(1929) 11 AHC CK 0013

Allahabad High Court

Case No: None

Mt. Bhagwan Dei		APPELLANT
	Vs	
Shib Singh		RESPONDENT

Date of Decision: Nov. 28, 1929

Hon'ble Judges: Sulaiman, J

Bench: Single Bench

Final Decision: Partly Allowed

Judgement

Sulaiman, J.

This is a defendant''s appeal arising out of a suit for a declaration of the plaintiff''s right in the property detailed in the plaint. The pedigree is printed at p. 22, and shows that Laoti Ram had two sons, Nahar Singh and Saheb Singh. The plaintiff Shib Singh is the son of Saheb Singh. Nahar Singh''s widow was Mt. Chaoni, and he left a son Chait Ram. Chait Ram died leaving Bahu Lal as his son. He left a widow Mt. Bhagwan Dei, the defendant appellant.

2. The plaintiff''s case briefly stated was that Babu Lal and Shib Singh were members of a joint Hindu family when Babu Lal died, and that the names of Mt. Chaoni and Mt. Bhagwan Dei were entered in the revenue papers against the share of Babu Lal for their consolation and to secure payment of their maintenance allowance, but that the plaintiff himself remained in actual possession of the property. The plaintiff complained against the action of the widow in granting a lease, but he did not claim any specific relief with regard to that lease. The actual relief claimed in the suit was one in the following words:

It may be declared that the plaintiff is the owner of the property mentioned below and the defendant has no right therein except that of maintenance.

3. The contesting defendant took up the position that the family was separate, and that therefore she had entered into the estate of Babu Lal as his widow. She further pleaded that under a family arrangement she was made the owner of the property

in her possession, and Shib Singh became the owner of the property allotted to him on the understanding that neither party would have any right of interference or connexion with the property given to the other. An attempt was made to offer an elaborate explanation of the various transactions which had taken place since the death of Babu Lal and might prima facie throw some doubt on the title of the defendant.

4. The learned Subordinate Judge has come to the conclusion that the family was not separate and that the plaintiff Shib Singh is entitled to the estate. He has overruled the defendant''s contention that there was any arrangement under which she was made the owner of any part of the property, and has also repelled her contention that she has been in possession of this property adversely against the plaintiff. The actual form in which the decree has been passed is;

It is declared that the plaintiff is the owner of the property in suit and the defendant is entitled to get maintenance from him,

5. It is obvious that the form of the decree given is not exactly what the plaintiff had asked for in the plaint.

6. The defendant has appealed from this decree and on her behalf the findings of the learned Subordinate Judge have been challenged.

7. A new point has been urged before us which does not appear to have been seriously pressed before the Court below but which, if accepted, would certainly strengthen the appellant''s case, that the family was separate. It is said that Nahar Singh by conversion became a Mussalman and therefore there was a break up in the joint status of the family. That such a result would follow as a matter of law is obvious from the case of Gobind Krishna Narain v. Khunni Lal [1907] 29 All. 487, and the pronouncement of their Lordships of the Privy Council in the case of Khunni Lal v. Gobind Krishna Narain [1911] 33 All. 356. But in our opinion that fact is not at all proved.

8. In the first place, this was not the position taken up clearly in the written statement, We think that if the defendant intended to urge before the Court that Nahar Singh had become a convert and that there was a disruption in the family ipso facto, the point would have been put forward expressly in the grounds of appeal. No such question was put either to the plaintiff or to any of the witnesses who supported the jointness of Nahar Singh and Sahib Singh. The plaintiff''s oral evidence was closed on 20th April 1926, and on that very date an application was made for the examination on commission of a witness, Mt. Amatul Mannan, who was described as the daughter of Khalil-ur-Rahman and the interrogatories for whom suggested that her father had been Nahar Singh. This witness was examined on 21st April 1926, and stated that she was the daughter of Khalil-ur-Rahman, whose former name had been Nahar Singh, that her father lived separately from Sahib Singh and that they were separate in mess though their property was joint.

According to her, this Khalil-ur-Rahman died 15 or 16 years after the death of Saheb Singh, and Saheb Singh must have died about 30 years ago. Another witness Chaman Lal somewhat corroborated the story told by Mt. Amat-ul-Mannan, and stated that Nahar Singh had become a Mahomedan, that he actually saw him for the last time 18 or 19 years ago, and that ho was separate from Saheb Singh. In cross-examination this witness admitted that the first time he saw Nahar Singh was 18 or 19 years ago and before that he did not know him, nor did he see his possession over any property. His information as to this alleged conversion was apparently based on what he had been told by Balak Ram. There is no other evidence in support of this theory. We are unable to accept this story. It seems to us that this story was put forward at a late stage in the case and was apparently an afterthought. It has been made to look plausible because Nahar Singh died or disappeared a long time ago. It is also clear that Nahar Singh did not take away with him his son Chait Ram, nor did he get his share in the family property separated. On the other hand a khewat for 1867(p. 149) shows that Nahar Singh''s minor son Chait Ram was entered as owner of a share under the guardianship of his grandfather Laoti Ram under an order dated 20th July 1867. We therefore totally reject this story of conversion.

9. There being a presumption of jointness under the Hindu Law, the burden undoubtedly lay on the defendant to establish the actual separation in the family. Before the hearing commenced the learned Subordinate Judge took down the statements of the pleaders for the defendant as to the time when this separation was alleged to have taken place, and the proceedings (pp. 6 and 7) then recorded show that the pleaders for the defendant stated that Laoti Ram, the common ancestor of the plaintiff and Babu Lal, deceased, died after 1867. Their families have been separate from the time of Sahib Singh and Nahar Singh. It cannot be stated when the partition took place. Nahar Singh so far as the defendant can say died before 1867. Loati Ram died about the year 1867. It cannot be said whether Nahar Singh died first or Laoti Ram died first. From this statement it is clear that the case of the defendant originally was that there was a separation in the family from the time of Saheb Sing and Nahar Singh and that the latter died about 1867.

10. We have already referred to the khewat for 1867, which shows that the name of Chait Ram the minor son of Nahar Singh was entered in respect of a share under the guardianship of his grandfather Laoti Ram. That strengthens the case of the plaintiff that Nahar Singh might have died in the year 1867 or before that year. It is clear from a sale-deed dated 2nd May 1869(p. 61.) that Laoti Ram remained alive till that date. There is no documentary evidence subsequent to 1869 which would go to show that Nahar Singh owned or was in possession of any separate property. A hypothecation bond (p. 65) dated 10th September 1869 in favour of Saheb Singh might merely show that Laoti Ram and Nahar Singh were dead, and that Chait Ram was then a minor. We have about five documents from September 1869 to December 1879 standing in the name of Saheb Singh alone. They also do not show

anything more than that.

11. On pp. 151, 153 and 155, the khewats for 1297 Fasli again show that the name of Chait Ram son of Nahar Singh and that of Saheb Singh were entered jointly. There are other khewats for 1297 Fasli and 1298 Fasli in which either the name of Saheb Singh or Chait Ram alone is entered. On p. 81 there is a decree dated 14th May 1896 in a suit brought against Saheb Singh and Chait Ram jointly. It is an admitted fact that in 1899 Saheb Singh died, and on p. 83 we have a decree obtained by Chait Ram in his own right and as guardian of Shib Singh the minor son of Saheb Singh. After this Chait Ram died in 1901. On 26th November 1902 Shib Singh executed a deed of gift of the share entered against his name in favour of his stepmother. Apart from the facts that this was a gift of the share entered against his name, made at a time when Babu Lal was alive, and that it related to a half share in the estate, there is no other recital in the document which would indicate that the family was separate. This is the entire documentary evidence up to the time of the death of Babu Lal. In our opinion it is not sufficient to rebut the presumption of jointness which arises under the Hindu Law.

12. As regards the oral evidence the position is as follows: On behalf of the plaintiff there are the statements of Shib Singh, the plaintiff himself, and of Kalyan Singh, Ram Prasad, Bul Chand, Kallu and Jawahar Singh who, generally speaking, said that Nahar Singh had died long ago and that there was no separation in the family. On the other hand the defendant herself has not gone into the witness-box, but the statements of Mt. Amatulmannan, Murari Lal and Chaman Lal are to the effect that there was a separation in residence, mess and business. We have already rejected the testimonies of Amatulmannan and Chaman Lal, and we do not think that the defendant''s evidence in any way outweighs the plaintiff''s evidence.

13. There are a few circumstances which make the alleged separation highly improbable. The evidence in the case shows that Nahar Singh predeceased his father Laoti Ram, and there is no ground for supposing (barring the alleged conversion which we have not believed) that Nahar Singh had separated from his father in the latter''s lifetime. The khewats show that Nahar Singh''s minor son Chait Ram was under the guardianship of his grandfather Laoti Ram. It further appears from the decree of 1896 that Shib Singh and Chait Ram were impleaded jointly. It also appears from the decree of 1901 that after the death of Shib Singh, Chait Ram was acting for himself and as guardian of Shib Singh, who was then a minor. Chait Ram died soon after in 1901, and his death was followed by that of Babu Lal in 1903. The death register (p. 93) shows that Babu Lal at the time of his death was about 22 years old. All these circumstances in our opinion do not make it at all probable that there was a disruption in the family. The learned Subordinate Judge who heard the oral evidence and considered the documentary evidence has come to the conclusion that the defendant has failed to prove this alleged separation. We see no reason to interfere with that finding, which we accept.

14. The family being joint, the defendant Mt. Bhagwan Dei was not entitled to any property as a Hindu widow. She of course, had a right to be maintained out of the income of the family property. The case of absolute ownership put forward by her in para. 3 of the written statement is inconsistent with the case of her being a Hindu widow on the death of Babu Lal, a separated member as suggested in para. 1. If the family had been separate she only acquired a Hindu widow''s estate in the property left by her husband, and by no agreement with the reversioner could she enhance her rights and ripen it into full proprietorship. From the position taken up by her that her husband was a separated member of the family the utmost that she could claim would be an acquisition of a Hindu widow''s estate by adverse possession over 12 years: Rajwanti v. Safa Chand AIR 1924 P.C. 121. Her case rests on an alleged compromise of the year 1909 after the death of Mr. Chaoni. In support of her case she produced two documents Exs. D and C, said to be copies of two deeds of compromise filed in the mutation Court, which copies were signed by Shib Singh himself and handed over to Mt. Bhagwan Dei. These are printed at pp. 97 and 99 of the paper-book. On reading them there can be no doubt that they both are non-testamentary documents purporting to declare, if not also create, rights in immovable property, and that they certainly affect the properties mentioned therein. The recitals further go to show that those documents were intended to be prepared and signed in order to serve as evidence of title, and that they themselves were the deed of compromise intended to operate as title deeds (in the translation the word "sulehnama," which means a "deed of compromise," has been wrongly translated as "compromise"). Even if they evidenced a family arrangement, when such arrangement was reduced to the form of a document registration was necessary. These papers are not mere recitals of something which had happened previously, but they themselves purport to embody the alleged compromise. The documents therefore require registration: Ram Gopal v. Tulsi Ram AIR 1929 All. 641. Not being registered they are wholly inadmissible in evidence: James R.R. Skinner v. R.H. Skinner AIR 1929 P.C. 239.

15. The learned advocate for the appellant has contended before us that even if these documents are inadmissible in evidence to show the rights given to Mt. Bhagwan Dei, they can be admitted for a collateral purpose, viz: to show the nature and character of the possession of Mt. Bhagwan Dei.

16. No doubt it has been consistently held by this High Court that even an unregistered document might be taken in evidence for a collateral purpose in order to show the character of possession: Jhamphu v. Kutramani [1917] 33 All. 696. This view also found favour in Calcutta and Bombay: Jagannath Marwari v. Sm. Chandni Bibi AIR 1921 Cal. 647 and Thakore Fatesingji v. Bamanji A. Dalal [1903] 27 Bom. 515. The same view was re-affirmed in the Full Bench case of Sohan Lal and Others Vs. Mohan Lal and Others, This view finds support from the pronouncements of their Lordships of the Privy Council in the case of Varada Pillai v. Jeevaratknammal AIR 1129 P.C. 44 and Vyravan Chetti v. Subramanian Chetti AIR 1920 P.C. 33. In Varada

Pillai''s case AIR 1129 P.C. 44 their Lordships remarked:

Although the petitions of 1895 and the change of names made in the registration in consequence of those petitions are not admissible to prove a gift, they may nevertheless be referred to as explaining the nature and character of possession thenceforth held by Duraisani

17. and in Vyravan Chetti''s case AIR 1920 P.C. 33 their Lordships observed:

If, on the other hand, there are two distinct provisions, the one relating to rights of property and the other with regard to the division of the realisation moneys then, as these proceedings relate merely to the question of the realized money, it need not be registered for the purpose of being given in evidence in this suit although it may be that it would require to be registered for the purpose of being given in evidence in a suit relating to the regulation of the rights against the estate itself.

18. We do not think that the recent pronouncement of their Lordships in James Simmer''s case AIR 1929 P.C. 239 in any way throws doubt on the previous pronouncements. In that case the deed in question itself clearly purported to transfer George Skinner''s interest in the immovable property inherited from Richard Skinner. Their Lordships accordingly held that if the instrument purporting to create by transfer an interest in immovable property is not registered it cannot be used in any legal proceeding to bring about indirectly the effect which it would have had if registered. Their Lordships declined to admit this deed of transfer as proof of a mere agreement to sell; but it was made quite clear that, u/s 17(2)(v), a document which does not itself create an interest in immovable property but merely creates a right to obtain another document which will do so was not compulsorily registrable. Thus James Skinner''s AIR 1929 P.C. 239 case was not intended to be an authority for the proposition that an unregistered document can in no circumstances be used in evidence for a collateral purpose. It may in this connexion be pointed out that whereas the Registration Act of 1864 had provided that no instrument (required to be registered) shall be received in evidence in any civil proceeding in any Court or shall be acted upon by any public official and the Act of 1866 provided that no such instrument shall be received in evidence in any civil proceeding in any Court or shall the acted on or shall affect any property comprised therein, the languages of the corresponding sections of the Acts of 1897 and 1908 are different. Now no such document required to be registered can affect any immovable property comprised therein or be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered. We, however, think that it would be unsafe to rely upon Exs. B and C filed by the defendant. The defendant herself did not go into the witness-box to substantiate her case of a compromise in 1909, nor did she explain how these papers have remained in her custody.

19. The learned Subordinate Judge has pointed out that there were three previous occasions on which these documents might have been produced in Court. These are

the mutation proceedings following on the grant of a lease by Mt. Bhagwan Dei to her lessees, the criminal proceedings following thereupon, and the civil suit brought by the plaintiff against the defendant and her thekadars. There is also the fact that these papers were not put to the plaintiff when he was in the witness-box, although his pleader had denied their genuineness. The learned Judge has also pointed out that the writing on one of the two papers shows that the lines were crowded in the beginning and were spread out towards the end, which fact raises a suspicion that it might have been written on some paper bearing the signature of Shib Singh. We have only the statement of one witness Muhammad Ali, the scribe, who deposes to this document having been executed by Shib Singh. There is no other evidence in support of his testimony. No doubt the entries in the khewat correspond with the recitals in these deeds, but that fact by itself is not of any significance inasmuch as these documents might well have been prepared in view of the entries in the khewat. In the written statement no specific mention was made of these important documents said to have been signed by Shib Singh himself. And although the written statement was filed on 27th September 1925, these papers were not produced till 24th March of the following year, just before the dates fixed for the hearing. The learned Subordinate Judge who considered the evidence in support of these papers felt very suspicious, and remarked that in his opinion they had been prepared for this suit only. Haying considered the evidence we are of opinion that it would be unsafe to rely upon these two documents, and to accept them as genuine by overruling the finding of the Court below. We accordingly exclude Exs. B and C entirely from our consideration.

20. We, however, do not agree with the view of the learned Subordinate Judge that the defendant has never been in possession of these properties, and that her name appears to have been recorded in the revenue papers merely fictitiously. As a matter of fact even in the plaint the plaintiff had admitted that the names of the ladies were entered for their consolation and to secure payment of their maintenance allowance, and in the relief claimed he had stated that she had a right of maintenance in the property detailed in the plaint. It also appears that in the mutation proceedings of 1922 (p. 135) the position taken up by Shib Singh was that:

Mt. Bhagwan Dei''s name was entered in the khewat on the death of her husband in lieu of her maintenance supply with a view to console her.

21. It is also difficult to imagine what consolation it would have brought to Mt. Bhagwan Dei if she had been merely told that her name was fictitiously entered in the revenue papers, when she could not in case of any dispute or quarrel fall back on the property standing in her name.

22. The entry of her name in the khewats which had stood from 1899 up to the present day raised a prima facie presumption in her favour that she had been in possession of the property. These khewats are printed from p. 173 to 201.

23. On 14th June 1909 a sale deed was jointly executed by Shib Singh and Mt. Bhagwan Dei under which a share in mauza Akbarpur which had stood in the names of both was sold for Rs. 1,500. The registration endorsement showed that Rs. 1,200 were paid to Shib Singh and Rs. 300 were paid to Mt. Bhagwan Dei separately, that is to say the consideration was paid in the ratio of 4 to 1. The shares standing in their respective names were 1 to 3. It seems to us that this document indicates that her right in the property was to some extent recognized, otherwise the whole consideration would have been taken exclusively by Shib Singh himself. We also have a number of counterparts of leases executed by tenants jointly in the name of Shib Singh and Mt. Bhagwan Dei in which it was clearly admitted that the property leased belonged to Shib Singh and Mt. Bhagwan, Dei. The only explanation which Shib Singh in his re-examination offered as regards these rent deeds was that they were obtained in his absence by a mukhtariam Ismail. It is admitted (p. 8) that this Ismail was the mukhtariam both of Mt, Chaoni and Bhagwan Dei and also of the plaintiff Shib Singh He was dismissed by Shib Singh in 1921. These counter leases are on pp. 105, 113, 117 and 121, and range from 1917 to January 1921. On 10th February 1921 a lease was executed by Mt. Bhagwan Dei alone in favour of two persons relating to a share which stood in her name exclusively. It is since then that the dispute has arisen between Shib Singh and the defendant. First of all an objection was raised by Shib Singh in the mutation Court against the lessees to the effect that the lease was null and void and was in no way binding upon him. The judgment of the revenue Court is printed at p. 135, and shows that the lady''s mukhtariam Mohammad Ismail who was the brother of one of the lessees ultimately made an admission before the Court that Mt. Bhagwan Dei was not in possession of the property, and the estate was really managed and possessed by the objector Shib Singh who only realized rent. In view of such an admission the case was decided against the lessees. It does not appear that Mt. Bhagwan Dei herself appeared in these proceedings. In the criminal case against the lessees who were acquitted on appeal by the Sessions Judge it was remarked by the Judge that probably Muhammad Ismail saw his profit in changing sides. The opinion of the criminal Court cannot be considered as any evidence in the case, but the fact remains that the learned Judge''s view was decidedly in favour of Mt. Bhagwan Dai''s title and possession.

24. Then followed the suit brought by Shib Singh on 4th November 1901, against the lessees and Mt. Bhagwan Dei (p. 129). A written statement purporting to have been filed on behalf of Ismail as well as Mt. Bhagwan Dei (p. 133) was only signed by Muhammad Ismail and not by the lady. This case was decreed against the lessees on the basis of a compromise and also against Mt. Bhagwan Dei on 29th April 1902 (p. 139). It is noteworthy that this compromise decree was one day after the mutation order which was based on an admission of Muhammad Ismail. There was another suit brought by the plaintiff Shib Singh against Muhammad Ismail for accounts which was also allowed to be dismissed on 29th April 1922. This was one

day after the mutation order based on the statement of Muhammad Ismail. The plaintiff in his deposition has admitted that he got the suit dismissed after Ismail had stated in his favour in the mutation proceedings (p. 9). Mt. Bhagwan Dei succeeded in getting this ex parte decree set aside, but after this Shib Singh instead of proceeding to fight out the suit against her entered into a compromise on 9th October 1922 and agreed that the decree should not be operative against or binding on Mt. Bhagwan Dei, and it was declared that the plaintiff and Mt. Bhagwan Dei shall continue to have the same rights as against each other as they had prior to the suit (p. 147). In addition to these circumstances there is this admitted fact that previous to 1921 Muhammad Ismail was the karinda who was making collections of rent, and that he held a general power-of-attorney on behalf of Mt. Bhagwan Dei also. The patwari produced by the plaintiff admits that Muhammad Ismail used to make collections although since 1921 the plaintiff alone has been getting entries made in the siaha and has been making collections. In view of all the circumstances and the evidence we are unable to agree with the Court below that the defendant hast not been in possession of the property standing in her name although it may he that during recent years the plaintiff alone has been realising and appropriating profits.

25. On the death of Babu Lal his grandmother Mt. Chaoni had no right to get her name recorded in any part of the property except in lieu of maintenance. Similarly when the family was joint Mt. Bhagwan Dei had no other right. The fact that the names of the ladies were recorded and that Mt. Bhagwan Dei was treated as being in possession cannot be seriously disputed. The plaintiff in his plaint himself made a partial admission that it was to secure payment of her maintenance allowance that her name was recorded, and in the relief which he claimed did not deny her right of maintenance in the property in suit. We have also noted that not only her possession was acknowledged by the various lessees, but she was actually given a share in the sale consideration when a part of the property entered in her name was transferred.

26. We have therefore come to the conclusion that Mt. Bhagwan Dei under a family arrangement was put in possession of the property standing in her name in lieu of her maintenance allowance. She is entitled to retain possession of the same during her lifetime, but not having acquired the estate of a Hindu widow she has no power of transfer even for legal necessity. The proprietary interest in the property remained vested in the joint family of which Shib Singh was the manager. We have already remarked that when Mt. Bhagwan Dei was claiming that her husband was a separated member she could only have acquired a Hindu widow''s estate by adverse possession and not absolute ownership. Her case that she acquired an absolute proprietary interest was based on Exs. B and C which we have rejected. It has been suggested on her behalf that the mere fact that she has remained in possession raises a presumption that she must have been in adverse possession as the family was joint. We do not think that this necessarily follows, because her possession

might be either adverse or that of a Hindu widow or in lieu of maintenance. Had she taken possession of the estate as the widow of Babu Lal one would expect to find that she would have secured possession over the whole share which had stood recorded in the name of Babu Lal. On the other hand we find from the khewat that the names of Mt. Chaoni and Bhagwan Dei were recorded in equal shares over that property, and on the death of Mt. Chaoni. half of the share standing in her name went to Shib Singh and the other hal went to Mt. Bhagwan Dei. Thus she did not acquire the whole of her husband''s estate.

27. During the pendency of this appeal Shib Singh has become an insolvent and his estate has vested in an official receiver. It is unnecessary for us to enquire into the question of whether it is only the interest of Shib Singh in the family property which has vested in the receiver or the entire family estate. That will depend on the nature of the debts which are outstanding.

28. We accordingly allow this appeal in part, and modifying the decree of the Court below grant the plaintiff a declaration that the proprietary interest in the property in suit vests in the family represented by Shib Singh, and that the defendant has not acquired an absolute title either by adverse possession or even the limited estate as a Hindu widow, but that her possession is in lieu of maintenance and that she is entitled to remain in possession during her lifetime without any power of transfer. We direct that the order of the Court below as regards costs in that Court should stand, but the parties should bear their own costs of this appeal.