

(1880) 04 AHC CK 0012

Allahabad High Court

Case No: None

Hira Singh

APPELLANT

Vs

Ganga Sahai and
Another

RESPONDENT

Date of Decision: April 12, 1880

Citation: (1880) ILR (All) 809

Hon'ble Judges: Robert Stuart, C.J; Straight, J; Spankie, J; Pearson, J; Oldfield, J

Bench: Full Bench

Final Decision: Disposed Of

Judgement

Pearson, J.

The plaintiff in this suit claimed to obtain separate possession by partition of a share which he alleged to belong to him by right in certain houses being ancestral property. The exact nature of his right he did not define. But it is not disputed and is not open to dispute that he is not entitled to the share or any share in the property in question by right of inheritance, inasmuch as he was admittedly born deaf and dumb and incapable of inheriting property, under the Hindu law. The ground on which the lower Appellate Court has allowed his claim is that his right as heir to his father's estate was declared by an award dated 4th January 1875, to which the defendants in the present suit assented. The plaintiff was not himself a party to the agreement to refer to arbitration the question who was Har Dial's heir, and the Judge is wrong in supposing that Debi Singh, the plaintiff's natural brother, agreed to the arbitration as his guardian and represented him before the arbitrator. The award could only bind the parties to the arbitration, and, the plaintiff, not being a party thereto, is not bound by it, and, not being bound by it, cannot claim to take any advantage from it. It could not confer on him, who was not a party to the arbitration, a right which he did not possess by law, nor can it constitute evidence of a right which the law disallows. The award does not profess to be based on the Hindu law, but rather seems to have been wilfully made in contravention thereof.

Nor could the defendants" assent to the award convey to him a right of inheritance which did not devolve on him by law. The lower Appellate Court is mistaken, I conceive, in holding that either they, or the arbitrator, could by any thing done by them in the arbitration-proceedings, bestow on the plaintiff, who was not a party to them, a right which the law has refused to him, the law notwithstanding, and could cure the legal defect in his title. It has been urged and may be granted that a person who was not originally a party to arbitration-proceedings may Subsequently become a party to them; but it does not appear that the plaintiff ever became a party to the proceedings which terminated in the award dated 4th January 1875. Had the award recognised the defendants" right to the inheritance they might doubtless have made a gift of the property or any portion of it to him; but it seems impossible to contend that they could make a gift of what was adjudged not to belong to them.

2. The circumstance that he may have been allowed to continue as before in joint possession of the property is explained by the consideration that he is, under the Hindu law, though excluded from inheritance, entitled to maintenance. It has been suggested that the defendants, by their assent to the award, are estopped from questioning the plaintiff's right of inheritance in this suit by the provisions of Section 115 of the Indian Evidence Act; but that section, which is understood to embody the rule of the English law, seems to me to be inapplicable. "The doctrine of estoppel" says Mr. Justice Story, "is based on a fraudulent purpose and a fraudulent result. If, therefore, the element of fraud be wanting, there is no estoppel. There must be deception and change of conduct in consequence." Now it can hardly be contended that the defendants in expressing their acquiescence in the award intended to deceive the plaintiff or that he was deceived thereby, and led to take any action which has put him in a different position from that which he occupied before in respect of the property in suit. The plaintiff then having no right in him either by the law of inheritance or under the award, or by reason of any conveyance made in his favour by the defendants, cannot possibly succeed, if they be not estopped from calling his right in question.

3. I conclude, therefore, that the Court of First Instance rightly decided the first three of the issues laid down by it for trial and rightly dismissed the suit.

4. I must add that the Zila Judge failed to apprehend rightly this Court's order of the 17th January last, which directed him to dispose of the case according to law. The law by which his procedure should have been regulated is contained in Sections 565, 566 and 567, Act X of 1877*.

5. I would decree the appeal with costs, reversing the lower Appellate Court's decree and restoring that of the Court of First Instance.

Robert Stuart, C.J.

6. The judgment of Mr. Justice Pearson in this case is so entirely satisfactory to my mind that I cannot hesitate to express my concurrence in it. A distinction at the

hearing appear to be taken between incapacity to take, by inheritance, and the capacity to enjoy by permitted actual possession of property, and the conduct of some members of Hira Singh's family would appear to recognise a legal status in him for that purpose. But that does not get rid of the disability which cannot from its nature be removed.-Hira Singh is entitled to maintenance, but he has not other rights or status whatever. The appeal must, therefore, be disposed of according to the order proposed by Mr. Justice Pearson.

Oldfield, J.

7. I concur.

Straight, J.

8. I entirely concur in the judgment of Mr. Justice Pearson.

Spankie, J.

9. I retain the opinion I have already expressed, and hold that the documents referred to may be used in evidence by the plaintiff. I do not think that the circumstance that he is deaf and dumb disqualifies him necessarily from bringing the suit. This is not a claim to establish his right to succeed as heir of his father. Were it so, the suit would fail, as he could not succeed as heir under the Hindu law. But if he can show as against the defendants that they have recognized his possession, and confirmed it by ceding their own claims in his favour, there is nothing to prevent his doing so; a gift in favour of a deaf and dumb man would seem to be valid.

* [When evidence on record sufficient, Appellate Court shall determine case finally.

Section 565:--When the evidence upon the record is sufficient to enable the Appellate Court to pronounce judgment, the Appellate Court shall, after resettling the issues, if necessary, finally determine the case notwithstanding that the judgment of the Court against whose decree the appeal is made has proceeded wholly upon some ground other than that on which the Appellate Court proceeds.

When Appellate Court may frame issues and refer them for trial to Court whose decree is appealed against.

Section 566:--If the Court against whose decree the appeal is made has omitted to frame or try any issue, or to determine any question of fact, which appears to the Appellate Court essential to the right decision of the suit upon the merits, and the evidence upon the record is not sufficient to enable the Appellate Court to determine such issue or question, the Appellate Court may frame issues for trial, and may refer the same for trial to the Court against whose decree the appeal is made, and in such case shall direct such Court to take the additional evidence required.

And such Court shall proceed to try such issue, and shall return to the Appellate Court its finding thereon together with the evidence.

Finding and evidence to be put on record.

Objections to finding.

Section 567:--Such finding and evidence shall become part of the record in the suit; and either party may, within a time to be fixed by the Appellate Court, present a memorandum of objections to the finding.

Determination of appeal.

After the expiration of the period fixed for presenting such memorandum, the Appellate Court shall proceed to determine the appeal.]