belong, is unreasonable. With all respect to the learned single Judge, the practical

difficulties which according to him a male proprietor all have to experience during his lifetime if the custom prohibiting testamentary disposition were

to be held as reasonable cannot be accepted as a legally permissible test for determining reasonableness of this custom. Such a custom, it cannot

be disputed, prevails in numerous agricultural tribes in the State and has never been adjudged to be unreasonable. It is of the essence of agnatic

theory that in respect of ancestral Immovable property In the hands of an individual, there exists some sort of residuary interest in all the

descendants of the first owner or body of owners, however remote and contingent may be the probability of some among such descendants ever

having the enjoyment of the property and the owner in possession is not regarded as having the whole or sole interest in the property. Though it is

so, a male proprietor in possession of ancestral property may well divert the course of succession by making a will of it if the power of

testamentary disposition were conceded to him by custom and thus defeat the expectations of the agnates and their residuary interest in the

property. That exactly is the reason why custom denying such a power has been favoured by the agricultural tribes. For all these reasons, the

finding of the learned single Judge to the effect that the custom recorded in the Riwaj-i-Am of 1909 prohibiting testamentary disposition is

unreasonable and hence unenforceable, cannot be sustained end is, therefore, reversed.

17. The custom recorded during the settlement of 1909 having been held to be reasonable. the sole question now is whether this alone covers the

power of testamentary disposition by the Jats in the Rohtak District. Before considering the same it is necessary to set the same down:--

Sections v. Wills and Legacies: 93-A. Jats, Ahirs, Hindu Rajputs of Jhajjar, Brahmans, and Pathans of Guriani Zail, have no custom of making

wills and say that if any one made one it would be inoperative. Pathans of Gohana and Hindu and Muhammadan, Rajputs of Gohana and Rohtak

say that a will must be in writing and is complied with but must not transgress the recognised rule of inheritance of ancestral property. Pathans of

Jhajjar outside Guriani Zail and Shekhs of Jhajjar spry that a man can make a will orally or in writing, dealing with one-third of his property,

movable or immovable, ancestral or acquired, but not with more. No instances are produced by Pathans or Rajputs of a will except one by

Museammat Dhana Rajputhi of Gohana in favour of Allahdad son of Faujdar Khan, and this was never operated on.

18. What further deserves pointed notice is the fact that the aforesaid record of custom does not stand in isolation, is equally borne out from the

earlier record in the ""Punjab Customary Law Volume II, by C. L. Tupper, Edition 1881,"" Therein in Section II at page 180 pertaining to Rohtak

District a specific entry with regard to the will is in the following terms:--

43. There is no custom of making wills among the Zamindars.

What they call a will is merely a dying request, which they regard or not as they see fit.

19. It is evident from the above that there is a consistent stream of custom land records thereof specifically on the point of will, holding that the Jats

of Rohtak have no power to bequeath away their ancestral property.

20. In face of the above the reliant on the part of the defendants-respondents on Exhibit D. 2, which primarily land evidently relates to alienations,

does not appear to be well conceived. A reference to Exhibit D. 2 would show that it expressly deals with sale, mortgage and gift and does not

even remotely relate to wills or testamentary disposition. Even otherwise, the answer to the question herein appears to be rather in equivocal terms.

This apart, what deserves highlighting is that in the face of the existence of clear cut custom that amongst the Jats of Rohtak District, the making of

will was unknown and in any case was not recognised as valid, it would be vain to give the same power on the basis of an entry like Exhibit D. 2,

which exclusively relates to ordinary alienation of property.

21. Shri S. P. Jain, on behalf of the respondents was unable to urge anything sustantial against the categoric enunciation of custom in Entry 43 of

Tupper"s Customary Law and answer to question No. 93-A by E. Joseph What was halfheartedly submitted was that the quoted custom therein

debarring testamentary disposition was not supported by specific instances. This is hardly an argument for ignoring a clear-cut recorded custom

adopted by a community governed by such a customary law. An argument of this nature has been authoritatively negatived in AIR 1949 401 (P &

H.) in the following terms:--

Now it is well settled that an entry in the Riwaj-i-Am is a presumptive evidence of the existence of the custom recorded therein even though it is

not supported by any instances Reference may in this connection be made amongst other cases to the decision of their Lordships of the Judicial

Committee in Mt. Vaishno Ditti v. Mt, Rameshwari ILR 10 Lah 86: AIR 1928 PC 294.

22. In view of the aforesaid discussion, I hold with great respect to the learned single Judge that the only custom attracted to the case is the answer

to question No. 93-A of Customary Lam by E. Joseph and the same cannot negatived by holding it unreasonable. Consequently Hari Singh had no

power to make the will in respect of the ancestral property in his hands and the" one made by him is, therefore, to that extent inoperative and

ineffectual, against the reversionary interests of the plaintiff-appellants, Consequently L. P. A. No. 30 of 1975, which is directed against the

judgment of the learned single Judge in R. S. A. No. 889 of1972 is allowed and the judgment of the learned single Judge is set aside and that of

the learned Additional District Judge, Rohtak is hereby restored.

23. It deserves recalling that L. P. A. No. 29 of 1975 directed against the findings of the learned Additional District Judge with regard to the

ancestral or non-ancestral nature of part of the property was not pressed before us. The same is accordingly dismissed.

24. In the circumstances there will be no order as to costs in both the appeals.

S. S. SANDHAWALLA, C.J.

I agree.

25. Order accordingly.