

(1965) 10 AHC CK 0030
In the Allahabad High Court
Case No : S.A. No. 591 of 1957

Ram Dayal

APPELLANT

Vs

Bhim Sen

RESPONDENT

Date of Decision : 22-10-1965

Acts Referred:

Uttar Pradesh Tenancy Act, 1939 — Section 35

Citation : (1965) 35 AWR 755

Hon'ble Judges : S.N. Dwivedi, J;G.C. Mathur, J

Bench : Division Bench

Advocate : A. Banerjee and K.C. Agarwal, for the Appellant; S.S. Verma, for the Respondent

Final Decision : Dismissed

Judgement

Dwivedi, J.—This appeal is before us on a reference made by a learned single Judge.

2. A Mani Ram was the occupancy tenant of the disputed land. He died in May, 1952 leaving behind him his maided daughter, Gomti. At the moment of his death Gomti was enceinte. In Agahan, 1952 - (corresponding to a November, 1952) she gave birth to a son. He was named Ram Chandra.

3. The Defendant trespassed on the holding of Mani Ram after his death. So Ram Chandra instituted a suit for his ejectment. Ram Chandra died during the pendency of the suit. His father, Bhim Sen, was then substituted in his place.

4. Bhim Sen can succeed only If it is found that Ram Chandra had inherited Mani Ram's occupancy rights. The Defendant has contended that as Ram Chandra was not in existence at the death of Mani Ram, he could not inherit the occupancy tenancy of Mani Ram.

5. Succession would be governed by Section 35 of the U.P. Tenancy Act, 1939 (hereinbelow called the Act). u/s 35 a daughter's son is an heir of his maternal

grandfather. But in *Maggli Prasad v. Ram Balak* (1) (1956 AWR 752, *Randhir Singh, J.* has held that a posthumous daughter's son would not be the heir. The same view is taken by *Oak, J.* in *Ramjas and another v. Board of Revenue and Ors.* (2) (1963 AWR 354). There is a conflict of opinion in the Board of Revenue.

6. The reasons given by *Randhir Singh, J.* are: (1) the Act prescribed a special rule of succession; (2) the Act did not contain an express provision for succession of a child in embryo; (3) the rules of Hindu Law would not apply to Section 35.

Section 35 materially reads:

When a male tenant other than a tenant mentioned in Section 34 dies, his interest in his holding shall devolve in accordance with the order of succession given below:

(a) male lineal Defendants in the male line of descent:

Provided that no member of this, class shall inherit if any male descendant between him and the deceased is alive:

(b) widow;.

(h) widow of a male lineal descendant in the male line of descent;

(i) unmarried daughter;

(k) daughter's son;

(l) brother's son,...;

(n) father's brother's son.

7. The general rule is that an estate is not held in abeyance on the death of its owner. It vests in his heir then living. This rule would also apply to Section 35. Accordingly the interest of a tenant would devolve on the preferable heir u/s 35 living at the moment of his death. So far there can be no difference of opinion.

8. If the preferable heir is actually living at the moment of his death, there is no difficulty. He would surely inherit his interest. But would he also inherit if he had been in the womb at the death of the tenant and were born alive after his death ? This is the question which we are called upon to decide in this case.

9. According to all civilized systems of jurisprudence a child in embryo at the death of the holder of a proprietary interest, if born alive after his death, is deemed to be living at his death.

According to Blackstone an "infant en ventre mere, or in the mother's womb, is supposed in law to be born for many purposes. It is capable of having a legacy, or a surrender of a copyhold estate, made to it. It may have a guardian assigned to it; and it is enabled to have an estate limited to its use, and to take afterwards by such limitation, as if it were then actually born. And in this point the Civil Law

agrees with ours."-(Black-stone"s Commentaries, edited and abridged by George Chase, 4th Edn. p. 69)

While dealing with heirs presumptive Blackstone said that their "right of inheritance may be defeated by the contingency of some nearer heir being born; as a brother or nephew, whose presumptive succession may be destroyed by the birth of a child; or a daughter, whose present hopes may be hereafter cut off by the birth of a son. Nay, even if the estate hath descended by the death of the owner to such brother, or nephew or daughter; in the former cases, the estate shall be divested and taken away by the birth of a posthumous child; and in the latter it shall also be totally divested by the birth of a posthumous son."-(Blackstone"s Commentaries, edited and abridged by George Chase, 4th E.dn. p. 383). According to Lord Westbury, L.C. the rule also prevails in other systems of jurisprudence-[Blason v. Blason (3) (34LJ(Eq) 18 at. p. 19)]. In Moham madan Law if a person dies leaving a widow who is pregnant, the child, if born within the ordinary period of gestation, would succeed to the father. Where a child is born after the death of any other relation to whose inheritance it would have been entitled had it been in existence at his death, it will succeed only if born within six months from such death, unless the other heirs acknowledge that its mother was pregnant at the death of the relation-(Ameer Ali, Mohammaian Law, 3rd Edn. Vol. II, pp. 94-95).

10. In the original texts of Hindu Law the rule was confined to the deceased owner's posthumous son. But judicial decisions, relying on the rule of general jurisprudence, have gradually extended the rule to his daughter, the children of his daughter and the children of his relations. In *Bayava Shid-dappa Desai v. Parvateva Basavanappa* (4) (AIR 1933 B. 126) the posthumous daughter of the deceased was allowed to inherit his estate. In *Jatindramohan Tagore v. Ganendra Mohan Tagore* (5) ((1872) 9 Beng. LR 377) the Privy Council was considering a will executed by a person governed by the Dayabhaga School. The Dayabhaga allows a gift to be made in favour of a sentient person. After observing that a gift could be made to all persons in existence at the time when the gift was to take effect the Privy Council explained the text thus: "By a rule now generally, adopted in jurisprudence, this class would include children in embryo, who afterwards come into existence"-(*ibid* at p. 397. As regards a Will the Privy Council held that "a person capable of taking under a Will must be such a person as could take a gift *inter vivos*, and therefore must either in fact or in contemplation of law, be in existence at the death of the testator"-(*ibid* at p. 400/. So a child in the womb at the death of the testator, if later born alive, would be deemed to be in existence at his death. Golap Chandra Sarkar Sastri has summed up the position thus: "This rule, which is applicable only to the proprietor's male issue,..... has been extended to other heirs taking by succession, not upon the ground of there being any clear authority in Hindu Law, but on the ground that the principle has been adopted by the modern systems of jurisprudence...". - Golap Chandra Sarkar Sastri: Hindu Law, 7th Ed. pp 364, 365).

11. The law, as it has emerged from judicial decisions, is tersely summed up in a passage in Mulla's Principles of Hindu Law: "On the death of a Hindu, the person who is then his nearest heir becomes entitled at once to the property left by him. The right of succession vests, in him immediately on the death of the owner of the property. It cannot under any circumstances remain in abeyance in expectation of the birth of a preferable heir, where such heir was not conceived at the time of the owner's death."- (Mulla's Hindu Law, 12th Edn. p. 96). This passage was quoted with approval by the Supreme Court in Shrinivas Krishnarao Kango Vs. Narayan Devji Kango and Others, .

12. We are unable to see any reason why Section 35 should not be construed in the light of the rule of general jurisprudence, which has been assimilated in Hindu Law by judicial decisions and which is also a part of Mohammadan Law. Persons governed by the Act are predominantly Hindus and Muslims. The legislature would be presumed to be aware of the rule of Hindu Law and Mohammadan Law. There is nothing in Section 35 or in any other provision of the Act to shut out the rule. One of the settled rules of construction of Statutes is that the legislature does not alter a fundamental principle or depart from the general system of law *sub silentio*.-[Maxwell: Interpretation of Statutes, 9th Edn. page. 85; M.K. Ranganathan and Another Vs. Government of Madras and Others, .; Buddhan Singh v. Nabi Bux (19H1 AWR 452 (FB): 1961 ALJ 536 at page 518); State of Gujarat v. Shyamlal Mohan Lai Choksi (AIR 1965 S.C. 1251 at page 1259)].

13. Section 21 creates seven classes of tenants. They are permanent tenure holders, fixed rate tenants, tenants holding on special terms in Oudh, exproprietary tenants, occupancy tenants, hereditary tenants, and non occupancy tenants. Section 34 regulates succession to the interest of a permanent tenure holder, fixed rate tenant, occupancy and exproprietary tenants in Oudh and tenant on special terms in Oudh by the personal law of the deceased tenant. Section 200 regulates succession to the interest of a rent free grantee and grantee holding at a favorable rent by the personal law of the deceased rent free grantee and grantee holding at a favorable rent. Likewise Section 206. regulates succession to the interest of a grove holder by the personal law of the deceased grove holder. So in all these cases a child conceived at the death of the deceased subject of interest would, on his birth, inherit his interest. How then can it be said on the language of Section 35 that the legislature ordained otherwise with respect to the devolution of the interest of an exproprietary tenant, occupancy tenant, hereditary tenant and non occupancy tenant?

14. Section 38 provides that when a co-tenant dies "leaving no heir entitled to succeed under the provisions of this Act, his interest in the tenancy shall pass by survivorship to the other co-tenant". Section 45 deals with the extinction of the interest of a tenant. Clause (a) of Section 45 provides that his interest shall be extinguished "when he dies leaving no heir entitled to inherit in accordance with the provisions of this Act". The word "leaving" in these two sections gives some

clue to the true meaning of Section 35. In a statute of descent the word "leaving" is "used in sense of... leaving living issue at the death."-(Words and Phrases (Permanent Edn.) published by West Publishing Co., Vol. 24, page 496). If we give this meaning to the word "leaving" in Section 38, the clause "leaving no heir entitled to succeed under the provisions of this Act", would read as "leaving no heir entitled to succeed under the provisions of this Act living at his death". Similarly the clause "leaving no heir entitled to inherit in accordance with the provisions of this Act" in Section 45 would read as "leaving no heir entitled to inherit in accordance with the provisions of this Act living at his death". The word "living" has more than one meaning. It means "alive; that lives or has life; contemporary; existing".-(Shorter Oxford Dictionary 3rd Edn. p. 1155). Surely a child in embryo at the death of a tenure holder has life. In *Cleghorn v. Burrows* (7) ((1895)2 Ch. 497 at page 498) Chitty, J. said, "The child was en ventre sa mere at the time of the death of its grandmother, and was plainly then living so as to bring it within the words of the will in case she has issue living". So the words of the fore quoted two clauses of Sections 38 and 45 are sufficiently wide to comprehend a child in embryo. In the result, under Sections 38 the interest of a deceased co-tenant would not pass by survivorship to the surviving co-tenant if the former has left at his death an enceinte daughter provided after his death she gives birth to a son. Similarly the deceased tenant's interest would not cease if he has left at his death an enceinte daughter provided after his death she gives birth to a son.

15. If the rule of general jurisprudence that a child in embryo is a child in case applies to Sections 38 and 45, as we have already shown, there is no reason why it should also not apply to Section 35. It is said that the rule sanctioned a fiction. That is true. But that alone can be no legitimate reason for excluding its operation from Section 35. Courts have already interpreted the old law of land tenures with the aid of a fiction of Hindu Law and have held that an adopted son is a male lineal descendant *Lala v. Nahar Singh* (8) (ILR 34 All. 658).

16. It is not easy to overlook the irrational hardships that would follow the exclusion of the rule from the material provisions of the Act. Suppose a tenant died leaving a son and his pregnant widow. After his death the widow gives birth to a son. Now if the rule is not applied, the posthumous son would get no share in his deceased father's tenancy. Again, a co tenant has died leaving behind his pregnant widow. His interest devolved on the widow. Immediately after his death the widow remarried. She forfeited her interest at once on remarriage. Then she gives birth to a child. If the rule of general jurisprudence does not apply, the child would not get its father's share; it would have passed by survivorship to the other co tenant on remarriage of the widow. It is not necessary to give further instances of hard-ship.

17. These hardships are not inevitable on the language of Sections 35, 38 and 45. Their words are quite wide to admits of the application of the rule of general jurisprudence. And if two interpretations are possible, the Court should prefer the

one which would avoid unintelligible hardships *State of Gujarat v. Shvamlal Mohanlal Ghoksi* (9)(AIR 1965 S.C. 1251).

18. In the light of the foregoing discussion we are of opinion that the daughter's son, who was in the womb at the death of his maternal grand father or his widow, would inherit the latter's tenancy. Accordingly we would hold that Ram Chandra inherited the occupancy tenancy of Mani Ram. On the death of Ram Chandra his interest devolved on his father, Bhim Sen. Bhim Sen is therefore entitled to eject the Defendant.

19. At this stage we should make it clear that we should not be deemed to have expressed any opinion about the rights of a bona fide transferee of tenancy rights for value without notice of the existence of an heir in embryo. That question should be considered as and when it arises.

20. The appeal of the Defendant is dismissed with costs.