Privy Council Appeal No. 5 *of* 1925.

Allahabad Appeal No. 1 *of* 1923.

Seth Lakhmi Chand - - - - - - - - *Appellant*

v.

Musammat Anandi and others - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT ALLAHABAD.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 15TH MARCH, 1926.

Present at the Hearing:

VISCOUNT DUNEDIN.
LORD BLANESBURGH.
SIR JOHN EDGE.
MR. AMEER ALI.

[*Delivered by* SIR JOHN EDGE.]

This is an appeal from a decree, dated the 21st November, 1922, of the High Court at Allahabad, which confirmed a decree, dated the 18th July, 1919, of the Subordinate Judge of Meerut by which the suit had been dismissed.

The suit had been instituted in the Court of the Subordinate Judge on the 5th June, 1918, and by the plaint in it the three following declarations were claimed:—

(*a*) The will, dated 5th of June, 1915, and registered on the 9th of June, 1915, executed by the plaintiff and Baldeo Sahai, deceased, on account of its being against the rules of succession under the Hindu Law, is absolutely invalid and null and void and it has no effect upon the right of survivorship of the plaintiff in respect of the estate, business, the zamindari, landed and house properties, bonds, mortgage deeds, promissory notes, money-lending business with *asamis* on account-books, parole debts, cash, gold and silver ornaments, conveyance, household and estate goods and articles of convenience and comfort, etc., of all kinds, belonging to the joint Hindu family.

(*b*) Defendant No. 1 now has and defendants Nos. 2 to 5 will in future have no right of any kind in respect of the estate, business and zamindari properties, etc., given in relief A.

(*c*) The plaintiff is the owner in possession of the entire estate, business and zamindari properties, etc., given in relief A.

The document in respect of which the declarations are claimed is described in the plaint as a joint will of Baldeo Sahai and the plaintiff Seth Lakhmi Chand, and is in the written statement of Musammat Anandi, the first and principal defendant, described as an *igrarnama*, that is an agreement.

The parties to the document in question were and the parties to the suit are Hindus, by caste Brahman Bohra, subject to the law of the Mitakshara, of the school of Benares. The document in question was written by one Ram Chandar Sahai of Khatauli on stamped paper which had been purchased by Baldeo Sahai on the 5th June, 1915, and was signed and executed on the same day by Baldeo Sahai and his younger brother Lakhmi Chand, the plaintiff, in the presence of five men who signed the document as witnesses. It was presented for registration on the 8th June, 1915, at the office of the Sub-Registrar of Jansath, in the district of Muzaffarnagar, by Lakhmi Chand, who, having admitted in the presence of the Sub-Registrar the execution and completion of the document, it was registered on the 9th June, 1915, by the Sub-Registrar.

Baldeo Sahai died on the 10th June, 1915. He had had by a first wife, who had died before the 5th June, 1915, a daughter, who was then dead and had left three minor sons who were living on the 5th June, 1915, and are the defendants 3, 4 and 5. Baldeo Sahai left surviving him his second wife, Musammat Anandi, who is the defendant 1, and an unmarried daughter, who is defendant 2. Baldeo Sahai had no son or other descendant of him. Lakhmi Chand had on the 5th June, 1915, five daughters living, but no son. Baldeo Sahai and Lakhmi Chand were on the 5th June, 1915, and until the death of Lakhmi Chand on the 10th June, 1915, the sole co-sharers in a joint Hindu family. Lakhmi Chand was then over 40 years of age.

The following is a copy of the document in question :—

"I, Pandit Baldeo Sahai, first party, and I, Pandit Lakhmi Chand, second party, sons of Pandit Jagram Das, caste Bohra Brahman, residents and 'raises' of 'qasba' Khatauli, pargana Khatauli, district Muzaffarnagar, do declare as follows :—

(1) We, both the parties, are full brothers and are members of a joint Hindu family according to the Hindu Law. We are joint in the business relating to the estate, in zamindari property, field or house property, bonds, mortgage-deeds, notes-of-hand, promissory notes, money-lending business with tenants under account-books, and parole-debts, cash, gold and silver ornaments, conveyances house-hold goods and paraphernalia of the estate and all other things of every description, of the value of lakhs of rupees.

(2) None of us, the two members of the joint family, has any male issue, but we have female issue and a wife each.

(3) As it has often been seen that disputes and litigations have taken place among persons of property and wealth and their survivors, we, both the parties, in order to avoid future disputes, do, in a sound state of body and mind, of our own accord and free-will, without the instance or instigation of anyone else, make this declaration, which shall be binding on ourselves and our representatives, that in the event of one party dying without any male issue, the name of his widow shall be entered in public papers, that the party remaining alive shall have no objection to the same, that if the surviving party has male issue, in that case, after the death of the widow of the deceased party, the son or the sons of the other party shall be the owner or owners of the entire estate, that the daughters or their sons shall have no right as against the son or sons of the other party, and that the widow of the deceased party shall have no right at any time to make any transfer whatsoever.

(4) The daughters or their male issue shall be entitled to the estate of their father only when both the parties die without any male issue. If any of the parties has any male issue, the female issue or the daughter's sons of any of them shall not get any property whatsoever.

(5) The first party has at present an unmarried daughter by his second wife and three minor sons of his deceased daughter by his senior wife, since deceased, who shall be entitled to get equal shares in the estate subject to the conditions given in paragraph No. 4. If the said daughter also, who is at present unmarried does not give birth to any male issue, then the daughter's sons and not the members of the family of the said (unmarried) daughter's husband, shall be entitled to the whole estate.

(6) I, the second party, have five daughters. They, and in case of the death of any of them, her male issue, shall, subject to the conditions given in paragraph No. 4, be heirs to the estate in equal shares. If any of the daughters die without leaving any male issue, the members of the family of her husband shall have no right, but her share in the estate shall be divided among the remaining daughters and their male issue in order.

(7) If we, both the parties, at any time in our life, divide the estate by our mutual agreement or on account of any dispute, then this document shall not be binding on any party provided none of us has any male issue. If any of us shall have any male issue, he shall be the owner of the entire estate. The widows shall have only life-interest. The daughters, their issue or any other party shall have no right to it.

(8) We, both the parties, have, up to this time, been jointly managing all the estate affairs and shall continue to manage it in the same way, provided no partition takes place. After the death of one party all managements relating to the estate shall be made by the surviving party. The wife of a deceased party shall have no right to get the property partitioned in the life of the other party, but shall continue to get her share of the profit from the other party after deducting the expenses relating to the estate. If the other party evades the payment of the profit, she shall be entitled to seek remedy in court only for recovery of profit.

(9) The residence of us, both the parties, shall be separate in this way that in enclosure No. 65, situate in the ' abadi ' of bazar, ' qasba ' Khatauli, the party alive shall let the widow of the other party live in any house she might choose, and shall not turn her out of it, but the widow of the said deceased party shall have right of easement and residence only to the said house. She shall have no concern with other houses. The party alive shall be at liberty to change the condition of the enclosure or to build a separate house for the female members of his house and take up his abode in it and have any of the houses or shops which exist in that enclosure as his sitting room.

(10) Season fruits such as mango, etc., shall be given by the party alive to the widow of the deceased party to the extent of about one-half (of the produce).

(11) The parties have got this document written after mature deliberation and after having fully understood the contents thereof. They have admitted and accepted the same of their own accord. None of the parties shall have any express or implied objections to this. We have, therefore, executed this agreement by way of a will, in order that it may serve as evidence.

Note:—In the 6th line of the 2nd page of this document, a mark is made and the words, ' situate in the ' abadi ' of bazar of ' qasba ' Khatauli ' are written on the margin."

Signature of Baldeo Sahai, in autograph.
Signature of Lakhmi Chand.

It has been held by the Subordinate Judge and by the High Court in Appeal that the document in question was a valid will of the two brothers. Whether it could operate as such will be presently considered.

It is now desirable to consider what was the position on the 5th June, 1915, before the document in question was executed. The property to which the suit relates was of considerable value ; it was valued for the purpose of jurisdiction, as appears by the plaint, at Rs. 1,00,000 (one lac). Baldeo Sahai was seriously ill and was not expected to recover. If he died as a member of the joint family his widow would be entitled to maintenance only, and the joint family property would vest in Lakhmi Chand by survivorship. If it could lawfully be agreed that the widow, Musammat Anandi, should on the death of Baldeo Sahai have and enjoy an interest in a moiety of the joint property equivalent to that of the widow of a sonless and separated Hindu, she would on the death of Baldeo Sahai be entitled for life as such widow to a moiety of all the profits of the immovable property, and to a moiety of all the profits of the movable property, which belonged to the joint family. On the 5th June, 1915, Baldeo Sahai could have separated from Lakhmi Chand by one word and would have been entitled to a partition of all the joint family, and if he had separated his widow, Musammat Anandi, would on his death be entitled for her life as the widow of a sonless and separated Hindu to a Hindu widow's interest in the property, and on her death the property in which she would have a Hindu widow's interest would go to the person entitled to it on her death who would not necessarily be Lakhmi Chand, or a descendant of him. There was some evidence that before the 5th June, 1915, Baldeo Sahai was making preparation for a partition, but that need not now be considered, for as the fact was Baldeo Sahai and Lakhmi Chand did not separate but remained joint until Baldeo Sahai died on the 10th June, 1915. But that the risk of a partition might at any moment occur and was in the contemplation of Baldeo Sahai and Lakhmi Chand when they executed the document of the 5th June, 1915, is apparent from a perusal of that document.

It is admitted in the plaint that Baldeo Sahai fell seriously ill

and desired "that after his death the name of his widow, defendant No. 1, should be entered in respect of his share in the joint property, and that after the death of the said widow his share in the property should devolve upon his daughter and daughter's sons," and that a document to effect that object should be executed, and that the plaintiff and Baldeo Sahai jointly executed the document in question "by way of a will." Baldeo Sahai could, from a legal point of view, have no interest in the joint property after he died. His interest in the joint property terminated with his life. What was meant by "his share in the joint property" was a moiety of the joint property which he would have had on a partition. After Baldeo Sahai's death Lakhmi Chand entered the name of Musammat Anandi in the revenue papers in respect of a moiety of the zamindari property.

The document in question could not, however, operate as a will. In *Vitla Buttin* v. *Yamenamma*, 8 Mad. Rep. 6, the High Court at Madras held that a will by a member of a joint Hindu family of his co-sharer's interest was not a valid devise. In *Lakshman Dada Naik* v. *Ramchandra Dada Naik*, 7 I.A. 181, the Board, referring to that case, stated that :—

> "Its," the High Court's, "reasons for making distinction between a gift and a devise are that the co-parcener's power of alienation is founded on his right to a partition; that that right dies with him; and that, the title of his co-sharers by survivorship vesting in them at the moment of his death, there remains nothing upon which the will can operate."

It was held by the Board in *Brijraj Singh* v. *Sheodan Singh*, 40 I.A. 161, that a will, which did not operate as a will at all, was good evidence of a family arrangement contemporaneously made and acted upon by all the parties. In the present case their Lordships hold that the document of the 5th June, 1915, is good evidence of a mutual agreement by Baldeo Sahai and Lakhmi Chand. What interest Musammat Anandi took under that mutual agreement is the only question which their Lordships need consider.

It is well established law that a co-sharer in a Mitakshara joint family without having obtained partition can with the consent of all his co-sharers mortgage or charge the share to which he would be entitled on a partition of the joint family property, but the consent of all the co-sharers must be obtained, and as pointed out by Sir John Wallis, C.J., in *Subbarami Reddi* v. *Ramamma*, I.L.R. 43 Mad. 824, a father who is a co-sharer with a minor son cannot give such a consent for his minor son.

Their Lordships have come to the conclusion that the right of a co-sharer in a Mitakshara joint family property, who has obtained the consent of his co-sharers to charge his undivided share for his own separate purposes has long been recognised.

In 1869 in *Sadabhart Prasad Sahu* v. *Foolbash Koer*, 3 Beng. L.R. 31, which related to a Hindu joint family governed by the law of the Mitakshara, Sir Barnes Peacock, C.J., in delivering the judgment of a Full Bench of the Calcutta High Court,

consisting of himself and Kemp, L. S. Jackson, Macpherson and Glover, JJ., held that a member of a joint Hindu family had no authority, without the consent of his co-sharers, to mortgage his undivided share in a portion of the joint property, in order to raise money on his own account and not for the benefit of the joint family. That implies that with the consent of all his co-sharers a member of a Hindu joint family can grant for his own purposes a valid mortgage of so much of the joint family property as would not exceed his share on partition. That principle that a member of a Hindu joint family can, with the consent of his co-sharers, charge for his own purposes the share in the joint family property which would come to him on a partition has been recognised by the Board in *Baijnath Prashad Singh* v. *Tej Bali Singh*, 48 I.A. at page 212, and cannot now be questioned as a principle of Hindu law. It appears to their Lordships that the same principle of the effect of the consent by the co-sharer applies in the present case and that Baldeo Sahai and Lakhmi Chand were competent to agree and did agree that Musammat Anandi should on the death of Baldeo Singh, have and enjoy for her life an interest in a moiety of the joint property equivalent to the interest which the widow of a sonless and separated Hindu would have in her deceased husband's estate, and that the interest which she obtained by the mutual agreement of Baldeo Sahai and Lakhmi Chand should continue for her benefit for her life, notwithstanding the birth, if it should happen, of " male issue " to Lakhmi Chand.

Their Lordships will humbly advise His Majesty that plaintiff is not entitled to any of the declarations claimed in the plaint, that the appeal should be dismissed with costs, and that the right of the person or persons who may claim to succeed the defendant Musammat Anandi on her death must be determined, if disputed, when the occasion arises, and not in this suit.

In the Privy Council.

SETH LAKHMI CHAND

v.

MUSAMMAT ANANDI AND OTHERS.

DELIVERED BY SIR JOHN EDGE.

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