

(2004) 11 AHC CK 0203
In the Allahabad High Court
Case No : S.A. No. 362 of 2000

Brijendra Pratap Singh (Deceased by LR) and Another	APPELLANT
Vs	
Smt. Prem Lata Singh and Others	RESPONDENT

Date of Decision : 01-11-2004

Acts Referred:

Citation : AIR 2005 All 113 : (2005) 3 AWC 2277

Hon'ble Judges : Janardan Sahai, J

Bench : Single Bench

Advocate : R.G. Padia, Prakash Padia, Murlidhar Avinash Chandra and A.C. Tripathi, for the Appellant; R.N. Singh, S.N. Singh, A.K. Rai and Tarun Verma, for the Respondent

Final Decision : Dismissed

Judgement

Janardan Sahai, J.—This appeal is about a house No. C-7/67 situate in Mohalla Senpura, at Varanasi. A dispute arose between two brothers Surendra Pratap Singh and Brijendra Pratap Singh. Surendra Pratap Singh brought a suit for partition claiming a half share in the house against his brother Brijendra Pratap Singh. His case was that Prabhu Nath Singh was the grandfather of the two brothers while Shyambadan was their father. It was alleged that Raj Kumari Devi was the daughter of Jai Dev Singh brother of Prabhunath Singh and she wanted to give this property to Shyam Badan but Brijendra Pratap played foul and fraudulently got a will executed in his favour. When this fact came to the knowledge of their father, Shyam Badan, he intervened. The result was a family settlement between the two brothers Surendra Pratap Singh and Brijendra Pratap Singh dated 23-9-1971. As the rights of the parties depend upon of this deed it is necessary to refer to its material terms. It bears a recital that the two brothers are members of a Hindu Joint Family, that the house in dispute was gifted by Smt. Raj Kumari to Brijendra Pratap Singh who thus became its sole owner, that house in dispute was being blended in the other joint properties of the family so that the two brothers have become owner of a half share each as in the other

joint properties of the parties. Then follows the crucial term upon the validity of which there has been a hot contest between the parties. The deed recites that on the death of either of the two parties, his male lineal descendant would succeed to his share but in case there is no male lineal descendant, the property would revert to the other brother or his male lineal descendants as the case may be and neither of the parties would have the right to give the property to any person other than to the male lineal descendants of the parties.

2. It was the plaintiff's case that the property in dispute was originally acquired from the nucleus of the joint family and was therefore the ancestral property of the parties. The trial Court however negated this stand of the plaintiff and held that it was in the sole ownership of Brijendra Dubey who had blended it by the settlement in the joint property of the parties and that each of the parties had a half share therein. However, the suit was decreed by the trial Court on the finding that the term of the deed which provides that on the death of either of the parties, the male lineal descendant would succeed is invalid being against the principles of the Hindu Law of inheritance. This point is crucial because during the pendency of the proceedings in the courts, below both the brothers died. Surendra Pratap Singh died first leaving behind no male lineal descendant and only a widow and daughter who are the respondents in this appeal. Brijendra Pratap Singh died later leaving behind a widow the appellant and also male and female issues. The appellate Court has affirmed the finding of the trial Court that the term in the deed relating to succession is invalid.

3. I have heard Shri Murlidhar assisted by Shri Tarun Verma for the appellants and Shri R.N. Singh assisted by Shri S.N. Singh for the respondents.

4. This appeal was admitted on the following substantial questions of law :--

(1) Whether in the facts and circumstances of the case the courts below can themselves divide a registered settlement deed and whether the courts below can hold that part of it is valid and part of it is invalid and illegal ?

(2) Whether in the facts and circumstances of the case individual property could be blended in joint family property or coparcenary property even though no such joint family property or coparcenary property existed at all ?

3. Whether the case of Tagore v. Tagore (1872) 1 Supp 47 : 18 WR 359) which is applicable only in the case of gift or will can be extended in respect of the family settlement as well ?

5. Today a statement has been made by Shri Murlidhar, counsel for the appellants that appellants are pressing only one point and are challenging only the finding of the courts below that the line of succession laid down by the deed is an invalid one. Questions 1 and 2 are not being pressed. Shri R.N. Singh counsel for respondents stated that he is not challenging the finding that the property solely belonged to Brijendra Pratap Singh before it was blended. In view of the stand taken by the counsel for the parties, I am taking it that the finding

of the Courts below that the property initially belonged to Brijendra Pratap Singh and that it was blended to acquire the character of joint property, is correct. Shri Murlidhar however contended that although the courts below have come to the conclusion that the line of succession under the deed was invalid according to the principles of Hindu Law the case has not been properly analysed and the law has not been correctly applied and the conclusion is therefore erroneous. It is this exercise, which this Court is required to embark upon in this second appeal . It is submitted by Shri Murlidhar that on the death of Surendra Pratap Singh, Brijendra Pratap Singh was alive. Surendra Pratap Singh left no male lineal descendant and consequently the property in dispute was inherited by Brijendra Pratap Singh under the terms of the deed without offending any rule of perpetuity or any principle of Hindu Law.

6. In the light of the submission made, the question No. 3 is reframed as follows :--

Whether the case of Tagore v. Tagore (1872) 1 Sup 47 : 18 WR 359), which is applicable in the case of gift or will can be extended in respect of the family settlement as well and whether the line of succession on the death of either of the executants laid down in the settlement is invalid?

7. Now a Hindu can dispose of his property by a settlement or otherwise in any manner known to Hindu law. But he cannot lay down a line of succession against the Hindu law of inheritance. This has now been settled by a series of decisions beginning from the Judicial Committee's decision in Tagore v. Tagore (1872) 1 Sup 47 : 18 WR 359). A Hindu can of course prevent the property from passing to his heirs and altering the course of succession by making a transfer inter vivos including a gift or an executory gift or by a testamentary disposition in the form of a Will. He can also create a trust. These are modes of disposition recognised by Hindu law. A Hindu can also enter into a family settlement recognising the rights of the parties to the settlement. Indeed the term in the settlement deed in this case that each of the parties would have a half share is valid and binding and its validity is not being challenged. But a Hindu cannot create an estate unknown to Hindu law or lay down in the deed of settlement of his property a line of succession against the principles of Hindu law of inheritance. For in doing so he would be legislating. In Hiraji Tolaji Bhagwan v. Shakuntala 1990 All CJ 365 it was held that a family settlement under Hindu law could not be used as a device to circumvent the law and the wife or the daughter so long as the property was joint were not entitled to a share. What has therefore to be seen in this case for testing the validity of the clause in question is whether the two brothers have thereby made a disposition of the property by any mode known to Hindu law or whether they have merely laid down therein the abstract principles of succession according to which the property would devolve and the line of succession so laid down by them is a departure from the Hindu law of inheritance.

8. Under the Hindu Succession Act a daughter has on her father's death a share in his property, whether solely or jointly owned by him and even in his share in

the Hindu Undivided Family property. So too the widow. The deed provides that on the death of either of the two parties, the male lineal descendants of that party alone would succeed. Under this term a male lineal descendant how so ever would succeed to the exclusion of all female heirs. It was no doubt open to the two brothers to make a gift of their property or to bequeath it by Will in favour of their sons or grandsons to the exclusion of their daughters or grand daughters or other female heirs but they have not done so. They have merely laid down an abstract rule of succession in favour of their male lineal descendants how low so ever. This clause in the deed is at variance with the Hindu Law of Inheritance wherein the daughter and widow also has a right to inherit.

9. Then follows the second part of the succession clause which has particular importance in the question framed that if one of the parties to the deed dies without leaving a male lineal descendant his share would devolve upon the other party or his male lineal descendants. The effect of applying this term of the deed to the situations that could hypothetically have arisen on the death of the parties would have been as follows. Although it appears there was no male issue of Surendra Pratap Singh at the time of the settlement but if a male issue were to be born to him later on and were to be alive on the date of his death, Surendra's share under the terms of the deed would have devolved upon his son or if he were dead but left behind a male lineal descendant then upon such a descendant how low so ever. But if he left no male lineal descendant his share would have devolved on Brijendra Pratap Singh. Similarly although Brijendra Pratap Singh had sons but should they not have survived on the date of death of Brijendra Pratap Singh his share would have devolved on Surendra Pratap Singh if he was alive and if he were not then upon his male lineal descendants if he had left any. From this clause it cannot be inferred that there was any intention on the part of either executant Surendra Pratap Singh or Brijendra Pratap Singh to gift his interest or to make a bequest of it by Will. Rather an abstract rule of succession was laid down and it would have been a matter of chance depending upon which the situations referred to above had arisen that the interest of either executant could have devolved upon the other one. As both Surendra and Brijendra had a chance of succeeding to the interest of the other in the contingency mentioned in the deed cannot be construed to be a gift to any one of them Surendra or Brijendra. There was thus an abstract rule of succession laid down. This line of succession as we have seen is at variance with the Hindu law of inheritance because the female heirs namely the widow and the daughter have also a share in the joint property left by the husband or father and are entitled to succeed to his interest therein to the exclusion of his brother. After the settlement each of the two brothers was absolute owner of a half share in the house. The effect of the aforesaid rule of succession contained in the deed is an attempt to alter the legal course of succession and is therefore invalid. If the deed could be read as a gift or a Will by Surendra Pratap in favour of Brijendra Pratap in the event of Surendra Pratap leaving behind no male issues the disposition would be valid as

it is in favour of a person who was alive on the death of the donor or testator and would not offend the rule of perpetuity. Such a mode of disposition by gift or by Will is valid and is recognised by Hindu law even though it alters the course of succession. But it is not possible as we have seen to read the document as a gift or a Will in favour of Brijendra Pratap by Surendra Pratap or vice versa. The deed rather lays down an abstract rule of succession contrary to the provisions of Hindu law. In AIR 1936 318 (Privy Council) the testator had appointed two of his sons Kartick and Ram as shebait and directed that on the death of any of them or any of the future shebait the then next eldest male lineal descendant of these two sons shall act as a shebait it being his intention that the eldest in the male line of the said two sons shall always remain as joint shebait. It was held by the Judicial Committee that even though Nitye son of Kartick and Lal Bihari the eldest son of Ram were alive on the testator's death the provision in the Will relating to the holding of office of shebait after the deaths of Kartick and Ram constituted an invalid attempt to lay down a line of succession not permissible under Hindu law. The contention that the deed could be construed as providing for independent gift for life to the persons who answered the description of the eldest male lineal descendants of the testator's two sons which was accepted by the Division Bench of the High Court was turned down by the Judicial Committee.

10. The Courts below have relied upon AIR 1931 179 (Privy Council) . In that case the Privy Council relying upon *Tagore v. Tagore* (1872) 1 Sup 47 : 18 WR 359 held that the condition that the properties granted should not in any case pass to the heirs of the daughters of the grantee can hardly be read as implying an estate to be determined on the death of the grantee; it is an attempt to alter the legal course of succession to an absolute estate, and is therefore void. Shri Murlidhar submitted that this case is distinguishable and in fact it rather recognised the right of a Hindu to give property by way of an executory gift upon an event which is to happen if at all immediately on the close of a life in being and in favour of a person born on the date of the gift. The proposition that a Hindu can make an executory gift cannot be doubted but I have already held that no gift was intended or made by the deed. The case is relevant for the proposition that an attempt to alter the legal course of succession to an absolute estate is void.

11. Shri R.N. Singh counsel for respondent relied upon a decision in *Sri Raja Rao Venkata Mahapati Surya Rao Bahadur v. Hon'ble Sriraja Rao Venkata Mahapati Gangadhara Rama Rao Bahadur* (1886) 13 I.A 97 in which an agreement was entered into between two brothers that in case of failure of "aurasa" (self-begotten) male issue of one, their joint Immovable property should go to the other and should not be alienated by making adoption and the like. It was held following the Tagore case that such an agreement is not binding upon the son or prevent that son's adoption from conferring title by inheritance.

12. Shri Murlidhar contended that the settlement can also be treated as a Will. I am not inclined to accept this submission. I have already held that no gift or

bequest was made by the deed in favour of any one but only abstract rules of succession were laid down. The deed in question cannot be regarded as a Will for another reason that it is always open to the testator to revoke his Will. The deed however is a settlement and it is not open under its terms to any party to alter the line of succession laid down therein. The Tagore case is applicable to all dispositions and also to a family settlement in which an attempt is made to alter the line of succession laid down by Hindu law. There is no good reason why the Tagore case would not be applicable to a family settlement. In my opinion the Courts below were right in holding that the deed lays down a line of succession contrary to the Hindu law of inheritance. The question is answered in the affirmative in favour of the plaintiff-respondent.

13. In the result, the appeal lacks merit and it is dismissed.