
(1913) 12 BOM CK 0002
In the Bombay High Court

Bhaiya Sher Bahadur

APPELLANT

Vs

Baiya Ganga Bakhsh Singh

RESPONDENT

Date of Decision : 10-12-1913

Acts Referred:

Citation : (1914) 16 BOMLR 306

Hon'ble Judges : Shaw, J;Johan Edge, J;Atkinson, J;Ameer Ali, J

Bench : Full Bench

Final Decision : Dismissed

Judgement

Atkinson, J.—This is an appeal from a judgment and decree dated the 26th February 1906 of the Court of the Judicial Commissioner of Oudh, which affirmed a judgment and decree dated the 3rd of January 1905 of the Court of the Subordinate Judge of Gonda, dismissing the plaintiff's suit.

2. The action out of which the appeal arises was instituted on the 3rd of April 1902 by the plaintiff as eldest son and heir of his father Jang Bahadur Singh, by a Mahomedan woman, claiming to recover the possession of the several villages mentioned in the Schedule annexed to the Statement of Claim, same forming part of an estate called the "Balrampur estate" which had been bequeathed to the plaintiff's father by his, the plaintiff's, paternal grandfather, the Maharajah of Balrampur, by a codicil dated the 15th of March 1878 to the last will of the Maharajah. Possession of these villages had been taken in the year 1899 by the first defendant, and since then retained by him. Mesne profits were claimed in respect of this possession, and a claim was added to recover possession of the moveable and Immoveable property mentioned in Schedules B and C, also annexed to the Statement of Claim, or in the alternative the plaintiff's legal share thereof, on the ground that the same was property acquired by the plaintiff said father, with an additional claim for further relief.

3. The first defendant, Bhaiya Ganga Bakhsh Singh filed a written statement alleging that the plaintiff was the issue of a Mahomedan woman with whom his,

the said defendant's father, Jang Bahadur Singh, had had illegal intercourse, as were also the defendants numbered 2, 3, and 4, and that her nikah had never taken place, that his father followed the Hindu religion bigottedly, and was a Hindu from his boyhood up to his death, that he married for the first time a Hindu lady of a Surajbansi Chhatttri family, that the defendant No. 1 was the only child of that marriage, is the only legitimate son and heir at law of his father, and is consequently under the provision of the said codicil entitled to the allowance therein mentioned.

4. The plaintiff replied traversing the several allegations contained in this and the other written statements filed by other defendants, and upon these pleadings the eight issues set forth at page 884 of the Record were knit. A vast body of evidence was given bearing upon each of these issues. Many of them are no longer of importance on this appeal, which is the ultimate stage of the litigation. The real questions now in dispute are first, the proper construction of the language of this codicil of the 15th of March 1878, and second the actual intention which the Maharajah desired to effect in executing it.

5. The facts so far as material to the decision of these questions are as follows: The plaintiff is the first-born son of his father, and the 2, 3, and 4 defendants are his brothers, sons of Jang Bahadur Singh by the Mahomedan woman already mentioned. It has been found as; a fact by both the Courts before which this case has come, that no ceremony of marriage was ever gone through between Jang Bahadur Singh and this woman, that she was his mistress not his wife, and that, consequently, the plaintiff and his brothers are illegitimate. The appellant accepts this finding as conclusive on this point. The first defendant is the son of Jang Bahadur by a Hindu lady of the Chhatttri caste with whom he had, admittedly, gone through the ceremony of marriage according to the strict Hindu rite.

6. The validity of this marriage is impeached by the plaintiff upon the ground that at the time it was celebrated Jang Bahdur was neither a Hindu nor a member of Chhatttri caste, and that consequently the first defendant is Like the plaintiff and his brothers, illegitimate. The issue thus raised necessitated a somewhat lengthy examination of the life history of Jang Bahadur. He was, as already mentioned, the son, born in the year 1846, of a rather distinguished man, a Hindu by religion of the Junwar Chhatttri caste, Sir Drig-bijai Singh, Maharaja of Balrampur, by a Mahomedan mistress named Iman Bandi, and was, therefore, as held by both the Courts abovementioned, a Mahomedan; by birth This decision is also accepted by the appellant.

7. The Subordinate Judge, at page 945 of the Record, finds that?

Jang Bahadur was brought up, not as a Mahomedan under the influence of his Mahomedan mother, but by his Hindu father in the religion of Hindus." " That (page 956) he never professed the Mahomedan religion and was never a Mahomedan in fact; that after he was able to make a choice he did not choose

the religion of Islam, but on the other hand lived and died in the faith of Hinduism...that he was throughout his life a follower of the popular idolatrous form of Hinduism, a form directly antagonistic to the cardinal principles upon which the religion of Islam is founded," " and. he (the Judge) came to the conclusion that as Jang Bahadur was never throughout his- life a Mahomedan, the Mahomedan law did not regulate the succession to his estate, and as he was not a Hindu by birth neither did the Hindu law regulate it; that (page 959) neither of these laws nor yet the Indian Succession Act governed him at his death, and that according to the principles of justice, equity, and good conscience, and by the application of so much of the Hindu law as was applicable to the case, Ganga Bakhsh Singh, the first defendant, was his father's legitimate-son and sole heir.

8. The Court of the Judicial Commissioner, whilst abstaining from pronouncing any definite opinion on the legitimacy of the first defendant, gave in the following passage of their judgment a sketch of the status, life, and character of Jang Bahadur Singh, which, though it differs to some extent from that of the Subordinate Judge, is, in their Lordships' view of the evidence, fairly accurate. It run3 thus:?

Jang Bahadur belonged to no caste, and even if the issue of his marriage with Hanaraj Kunwar should be held to be legitimate, a point on which I express no opinion, it is clear that the Hindu community at Balrampur treated the validity of the marriage as open to question. The Subordinate Judge has cited several authorities to show that the Hindu religion admits proselytes of all kinds. The truth of this is indisputable, but it is equally true that the admission of a proselyte and his descendants into the society of orthodox Hindus is a very slow process. The defendant's witnesses hit off the position exactly when they say that they might eat with Jang Bahadur's family if they persevered in their Hindu habits and maintained their character for several generations (see the evidence of defendant's witnesses Nod. 9 and 10), In two parts of one and the same Irrase Jang Bahadur had a Mahomodan aud a Hindu family and Room boon on equally affectionate terms with both. He ate food in English Hotels and Refreshment Rooms, drank gin and kept fowls and pigs. It is evident that he waa noither an orthodox Hindu nor an orthodox Mahoraedan. It appears to be that he led a double life as was almost inevitable under the circumstances. He no doubt called himself a Hindu, and if ho had any religion it was, as the Subordinate Judge says, the popular idolatrous form of Hinduism, but he is not proved to have boon an orthodox Hindu and there for it seems to mo that if the plaintiff were found to be of legitimate birth the circumstance that his father became a Hindu to the extent shown by the evidence would be no reason for passing over tho plaintiff and giving the property to the first defendant.

9. It has been urged on behalf of the respondents that the Court of the Judicial Commissioner was mistaken on supposing that Jang Bahadur kept his two families in two sides of the same house, that, in truth and fact, he kept them in

two different houses. This is really a small matter and does not affect the general accuracy of the passage.

10. A vast body of evidence was given describing in great detail the participation of Jang Bahadur Singh on many occasions in the most solemn rites and ceremonies of the Hindu religion. It was proved by many witnesses that he wore, somewhat ostentatiously, the Hindu tilak on his forehead, that he was invested by his father with the sacred thread, that he kept a Hindu cook to cook his food, &c. The fair result of the evidence in their Lordships' opinion is that Jang Bahadur did his utmost to become an orthodox Hindu, and to pass as such in the society in which he lived. That his father, from the boy's youth upwards, aided and encouraged him in those efforts; and, finally, when he was only fifteen years of age, procured a marriage to be celebrated with great pomp and rejoicing according to the strict Hindu rite between him and the already mentioned Hindu lady of the Chhattari caste, Hansraj Kunwar.

11. This lady's family were apparently not well off, and it was stated in evidence that the Maharajah gave to her brother Sheo Dial a village to induce him to consent to the union. This, however, only proves the anxiety of the Maharajah to bring about the marriage. No doubt the Maharajah did not attend the ceremony himself. He allowed certain priests to perform for him those ceremonies properly performable on such occasions by a father, but the marriage cannot but be regarded as a somewhat bold attempt to force, as far as possible, the son's entrance into the ranks of a high (twice born) caste, and it might well be that the father, as the Subordinate Judge thought, may have absented himself from the ceremony from motives of prudence. On the other hand it is difficult to believe that all the parties concerned, Sheo Dial, with his own sons, and his daughters to get married, the Maharajah with his position and distinction, the priests with their duties to their religion and office, and all those who assisted at the ceremony with their notions of what was due to their creed, would have promoted, or taken part in an elaborate public function if they knew that it could at best create only a relation of permanent concubinage, without hope or prospect of elevation into a worthier and more respected state. The evidence of Sheo Dial is important in this connection. He said he went with two Pandits to visit the Maharajah, that he had learned that Jang Bahadur was a Mahomedan woman's son, that on his expressing his scruples about the contemplated marriage owing to this fact the Maharajah assured him that Jang Bahadur was a Hindu; that he (the Maharajah) held him (Sheo Dial) by the arm and said". "From child-hood I have got him suckled by a Brahmin woman. He eats with me. He does puja, and his ways are the ways of a Hindu." Sheo Dial further says that Jang Bahadur Singh wore a tilak of Chandan, that his cook was a Hindu, that he saw him sitting near the Maharajah at dinner, and that hearing and seeing this he, Sheo Dial, consented to the marriage of his sister with Jang Bahadur. No doubt it is stated by another witness that the Maharajah did not sit at meals with this son, but unless this evidence of Sheo Dial be an entire fabrication it bears additional testimony to the anxiety of the Maharajah to have his son accepted

and treated as a Hindu. Hansraj Kunwar died in the Maharajah's lifetime. Jang Bahadur performed all the obsequies proper to be performed according to the Hindu religion by a surviving Hindu husband. His father, in the year 1872, got him, then -about twenty-four years of age, again married to another Hindu lady, a member of the same Chhatti caste, Raj Kali Kunwar, who survived him, and is the fifth defendant in this suit. There was; the same publicity and pomp as on the occasion of the first marriage, the same religious ceremonial. The Maharajah absented himself on this, as he did on the former occasion, and got his (sic) Kali Parshad, p. 723, and Jagdeo Singh, p. 726. The former said, "I did not eat with Jang Bahadur because he was Imam Bandi's son," and again, "I won't eat kutchra food touched by Ganga Baksh. I won't drink water from his hand because his grandmother was a Mahomedan," and the latter said, "I can not eat food cooked by Raj Kali Kunwar because she was Jang Bahadur's wife," but he proceeded to say that he would have no objection to eat with Jang Bahadur Singh if the Maharaja had asked him to do so, and then he added the important statement: "Jang Bahadur had offended the Maharaja by keeping a Mahomedan woman, that woman had four sons, she lived with Bandi as Jang Bahadur's mistress for twelve or thirteen years until her death." Babu Basudeo Lai, an educated man and an advocate, at page 731 says, "Jang Bahadur took particular care to put on the tilak more than a born Hindu would take because he was anxious to appear a Hindu; that from the orthodox point of view he (the witness) did not consider him a Hindu, but he could not say he was a Mahomedan, because he professed to be a Hindu," yet he gave not this fact but the fact that Jang Bahadur was of illegitimate birth as the reason for his unwillingness to take water from his hands.

14. Hanwant Singh (page 727) gives remarkable evidence to the same effect. He said: "I consider Jang Bahadur a Hindu. He worshipped like a Hindu. He did pilgrimages like a Hindu. He gave dāns to Brahmins like a Hindu. His ways were those of a Hindu. I saw him doing puja in the temple for the first time thirty years ago, and three times altogether I saw him feeding Brahmins at the temple." Yet despite what he saw, and his opinions on Jang Bahadur's religion, he says on the next page he would not eat with him because he was born of Imam Bandi, nor would he eat with Ganga Bakhsh, because presumably he was his father's son, though he admits that if the latter "persevered in his Hindu habits for two generations, he would be taken into the beradri."

15. These witnesses are fair specimens of those examined on this point. Their evidence might be of importance if it was necessary for their Lordships to determine whether or not the defendant No. 1 was the legitimate son and heir at law of Jang Bahadur. The Subordinate Judge has (at page 961) determined that question in the affirmative. Their Lordships concur with the Court of the Judicial Commissioner in thinking that it is not necessary to determine it one way or the other for the purposes of the decision of this appeal, and they therefore abstain from expressing any opinion upon it. What is of importance, when one has to construe this codicil, and determine what was the testator's intention on making

it, is to ascertain in what light he regarded his son, the marriages he helped that son to contract, and the issue that sprung from them.

16. Their Lordships are of opinion that the reasonable conclusion to be drawn from the evidence is that the Maharajah treated his son of his as a Hindu in religion, and desired that others should so treat him, that he treated his marriages with the two Chhatttri ladies as lawful marriages and desired that others should so treat them, and consequently resolved to regard and treat the offspring of these unions as legitimate and desired they should be so treated and regarded by others; and that it was in this frame of mind he made the testamentary deposition which is in dispute. It is lengthy, and in its material parts runs thus:?

Whereas I have a son, named Jang Bahadur Singh, born of an unmarried mahal, and whereas he is not born of Khas mahal, and it is against the usage of the family and against religion according to the Hindu Shastras, so he is not considered capable of gaddinashini and the proprietorship of the riasat. But he also being born of my loins, it is incumbent on me that such mean be provided for support as would enable him and his (aulad) issues to support themselves well and with respect. Accordingly ever since the date of his birth till this day whenever proper opportunity presented, grant was made for his support; and during my life time I shall make grants according to my will when over 1 shall deem it expedient to do so. But with a view to clearly roako a provision beforehand in order that there may not remain any co-ownership and dispute relating to a part or the whole of my moveable and Immovable property, a property should be determined for Jang Bahadur Singh and his (auhad) issues for generation after generation in order that the conditions of the deed may remain binding in perpetuity. Accordingly the settlement is made as follows. It is this Es. 4,000 per mensem or Us 48,000 per annum shall be continued to be paid by the proprietor of the riasat, the locum tenens of the gaddinashin for the time being; and that amount shall be paid to Jang Bahadur Singh aiad his (aulad) issues for generation after generation as long as the (Khandan) family of Jang Bahadur Singh and his (aulad) issues remain in existence.

Details of Conditions.

1. He shall nut directly or indirectly take part in running the riasat, and shall also remain a well wisher of the riasat.
2. He shall not transfer his maintenance allowance to a stranger by sale, mortgage or otherwise.
3. For his lifetime Jang Bahadur Singh has a right to spend this money, but after his death from among his (aulad) issues one-person (Jis-ko hay pahuttchata ho) to whom the right may go shall considered proprietor of this maintenance allowance without division as aims the other issues of the family of Jang Bahidur Singh shall by entitled to get food, raiment and other necessities out of the monthly allowance.

4. When there remains no descendant of the family of Jang Bahadur Singh, at any time, the monthly allowance of Its. 4,00 will be resumed and remain in proprietary possession of the proprietor of the riasat, the gaddinashin.

5. For the realisation of the monthly allowance, a few villages with jama and names of damircatoj villages and himself are selected, and a list of the same is annexed to the dooumant. The jama of tha selected (tajwiz shuda) villages will be credited from year to year towards the aforesaid fixed monthly allowance of its. 4,000. Neither has the proprietor of the riaiat, gaddinaihin, power to reilise the jama of the selected villagas yielding Its. 45,000, including final sewai, from Jang JJ Bahadur Singh or his descendants, nor is Jang Bahadur Singh or his family descendants competent to demand tho fixad nnnthlyallowance of Rs. 4000, from [the gaddi. nashin, the proprietor of the riasat.

6. The jama of tha salected villages, a copy of which is attached to the document, shall be deemed the jama, including mal and sewai in perpetuity. And ths proprietor of the riaiat for the tima being shall have no-power to increase or dacrewo tha jama. And Jang"Bahalur Hingh and-his family deacsaianta ahill raisa 111 esoi 38-39 fco increase or decrease of thg jama. And the proprietor of the riaiat shall have no power to cancel the lease. And Jang Bahadur Singh and his family descendants shall have no proprietary right against the proprietor of the riasat, except that of deriving benefit from the selected villages. Besides, Jang Bahadur Singh and his family desoaniants shall hive no power to transfer the Immovable property by sale or mortgage or otherwise. But they shall continue in perpetuity to hold possession over the said villages.

7. The villages selected for payment of tho monthly allowance shall have their boundaries maintained according to the map of had-o-bast kishtwar. The proprietor of the riasat shall have no power to vary them contrary toit, nor shall Jang Bihidur Singh or him deicendantshaveany.

17. Then follow the details of the villages leased out in perpetuity for the payment of the monthly allowance of Rs. 4,000. The testator then makes a bequest to Imam Bandi, the mother of Jang Bahadur, in the following words:?

Besides, with a view to support the mother of Jang Bahadur Singh, I propose to fix its. 1,000 per mensem, or Ks. 12,000 a year for her personal expenses. She, that is the mother of Jang, Bahadur Singh, has power to spend the fixed allowance without interference by anybody else, and-may, in her lifetime, make a will inrfavour of-anybody whoiif she pleases, and in respect of any good work she likes, and it will be deemed liable to be acted upon. And fur the purpose of realising the aforesaid annuity of Ra. 12,000, a few villages, mentioned below, are given by way of the with jama assessed thereon. The money will be realised from those villages from year to year.

18. He then gives a list of the villages out of which the Rs. 12,000 was to be collected, and proceeds to add :?

These few sentences have been put down to make provision for her support while in the enjoyment of health and possession of the five senses, and out of my own pleasure and accord, in order that they may by of use after me.

19. The testator died on the 27th of May 1882. In or about January 1894 Jang Bahadur Singh became insane. He so continued for several years, and died on the 1st of October 1899 leaving as his own the moveable and Immovable property mentioned in Schedules B and C attached to the Statement of Claim. The first defendant, as already mentioned, immediately went into possession of the property mentioned in Schedule A and has since retained it.

20. Jang Bahadur Singh was created by the codicil ancestor or first proprietor of the estate, maintenance allowances somewhat resembling rentcharges, were charged upon it. It was to be perpetual, impartible, indivisible, and incapable of being otherwise charged or encumbered, and it was not to be the subject of any co-ownership. On the death of Jang Bahadur a person, styled at page 224 the representative of the former, was to succeed him as proprietor of this maintenance allowance, without " division " as a rais. " This proprietor was to be one of the issue of Bahadur Singh" the other issue (aulad) of the family (hhandati) of Jang Bahadur Singh being only entitled to get food and raiment out of the allowance. In addition the marriage and funeral expenses of the male and female children of the family of Jang Badahur Singh were to be paid. The only indication given as to how the particular individual one of the issue of Jang Bahadur, who was to succeed him as proprietor of the allowance was to be ascertained is that contained in the words " on whom the right may devolve. " The testator must have had in mind some law or rule which would apply to fix the succession. What law could this high caste Hindu possibly have had in mind for such a purpose other than the Hindu law ? That law, however, in the matter of succession to property, takes no account, in U13 three higher classes, of illegitimate descendants. Sir Robert Finlay, as their Lordships understood, admitted contention?at least to this extent, that if when a successor came to be ascertained the class of beneficiaries contained both legitimate and illegitimate members, the eldest legitimate male would by the Hindu law succeed but where, as in the present case, as he contended, all the children were illegiti mate, the eldest male amongst them should succeed. But by what law or rule he did not indicate. It is difficult to suppose that if the testator intended all his grandchildren to be put upon the same level he would not have indicated some method by which the successor to his son should be selected. If he relied at all upon the Hindu law to select that successor it could only be because he wished it to be assumed that that law applied to some of the issue of his son, and that could only be the case if those members of the issue were to be taken to be legitimate.

21. At the date of this codicil Jang Bahadur was only "about thirty years of age. He had already had one son by his-deceased Chhattri wife. He had been married for some time to-another Chhattri wife, by whom it was quite possible he might

have had male issue and it would have been quite in conflict with the whole tenor of the Maharajah's treatment of and conduct towards his son Jang Bahadur, to deprive by his codicil these marriages and the issue springing from them of the character," and status he had striven to secure for them. The Court of the Judicial Commissioner came to the conclusion that the Maharajah thought these marriages of his son were valid, and the issue of them legitimate. However that may be, it is clear their Lordships think upon the whole of the evidence that he wished them to be so regarded by others. Nothing would more surely have defeated that desire than that he should by this testamentary instrument show that he himself regarded them in a wholly different light, and placed the children of these marriages on an equality with those of a Mahomedan concubine. The Maharaja has used the word "aulad" throughout this codicil to describe the issue of his son Jang Bahadur. The Court of the Judicial Commissioner has laid it down that this word *prima facie* means legitimate issue. This case is not one where a gift is made by will of the corpus of a fund, or a life interest in a fund to the children of the testator or of another as a class. There may be good reason in some such cases for holding that in India the word "children" includes illegitimate children, but here a succession of life interests from generation to generation is intended to be set up, the successor or "proprietor" in each instance being vested with absolute control of the come, subject only to the duty of maintaining the issue (aulad) of the family (khandan) of the first proprietor, Jang Badahur Singh. There is nothing on the face of the will to suggest that a meaning should be given to the word "aulad" different from its *prima facie* meaning; but if it is to be read as including illegitimate issue, then it follows that the testator intended to bring into the line of succession not only his illegitimate grandchildren but their illegitimate issue from generation to generation. Such a construction would render rather unnecessary the provision (No. 4, page 224) that if no descendants of the family of Jang Bahadur remained, the monthly allowance should fall into the possession of the gaddinashin, and would also seem to defeat the whole purpose and object of the testator in establishing this succession of life interests. Nor do their Lordships see any reason for extending in this instance the meaning of the word "khandan" which ordinarily refers to the group of descendants who constitute the family of the progenitor, so as to include illegitimate offspring, who from the necessities of the case cannot share in the family life or its worship or ceremonials.

22. It has been strenuously urged by Sir Robert Finlay on behalf of the appellant: firstly, that there would have been nothing easier for the testator, if he desired to exclude his illegitimate grandchildren from all benefit under this codicil than to have said so. The question is, has he not done so by the use of the word "aulad"? But even if this be not so, it was quite as easy for him to include them in the class described by the word issue as to exclude them from it so that the argument cuts both ways. And it was in the second place contended that having regard to his interest in these children, he never could have intended to leave them Un provided for. He undoubtedly did show some interest in them, but not a

very keen interest, and it is by no means clear that he did not intend them to be provided for in the way they have been, in fact, provided for, namely, by being maintained by their grand-mother Imam Bandi during her life, out of the income left to her by the codicil. He enabled her by the exercise of the testamentary power over this income conferred upon her so to provide for them after her death. The income was large, Rs. 1,000 per mensem. She was a woman who at the date of the codicil must have been at least forty five years of age, her son Jang Bahadur being then thirty years of age. The son's mistress and her children lived with her. She, according to the evidence, helped to rear them. It was scarcely conceivable that she should require Rs. 12,000 per annum for her personal expenses alone. The power of disposing of this income by will clearly showed that the testator had some object in view beyond providing adequately for her maintenance. What more natural than that this income, handsome in amount, and disposable by her will, should have been given to enable her to provide for her grandchildren ? Their Lordships are therefore of opinion that having regard to all the evidence in the case and the provisions of the codicil itself, the intention of the testator plainly was to treat the marriages of Jang Bahadur with the two Chhatti women already mentioned as valid marriages, and the issue of those marriages as legitimate issue. They think that the judgment appealed from was right, and that this appeal should be dismissed with costs, and they will humbly advise His Majesty accordingly.