Bhagwat Misir Vs Mt. Sheokali Kuar and Others

Court: Allahabad High Court

Date of Decision: Dec. 17, 1936

Citation: AIR 1937 All 290

Final Decision: Dismissed

Judgement

1. This is a second appeal by one of the defendants, Bhagwat Misir against concurring decrees of the two lower Courts in favour of the plaintiffs.

The family pedigree is given on p. 10. The plaintiff 1 is Mt. Sheokali Kuar, the daughter of Bindadin, who was the last male owner of the property

in dispute, and plaintiff 2, Ram Dutt Misir, is the son of plaintiff 1. The plaint sets out that the deceased Bindadin Misir was a resident of mauza

Lohra in Azamgarh district, which is in the province of Agra, under this High Court, and he died leaving the property in the plaint which consists of

pukhtadari shares paying revenue in the village of Daudpur and qabzadari property paying revenue in the village of Bhagwanpur Manjharia. Both

these villages are situated in Pargana Birhar, in the district of Fyzabad, in the province of Oudh, which is not under the jurisdiction of this High

Court. The third item of property in the plaint consists of an ahata or enclosure in mauza Lohra in Azamgarh district. The plaint set out that the

defendants had interfered with the possession of the plaintiffs in the property in question and asked for a decree. Originally the plaint asked for a

declaration but it was subsequently amended or 21st June 1930 and asked for possession, if necessary, and the Courts below have granted a

decree in favour of the plaintiffs. After the death of Bindadin the property. was held by his widow, Mt. Jai Ranwarli Kunwar, who died in the

month of September 1929, and the plaint was brought, shortly after her death on 2lst December. 1929. The appellant before us, Bhagwat Misir,

filed a written statement on 24tbu February 1930 and in para. 5 he pleaded, as follows:

In the family of the defendants as well as among the members of the brotherhood of the defendants living in the neighbouring places of pargana

Btrhar, of which the defendants are the original resident"s, there is a custom that a daughter or her son is excluded from inheritance. Accordingly

this custom has all along been in. vogue in the family of the defendants from the time of old and no daughter or her descendant has up to this time

ever got any share.

2. In para. 9 he alleged that no ahata and trees belonging to Bindadin Misir existed in mauza Lohra and that the plaintiffs-had created a fictitious

cause of action in the district of Azamgarh and filed the suit there and the suit was not cognizable by that Court. This question of jurisdiction of the

Azamgarh Court has been argued'', in second appeal on grounds Nos. 1 and 2, but the argument for the appellant is stultified by the fact that on

the very day on which he filed his written statement, 24th February 1930, he filed a plaint in original suit No. 107 of 1930 against the plaintiffs

claiming possession of the two houses in the village of Lohra in Azamgarh district, and he filed this suit in the Court of the Munsif at Azamgarh. On

p. 50 the lower appellate Court finds that the ahata pertains to the houses and that appellant interfered with the possession of plaintiffs. This action

of the appellant clearly shows that there was a dispute between the parties at the time of the pleadings in regard to property in Azamgarh District

and therefore it was clear that the Azamgarh Courts had jurisdiction. The suit of the appellant was dismissed by the trial Court and he filed an

appeal and his appeal was dismissed by the lower appellate Court. Learned Counsel for the appellant suggested that permission should be given to

him to withdraw his plaint in suit No. 107 of 1930 and he appeared to think that if such permission were granted the provisions of the Evidence

Act in regard to an admission would in some way allow him to destroy the existence of the admission he made in the plaint. No such result would

accrue from permission to withdraw the plaint. We are of opinion that the Azamgarh Court clearly had jurisdiction as there was a subject matter of

dispute in Azamgarh District.

3. Now the remaining grounds of second appeal which have been argued are that the Courts below were in error in not holding that the alleged

custom was proved. The Courts below have examined the instances produced by the parties about the alleged custom in this family and the Courts

have held that the instances in which the alleged custom was observed are not so numerous as the instances in which the alleged custom was not

observed. Learned Counsel considers that we should examine the correctness of the findings of fact of these instances; but we are of opinion that it

is not for a Court of second appeal to go into this matter. It is for the Courts which entertain questions of fact to find out which facts are proved,

and when those facts have been found this Court in second appeal can consider the question whether from those facts the conclusion should or

should not be drawn that a custom has been legally proved. The main argument however for the appellant was in regard to what he describes as a

rewaj-i-am establishing his alleged custom. This is contained in a document called the rewaj-i-am of pargana Birhar, Fyzabad District, Ex. E-1,

and it may be translated as follows:

Whereas settlement of our village is about to be made by the Government, we have, accordingly, entered in detail the rights of our qaum (caste)

which particularly affected our landed property in the papers relating to each village, but those rights which are commonly in use in our castes have

not been recorded. Therefore we, the lambardars and cosharers of qaum Brahman, pargana Chandpur Birhar, District Fyzabad, agree (ekrar

karte hain) with respect to them as follows:

Then follow a number of questions and their answers and question 14 as given in Ex. 49 is as follows:

Q. If an owner of land dies without a male issue leaving only daughter or unmarried daughters, Ã¯Â¿Â½what are their rights in the property?

A. It is not considered that the daughter or daughters have any right of inheritance except this that whoever becomes entitled to the property as heir

should get the unmarried daughter or daughters married in an ordinary and moderate manner with the income of that property.

4. Now the Courts below have found that this rewaj-i-am cannot apply to the present case for various reasons. One of the main reasons is that this

rewaj-i-am is of a certain pargana Chandpur Birhar in Fyzabad District, and we are of opinion that the Courts below are correct in holding that this

rewaj-i-am applies to the persons of the caste of Brahmans who are resident in that pargana. On the other hand the Courts below have held that

the parties to this case belong to a family which is resident in Azamgarh District and has been resident in that district for many generations and did

not previously come from pargana Birhar as alleged in the written statement but came from the District of Gonda and originally from Ceylon, of

which the ancient name was Shakaldipi, and the parties belong to the Shakaldipi Brahmans. The next reason why this document cannot apply is

that the appellant has failed to connect it with the villages in question, that is the two villages in the plaint in the Fyzabad District. No attempt was

made by learned Counsel to connect this rewaj-i-am which was for the whole pargana with the village of Bhagwanpur Manjharia. He made an

attempt to connect it with the village of Daudpur and has attempted it by reference to a document called a "shejra nasab malikan" of village

Daudpur which is quoted on page 74 of the paper book. In this genealogical tree there is a note:

Whatever usages and customs were in our qaum and family we have got recorded in the dasturul amal rewaj-i-am and they shall be put into

practice.

5. Now the copy as originally produced of this document showed that there was a verification by four persons whose names are not particularly

legible but who are stated to be Bhekhman, Sheshman, Earn Faqir and Earn Tahal and the verification was shown in the copy as made on 3rd

May 1882. If this had been the correct date the reference to the rewaj-i-am of pargana Birhar of the year 1878 would be comprehensible, but it

has been found that the copy bears an incorrect date and the verification was on 3rd May 1872 and not on 3rd May 1882. Learned Counsel has

failed to satisfy us that the reference in a document of 1872 can be to a document which was not then in existence and did not come into existence

until the year 1878. The argument made was that no other rewaj-i-am had been shown. Now the reference in the document of 1872 is not to a

rewaj-i-am of the pargana. It is not a sound argument that because a document has not been produced therefore it cannot have existed. The

Gazetteer of Fyzabad District shows that there were two summary settlements made in Fyzabad District after the annexation, the first being

apparently in 1856 and the second in 1859. On page 112 of the Gazetteer it is stated:

Operations in connexion with the regular settlement began in 1860 and continued for an unusually long period as the work was not finally

completed till October 1878.

6. The new assessments were introduced at various times between 1865 and 1870. On page 115 it is stated that in 1875 a revision of the

settlement was undertaken. It was apparently in the course of this revision that the document of 1878 was prepared, on which the appellant relies.

Now it is quite impossible to assume that the reference in a document of 1872 made in a settlement which was completed apparently about that

time can have any reference to a document completed in the revision of the settlement several years later. This is the second weakness in the case

for the appellant. The third weakness is that the Gazetteer shows that pargana Chandpur Birhar is a large area, and on page 206 it is stated that the

population of that pargana in 1901 was 153, 375 inhabitants, and the number of villages was 521 and the number of mahals 1323 as shown on

page 209. Now the reference in the rewaj-i-am of 1878, indefinite as it is, is merely a reference to the general custom of Brahmins in that pargana

as apparently stated by certain Brahmans who were asked questions on the point. It does not appear to be a sound argument that the statements

of a few individuals out of at least several thousands should be evidence of great weight in a question of a custom of this nature.

7. Now it is true that the general question of the weight to be assigned to statements of custom recorded in village papers has been the subject of

considerable argument in this appeal; but we do not consider that in the present case it is necessary to express any opinion on this subject. The

case in our opinion is concluded by the fact that the appellant has failed to show that the particular custom on which he relies and which is alleged

to be recorded in the rewaj-i-am of 1878 can be applied to the particular family in question. The custom in question has been considered by the

Courts in various cases. One of these cases is mentioned on page 85 of the judgment of the lower appellate Court and in this case brought by

reversioners against the daughters of one Bhekhman, who was a member of the family, it was held no doubt that this particular rewaj-i-am was

sufficient evidence on which to found a finding of the custom. This judgment is Ex. G-1. The second time the matter came before the Courts was in

a suit against the transferees of some of these daughters and it was held by the Courts in Fyzabad in a judgment, Ex. C-1, that the custom was

proved both on this rewaj-i-am and on some oral evidence. But it is to be noted that in that case the daughters were not interested in arguing that

the custom did not apply because it was to the interest of the daughters that the rights of the transferees should be defeated. Now on the other

hand as stated on page 73 of the judgment of the Court below the Additional District Judge of Fyzabad held that this particular rewaj-i-am of

1878 could not bind the persons in the villages of that pargana, and in another instance the Courts in Fyzabad also held that the rewaj-i-am of the

pargana was not sufficient evidence. In the pedigree there have been cases brought before the Courts on three occasions. One is the case

mentioned above decided in favour of the appellant''s view in regard to the daughters and daughters'' sons of Bhekhman.

8. Another case was in regard to Mt. Sundra, the daughter of Ganesh. Mt. Sundra is not mentioned in the pedigree on page 10, but it is admitted

that she is the daughter of Ganesh. Her right to succeed to the property of her father was challenged by the reversioner Tribeni Misir, defendant 2,

her father''s nephew, and his suit was dismissed for default and his appeal to the learned District Judge was also dismissed. It is of course a matter

for argument as to whether he allowed his suit to go by default because he had not sufficient evidence of custom to produce as the lower appellate

Court has considered, or as to whether it was for some other reason, but we do not think that we are called upon to go into a question of this

nature in second appeal.

9. The remaining instance in this family is that of Mt. Mutera, the daughter of Prag Datt. A suit was brought against her by Tribeni Misir and his

father Jag Datt and. they succeeded in obtaining the property of Prag Datt. Now the lower appellate Court has gone into the facts of this case and

has held that it is not a good instance because the ordinary presumption of Hindu law would have applied, that Prag Datt was not a separated

Hindu but was joint with his relatives. In second appeal it has been argued that the Court below was not entitled to draw such a conclusion

because it had not been specifically pleaded. The case of Prag Datt was not the subject of any pleading by any party.

10. Some further argument was made by learned Counsel for the appellant that the case of the present respondents-plaintiffs was that Tribeni had

succeeded by a will and that although the trial Court had found that the will of Prag Datt was proved the lower appellate Court had held that that

will was not proved. The suggestion then made is that because there was the argument about a will therefore a will pertains to a separated Hindu

and the Court below was wrong in holding that Prag Datt may have been joint with the rest of the family, Tribeni Misir and Jag Datt. The point

about a will was merely put forward by a question of counsel in cross-examination and we do not think that a mere question in cross-examination

is in any way an admission binding a party under the Evidence Act. There was also a mention of this will in the pleadings of Tribeni Misir in a suit.

We are satisfied that the Court below was entitled to arrive at the finding at which it did that the case of Mt. Mutera was not a good instance.

Therefore as far as the family in question are concerned, there is one instance in which the reversioners succeeded in ousting the daughters and

there is another instance in which the daughter maintained her position under the Hindu law against an attempt by the reversioners to oust her by a

suit in the Courts. It cannot therefore be said that the instances in this family prove that there is any custom of the exclusion of daughters. As we

have stated above the rewaj-i-am of the pargana Birhar of 1878 was not good evidence in the present ease of any custom in this particular family.

The general principle of Hindu law is that daughters and daughters'' sons are entitled to succeed. Evidence in derogation of this custom must be

evidence which is of very considerable weight, and the Courts below have held that there was no such evidence in the present case. We see no

reason to differ from that conclusion. Accordingly we dismiss this second appeal with costs.