Privy Council Appeal No. 39 *of* 1939
Allahabad Appeals Nos. 4, 5 *and* 6 *of* 1936

Bishun Singh *alias* Babu Singh and another – – *Appellants*

v.

Sri Thakurji Mangla Nain Bhagwan – – – *Respondent*

Same – – – – – – – – – *Appellants*

v.

Shiam Lal and others – – – – – – *Respondents*

Same – – – – – – – – – – *Appellants*

v.

Sheo Narain Singh – – – – – – – *Respondent*

Consolidated Appeals

FROM

THE HIGH COURT OF JUDICATURE AT ALLAHABAD

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 17TH OCTOBER, 1944

Present at the Hearing:
LORD PORTER
LORD GODDARD
SIR MADHAVAN NAIR

[*Delivered by* SIR MADHAVAN NAIR]

These are consolidated appeals from a judgment and three decrees of the High Court of Judicature at Allahabad dated 30th October, 1935, which set aside a decree of the Subordinate Judge of Cawnpore dated 2nd January, 1932, and dismissed the plaintiffs' suit as against all the present respondents.

The appellants are the plaintiffs. The 1st appellant claimed the properties in suit as the nearest reversioner of one Pohkar Singh deceased; and the 2nd appellant, is a transferee of half of the properties from the 1st appellant.

Stated generally, the respondents all derived their title directly or indirectly from the transfers of the property made by Musammat Gambhiri, the wife of Pohkar Singh, who survived him and died in 1919.

The following pedigree set out in the plaint explains the relationship of the principal parties.

BADRI SINGH.

Pohkar Singh (died 1900) = Gambhiri Kunwar *alias* Parbati, widow (died 1919).

Koklat Singh.

Gajraj Singh.

Bishun Singh, plaintiff No. 1.

Ram Piari, daughter (died 1915 childless), married Shiam Lal, defendant No. 1.

Man Kunwar (died childless before 1900), married Gauri Shankar.

Indramati Kunwar died childless.

The last male holder of the properties in question was Pohkar Singh, who died in 1900. He was separate from his brother Koklat Singh. He had three daughters, one of whom, Man Kunwar, had died before 1st October, 1895, leaving a widower Gauri Shankar. Of the other daughters, Ram Piari, who died in 1915, was married to Shiam Lal (1st defendant), and Indramati was a minor unmarried.

On 1st October, 1895, Pohkar Singh executed a document purporting to be " a deed of gift " in favour of Gauri Shankar and others. The question for decision before the Board is, what rights were conferred by this document on his widow by Pohkar Singh.

After the death of her husband, Musammat Gambhiri executed the three following documents:—

1. On 22nd May, 1903, a deed of gift of certain properties in favour of her daughter Musammat Ram Piari. The latter died childless in 1915, and she made a deed of gift in favour of her husband Shiam Lal.

2. On 28th July, 1914, a sale deed of a village and a shop in favour of the father of defendant No. 2.

3. On 26th September, 1917, a deed of gift in favour of Shiam Lal. There have been subsequent transfers by the transferees from Musammat Gambhiri Kunwar.

The suit out of which this appeal arises was instituted by the appellants to set aside the alienations of the suit properties made by Musammat Gambhiri and her transferees, on the ground that Musammat Gambhiri had no power to make the said alienations as she took only the limited estate of a Hindu widow in the properties left by her husband, and that the alienations were not made for legal necessity.

The respondents pleaded that the deed of gift above referred to, amounted also to a " will " in favour of Musammat Ghambhiri by virtue of which she became the absolute owner of the properties in question and she had therefore every right to alienate them, the appellants' contention on these points being that the " deed " does not amount to a " will " as there are no words of bequest in it and that it should be ignored altogether, as it confers on Musammat Gambhiri nothing more than a widow's estate on the properties which as the widow of Pohkar she would ordinarily have. The deed of gift continuous in its narration of facts, consists in substance of two parts. By its first part, Pohkar Singh gifted a 16 annas share in mauza Malkanpur and a 12 annas share in mauza Deomai to Gauri Shankar, Ram Piari and Indramati in equal shares reserving to himself the remaining 4 annas share in mauza Deomai.

The relevant portions of the second part of the document run as follows:—

> " The transferees, aforesaid, shall have, as proprietors, all powers, like myself to make all kinds of transfers and I have transferred the property, made gift of, with all sorts of interest relating thereto, just like myself, in favour of the transferees without the exception of anything and any interest and after the registration of this document I shall get the mutation of names effected, as required, in favour of the transferees."
>
> . . . . . .
>
> " as regards other property with 4 anna zemindari share in mauza Deomai, which is in my possession and which under this document has not been transferred, I shall have power of transfer and after my death my wife Musammat Gambhiri Kunwar shall have power of transfer in respect of the remaining property of all kinds " [or as Shyam Lal contends " shall have power of making every kind of transfer of the remaining property."]
>
> " For the present I do not make any arrangement or transfer regarding that property. If I the executant or my wife die without making (any) arrangement or transfer, then my property shall according to shastra devolve on my daughters who are alive or on their descendants, entitled to it. Therefore I and my heirs and representatives shall have no objection to it, and if they do so, it shall not be heard, and will be null and void. Hence I have executed these few presents by way of a deed of gift so that it may remain as evidence and be of use when needed."

It may be mentioned in passing, that the document is written in the vernacular language of the parties; and there was dispute with regard to the translation of that part of it corresponding in the original to what has been enclosed within brackets in paragraph 2 of the extract given above. The Board following the usual practice have adopted the translation accepted as correct by the High Court.

Nothing arises in this appeal regarding the construction or subject matter of the first part of the document. It is admittedly, what it purports to be, viz. a deed of gift. The dispute between the parties relates to the construction of its latter portion and the nature of this dispute has been already referred to. The contentions of the parties with respect to it were raised in the material portion of issue 2, and issue 3, which are as follows:—

Issue 2, " Whether Pohkar Singh made any ' will ' by means of the deed of gift of 1895 . . . . . or he died intestate? "

Issue 3, " Was Musammat Gambhiri the absolute owner of the properties by virtue of the ' will ' of Pohkar Singh as alleged by the defendants? "

The Subordinate Judge held that the " deed " constituted also a " will " in favour of Musammat Gambhiri, but according to him, there was nothing in its provisions " to show that Pohkar Singh intended to confer an absolute estate, or anything more than a limited estate on his wife, or that he wanted to alter the course of inheritance in any way." He accordingly held that the alienations complained against were invalid as they were not supported by legal necessity. The appellants were therefore given a decree for possession of the properties with profits, except 2 items about which there is now no dispute.

On appeal, the learned Judges of the High Court held agreeing with the Subordinate Judge that no absolute estate was conferred on Musammat Gambhiri by her husband. They were also of opinion that the document was not intended by Pohkar Singh to effect any testamentary disposition of the property; but they held that even if Musammat Gambhiri took the property on the death of Pohkar Singh as a Hindu widow still, the document conferred upon her as full a power of transfer over the properties as he himself had and the alienations in question which were made by her acting on this power were therefore valid. The appeals were therefore allowed and the plaintiffs' suit was dismissed.

In this appeal, the substantial question for decision is what were the powers conferred on Musammat Gambhiri under the document? Did she get under it rights higher than those which a Hindu widow would ordinarily get over her husband's properties? The learned Counsel Sir Thomas Strangman, on behalf of the respondents, does not contend that the document bestows on her an absolute estate in her husband's properties, nor does he contend that it makes any testamentary disposition of the properties. So the question which their Lordships have to consider reduces itself to this, viz., Is the interpretation put upon it by the High Court correct, or should the correct interpretation be, as strenuously contended for by Mr. Khambatta for the appellants, that the document confers on Musammat Gambhiri nothing more than an ordinary Hindu widow's limited estate? If the High Court's interpretation is accepted as correct, then, the further question—also considered by the High Court—arises, viz., Is the arrangement made by Pohkar Singh invalid under the principles of Hindu law?

It is clear to their Lordships that the " deed " does not confer on Musammat Gambhiri any absolute estate in her husband's properties. This is easily inferable from the contrast in the language used by Pohkar Singh in connection with the gift of the property which he has made by the first part of it in favour of Gauri Shankar and others and the language used in describing what has been bestowed on Musammat Gambhiri. It is enough to say that the word " malik " does not appear in the latter portion of the document. It is equally clear that Pohkar Singh has not gifted any property to his wife under the document; for he says, explicitly " For the present I do not make any arrangement or transfer regarding the property." The learned Judges have pointed out that the word in the vernacular translated in English as " arrangement " means a testamentary disposition of the property, and the word " transfer " would indicate transfer *inter vivos*, such as transfer by gift. Their Lordships apprehend that it is not the

case of any party to the suit that any subsequent gift of the properties had been made by Pohkar Singh in favour of his wife. Paragraph 31 of the written statement of Shiam Lal, one of the respondents before the Board, makes this clear. It therefore follows—if there was nothing else in the document—that Musammat Gambhiri would take only the limited estate of a Hindu widow in the properties of her husband. This would apply to all the properties of Pohkar Singh as the words " the other remaining property together with 4 annas zamindari share " are certainly wide enough to include the rest of his entire estate, though only the properties gifted to his daughters were specified in the brown paper attached to the main sheet. In their Lordships' view, that part of the document may well be looked upon as a " will " as has been accepted by the Subordinate Judge and treated as such by the learned Judges of the High Court. The point is not of much importance in the case, but their Lordships are referring to it because it was argued in the Courts in India that there are no words of bequest in that portion of the document and the learned Counsel for the appellants made an allusion to it in opening the case, suggesting thereby that that part of the document may well be ignored altogether. Their Lordships think that the provisions in the document give a clear indication of the testamentary intentions of Pohkar Singh and that is all that at this stage need be said on the point.

So far, the construction of the document has not been difficult; but does it by any means follow from what has been said above, as has been emphasised by Mr. Khambatta that Musammat Gambhiri gets under the document only a Hindu widow's limited estate and nothing more? Their Lordships think not, for to hold so would be to ignore a significant part of it to which their Lordships will now draw attention. With respect to the properties remaining after making the gift, Pohkar Singh says " As regards the other property with 4 annas zamindari share in mauza Deomai which is in my possession and which under the document has not been transferred, I shall have power of transfer and after my death my wife Musammat Gambhiri Kunwar shall have power of transfer in respect of the remaining property of all kinds." It is clear to their Lordships that by this portion of the document Pohkar Singh was conferring a " power of transfer " in respect of his remaining estate on his widow. Note the words he uses: he says " I shall have power of transfer and after my death my wife Musammat Gambhiri shall have power of transfer." It is evident that by these words he refers to the free power of transfer which an owner has over his properties and he uses the same words in the same sense both with reference to himself and to his wife. In the earlier portion of the document referring to the gift, Pohkar Singh confers on the donees " all powers like myself to make all kinds of transfers." It is obvious that the word " transfer " must be understood as having been used in the same sense throughout the document, in other words, it means that Pohkar Singh bestows on his wife as full a power of transfer as he, the owner himself, has over the properties. The contention that the power of transfer referred to, with respect to Gambhiri is merely the power of transfer which a Hindu widow has over her deceased husband's properties in cases of legal necessity cannot be accepted, for if that were so, there was no need to confer specifically any such power at all; for, indeed, as his widow, Gambhiri would always get a Hindu widow's estate with power to transfer the properties for legal necessity. What appears to their Lordships to clinch the matter is the provision in the document " If I the executant or my wife die without making (any) arrangement or transfer then my property shall devolve according to shastras on my daughters who are alive . . . . . " In their Lordships' view this provision contemplates two things; (1) What it clearly says, viz., that the property should devolve according to shastras " if he or his wife died without making any arrangement or transfer "; and (2) What it implies, viz., that the property would not devolve on daughters according to Hindu law if his widow had made any other arrangements during her life time. Arrangements with respect to the properties are here contemplated which certainly implies that Pohkar Singh had intended to confer powers on his wife to effect such

arrangements. There is nothing in the document to show that the transfer herein contemplated is one for legal necessity only. As observed by the learned Judges of the High Court " Had he intended that the property should devolve on the daughters in spite of any transfers having been made by the widow which are invalid under the Hindu law, he would not have prefixed the devolution " according to shastra " by the condition of his wife dying without making any arrangement or transfer. It is true that their Lordships have said in *Mahomed Shumsool* v. *Shewukram* (1874) 2 I.A. 7, 14-15, " In construing the will of a Hindu it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindus with respect to the devolution of property. It may be assumed that a Hindu . . . knows that as a general rule, at all events, women do not take absolute estates of inheritance which they are enabled to alienate," but that statement is no authority for the proposition that if the terms of the will give the woman an absolute right of disposition those terms should be ignored. In this connection their Lordships may well draw attention to the following observations made by Sir George Lowndes in delivering the judgment in *Jagmohan Singh* v. *Sri Nath* (1929-30) 57 I.A. p. 291 at 294. " There is, their Lordships think, no magic in the use of any particular word or form of words; the document must be construed as a whole, and its fair import deduced in the ordinary way, and if the conclusion come to is that it confers the estate out and out with no reservation, the rights of alienation will be included just as much as any of the other incidents of ownership, and just as much where the gift is to a female as where it is to a male." Construed in this light their Lordships have no doubt that by the terms of the deed in question Pohkar Singh has conferred on his widow full power of transfer over the properties which she has inherited from him as his widow.

Under the Hindu law, a widow or other limited heir has no power to alienate the estate inherited by her from the deceased owner except for the following purposes, namely:—(1) Religious or charitable purposes (2) other purposes amounting to legal necessity and (3) for the benefit of the estate. The question now arises, whether if a Hindu owner confers an absolute power of transfer on his next heir, the widow, who would otherwise have had only a limited power of transfer, does she thereby get any higher rights? It is not free from difficulty. On the one hand it may be said that when a testator dies without making any disposition of property his widow would ordinarily get only such estate as the Hindu law allows her, and where there is no devise of any estate as here in favour of the widow, the conferment of an absolute power gives her no more rights than those possessed by a Hindu widow. On the other hand if the husband could validly confer on her a full power of transferring the estate without limitation then as stated by the High Court " she would acquire an estate almost like an absolute interest differing only in this respect that in the case of an absolute estate it would devolve on her heirs and whereas, in the case of a widow's estate with full powers of transfer, the property remaining untransferred would devolve on the next heir of the husband, though where daughter or daughters' sons would be the next heirs they would be heirs of both." If the conferment of such power of transfer on a Hindu widow is not repugnant to any principles of Hindu law, then it appears to their Lordships that such conferment should be upheld as by so doing they would only be giving effect to the intentions of the testator, such intentions being not in conflict with the law.

It may be stated at once that no decision directly bearing on the point has been brought to their Lordships' notice; those that are said to throw some light on it will be referred to presently. On principle, the difficulty presented by the case does not seem to be insurmountable. The objection strongly urged is against the conferment of power of transfer on Gambhiri without any bequest of property in her favour; but the testator knows that she would inherit the estate in the ordinary course. What she will not so get ordinarily has now been bestowed on her by this " deed." The power of transfer has not been conferred on one, while the property devolves on another. Pohkar Singh was the absolute owner of the estate and had

full power to dispose of it in any manner he liked. While he had full power to bestow an absolute estate on his widow, their Lordships cannot find any valid objection to his being allowed to bestow a fuller power of transfer on her who would get the estate as his heir. This conclusion does not clash with any fundamental principle of the Hindu law.

In the course of the arguments, the learned Counsel drew their Lordships' attention to the decisions in *Bai Motti Vahoo* v. *Bai Mamoobai* (1896). 24 I.A. 93; *Narsingh Rao* v. *Mahalakshmi Bai* (1927-28) 55 I.A. 180 and some other cases referred to in the High Court's judgment to show that conferment of power to adopt, of larger power to alienate, etc., on persons holding limited estate are not illegal, but as these cases are admittedly distinguishable on facts their Lordships do not think it is necessary to discuss them. However, one decision may be referred to as of some interest having regard to its facts. In *Promode Bala Debi* v. *Krishna Sundari Debi* (1905) 1. Calcutta Law Journal, 301, a testator " by his will empowered his two wives to make a *patni* settlement of his immovable property " and wished that they would make the *patni* settlement with his brother. The two widows were given monthly allowances but no bequest of the estate was made in their favour. By one clause in the " will " full authority was given to three persons to do what they thought fit as regards the performance of the rites and the debts and the dues. It was held by the learned Judges of the High Court that the clauses of the " will " by which the executors were authorised to pay the expenses of the rites and ceremonies and the debts and the widows were empowered to make *patni* settlement of the immoveable property were not inconsistent. The power of the widows to make *patni* settlement of the immoveable property was recognised as it did not clash with the authority given to the executors. As pointed out by the learned Judges of the High Court in the present case " This was a case where in reality there was no bequest of any estate to the wives at all and they were given some allowances and only a power to make a *patni* settlement with the testator's brother. The power to make such a transfer was assumed to be valid by the Bench and it was not considered that the conferment of such a power by a Hindu woman was in any way repugnant to the principles of the Hindu law." This case is referred to as an instance to show that the idea of conferring enlarged powers of alienation on widows without making bequest of any estate is not alien to the minds of Hindu testators. However, their Lordships' decision in the present case must rest on the principles on which they have based it and not on any express decision brought to their notice.

For the above reasons, their Lordships hold, agreeing with the High Court, that " although Musammat Gambhiri Kunwar did not acquire an absolute estate under the ' will ' of her husband she acquired thereunder a full power of transfer in excess of the ordinary powers of transfer for legal necessity possessed by her as a Hindu widow, and in the exercise of that full power she had authority to make an out and out gift to her daughters, which would remain binding on the reversioners even after her death." The alienations questioned in these appeals are all valid. In the result, these consolidated appeals should be dismissed with the costs of the respective respondents. Their Lordships will humbly advise His Majesty accordingly.

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In the Privy Council

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