A **SHIROMANI & ORS.**

v.

HEM KUMAR & ORS.

April 4, 1968

B [J. C. SHAH AND V. RAMASWAMI, JJ.]

Indian Registration Act (16 *of* 1908), *s.* 17(1)(*b*)—*Partition of property in specific shares—Deed not registered—Admissibility.*

Pleadings—Plea of acquiescence—Not raised in pleadings—Cannot be allowed to be set up subsequently.

C *Hindu Law—Agharia caste—Custom of Jethansi allowing larger share of family property to eldest son—Outmoded custom loses legal force.*

Indian Evidence Act (1 *of* 1872), *s.* 91—*Bar on oral evidence.*

D died in 1940 leaving certain agricultural land as well as house property. He had two children by his first wife the elder of whom was respondent no. 1. By his second wife, appellant no. 2, he had a son, D appellant no. 1. The family belonged to the Agharia caste and was governed by the Benares School of Hindu Law. In 1956 Appellants 1 and 2 filed a suit in the Court of the Civil Judge Raigarh (now in Madhya Pradesh) claiming that they were entitled to ¼th share each in D's estate and that there should be a partition by metes and bounds of joint family property. According to their pleadings Ex.D-4 dated December 27, 1943 by which appellant no. 2 accepted a lesser share of the properties than was due to her and her son was executed as a result of coercion by res- E pondent no. 1. The latter along with other respondents contested the suit, relying on Ex.D-4. The trial court, the first appellate court, as well as the High Court decided against the appellants who by special leave came to this Court. The questions that fell for consideration were: (i) whether Ex.D-4 was admissible in evidence without having been registered; (ii) whether Appellant No. 2 was precluded from demanding her share because her signing of Ex. D-4 showed acquiescence on her part; (iii) whether a higher share for respondent no. 1 was justified because F of the custom of Jethansi in the Agharia caste according to which the eldest son was entitled to a larger share than others; (iv) whether it was open to the respondents to give oral evidence of actual partition subsequent to the execution of Ex.D-4.

HELD: (i) The recitals in Ex.D-4 showed that there was allotment of specific properties to individual co-parceners and the document therefore fell within the mischief of s. 17(1)(b) of the Registration Act. It G followed that Ex.D-4 was not admissible in evidence to prove the title of any of the co-parceners to any particular property or to prove that any particular property had ceased to be joint property. The document was only admissible to prove an intention on the part of the co-parceners to become divided in status. [643 F—H]

Nanni Bai v. *Gita Bai*, [1959] S.C.R. 479, relied on.

H (ii) There was no pleading on behalf of the respondents and no issue framed to the effect that by signing Ex.D-4 appellant no. 2 had acquiesced in the division of properties among her sons without claiming the share to which she was entitled under the Mitakshara Law of the Benares

School. The respondents therefore could not be allowed to set up the plea of acquiescence by appellant no. 2 [644 E] A

(iii) The doctrine of "Jethansi" or "Jeshtbhagam" is now obsolete and unenforceable. The principle of Hindu Law is equality of division and the exceptions to that rule, have almost, if not altogether disappeared. As between brothers or other relations absolute equality is now the invariable rule in all the States, unless, perhaps, where some special family custom to the contrary is made out. The respondents had failed to prove that such a custom was prevalent in the caste of Agharias to which the parties belonged. [644 F-G; 645 F-G; 646 A—F] B

M. Y. A. A. Nachiappa Chettiar v. *M. Y. A. A. Muthu Karuppan Chettiar*, A.I.R. 1946 Mad. 398 and *Hur Purshad* v. *Sheo Dyal*, 3 I.A. 259 at p. 285, referred to. C

(iv) The evidence showed that document Ex.D-4 was intended by the parties to be the sole evidence of partition and since it had been held that Ex.D-4 was not admissible in evidence on account of non-registration to establish when the property was so partitioned, it was manifest that no oral evidence was admissible to prove any subsequent partition having regard to the provisions of s. 91 of the Evidence Act. [646 G—647 A] D

CIVIL APPELLATE JURISDICTION : Civil Appeals Nos. 749 and 750 of 1965.

Appeals by special leave from the judgment and decree dated November 8, 1963 of the Madhya Pradesh High Court in second appeals Nos. 569 and 568 of 1960 respectively. E

S. V. Gupte and *G. L. Sanghi*, for the appellants (in both the appeals).

Sarjoo Prasad and *D. N. Mukherjee*, for the respondents (in both the appeals). F

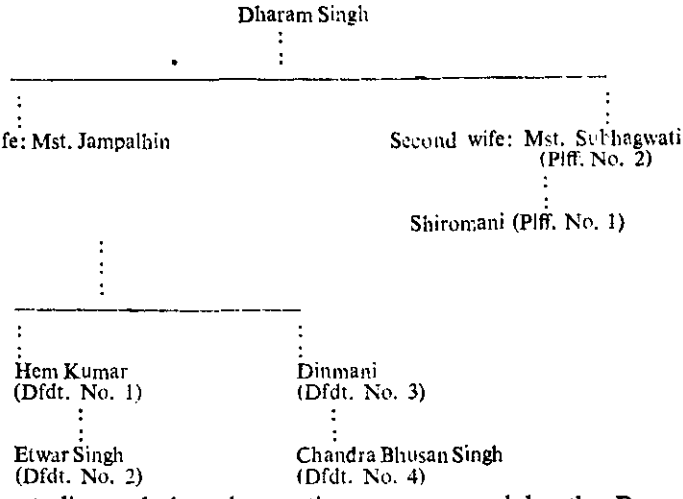
The Judgment of the Court was delivered by

Civil Appeal No. 749 *of* 1965 :

Ramaswami, J. This appeal is brought, by special leave, from the judgment of the High Court of Madhya Pradesh, Jabalpur dated November 8, 1963 in Second Appeal No. 569 of 1960. G

Respondents nos. 1 and 3, Hemkumar and Dinomani and appellant no. 1 Shiromani are the sons of late Dharam Singh Agharia. Appellant no. 2 Mst. Subhagwati is the second wife of Dharam Singh and the mother of appellant no. 1. Mst. Jampalhin, the mother of respondents 1 and 3 died before Dharam H

Singh married appellant no. 2. The relationship of the parties will appear from the following pedigree :



It is not disputed that the parties are governed by the Benares School of Hindu Law. It appears that Dharam Singh was murdered in 1940 and his son Hemkumar was involved as an accused but he was acquitted in that case. Mst. Subhagwati, appellant no. 2 appeared as a prosecution witness in the murder case and deposed against Hemkumar. At the time of his death, Dharam Singh had left 102.28 acres of ryoti land in village Tilgi and 16.56 acres of ryoti land at village Supaka and also some house properties. Appellants 1 and 2 instituted C.S. no. 43-A of 1956 in the court of the Civil Judge, First Class, Raigrah claiming that they were entitled to ¼th share each of Dharam Singh's estate and there should be partition by metes and bounds of the joint family properties. They challenged the validity of Ex. D-4 dated December 27, 1943. It was alleged that Mst. Subhagwati was compelled by Hemkumar under threat of violence to execute the deed, Ex. D-4. It was said that the deed Ex. D-4 was prejudicial to Shiromani who was a minor at that time because he was given less than the share to which he was entitled and his mother Mst. Subhagwati was also not given her due share of joint family properties. The appellants accordingly prayed that there should be a fresh partition by metes and bounds of the joint family properties and they should be given ¼th share each therein. The suit was resisted by the respondents on the ground that the parties were bound by the deed of partition, Ex. D-4 and there was no ground for reopening the partition which had already taken place. The trial judge found that the partition deed, Ex. D-4 dated December 27, 1943 was not executed by Mst. Subhagwati under undue influence and that document was acted upon. It was further held by the trial judge that though the partition

deed did not reserve any share to Mst. Subhagwati, the appellants were not entitled to reopen the partition because Mst. Subhagwati was not entitled to a share and Hemkumar was entitled to an increased share on account of the custom of "Jethansi". The appellants took the matter in appeal to the District Judge of Raigarh but the appeal was dismissed. The appellants preferred a Second Appeal to the High Court of Madhya Pradesh which dismissed the Second Appeal. The High Court took the view that the deed, Ex. D-4 was neither an award nor was it a document effecting partition of immovable properties of the value of more than Rs. 100. It was held that Ex. D-4 was admissible in evidence in order to show that there was separation of status between the coparceners. The High Court also rejected the plea of the appellants that the partition should be reopened because it did not give a share to Mst. Subhagwati. According to the Benares School of Hindu Law, Mst. Subhagwati was entitled to a share in the joint family properties equal to that of a son but the High Court found that there was a clear acquiescence on the part of Mst. Subhagwati when she executed the deed, Ex. D-4 and it must be taken that she relinquished her share in favour of the other coparceners. On the question of "Jethansi" claimed by Hemkumar, the High Court found that the evidence established the custom of "Jethansi" whereby the elder son was given a greater share in the property of his father. On the basis of these findings the High Court dismissed the Second Appeal.

The first question to be considered in this appeal is whether the deed, Ex. D-4 dated December 27, 1943 is admissible in evidence. On behalf of the appellants Mr. Gupte put forward the argument that the document is inadmissible in evidence as it effected the partition of the properties of the value of more than Rs. 100 and it was not registered. It was argued that there was allotment of specific properties to individual coparceners in this document and its registration was therefore compulsory under s. 17(1)(b) of the Registration Act. In our opinion, the argument put forward on behalf of the appellants is well-founded and must be accepted as correct. It was contended on behalf of the respondents that the document was not necessary to be registered because there was only severance of joint status of the members of the coparcenary and there was no partition of the properties by metes and bounds. It is not possible to accept this argument as correct. The relevant portion of Ex. D-4 is to the following effect :

> "For the partition of our joint land in Mauza Tilgi and Supa and house and utensils etc. and Dhan, movable and immovable property, amongst us three brothers, the Panchas have been appointed. The partition and distribution effected by the under-mentioned

A Panchas will be acceptable to us and also the undermentioned conditions will also have to be accepted by us.

1. Out of lease land in Mauza Tilgi and Mauza Supa totalling 123 acres, Hem Kumar's share including Jethosi will be 51 acres that is 51 shares and Dinmani's
B 39 acres that is 39 shares and minor Shiromani's whose guardian is Smt. Subhagwati 33 acres that is 33 shares. The three of them will be in possession of the same. Out of 123 acres of land, the land near Munga Tikra Gara Para will be given to Dinmani and minor Shiromani through guardian Smt. Subhagwati
C for building a house instead of the old house. For building of the house in Munga Tikra the three brothers will give Rs. 60. Out of the 'Mitti Khatu' and Gobar khatu, there is in the house, after deducting Hemkumar's tenth share will be divided into three equal shares amongst the three brothers and they will take it so. They will also divide the buried Khatu
D into their shares.

. . . . . .

5. That out of the old house the house on the side of the village the length of which is 30 haath and the stone used in it and the house on the side of 'Patav' the length of which is 30 haath, is given to Hem Kumar
E in his share and as Jethosi and the Bamboo, wood etc. used in the other house is given to the two brothers Dinmani and Shiromani. Besides the house and Kotha there is old and new wood and 3 new doors. All this is given to Dinmani and Shiromani."

With regard to ryoti lands, para 1 definitely states that Hem-
F kumar is allotted 51 acres, Dinmani 39 and Shiromani 33 acres. With regard to the joint family house there is partition between the three brothers by metes and bounds and specific shares are given to each. In view of the recitals in Ex. D-4 we are of opinion that there is allotment of specific properties to individual coparceners and the document therefore falls within the mis-
G chief of s. 17(1)(b) of the Registration Act. It follows that Ex. D-4 is not admissible in evidence to prove the title of any of the coparceners to any particular property or to prove that any particular property has ceased to be joint property. Of course, the document is admissible to prove an intention on the part of the coparceners to become divided in status; in other words, to prove
H that the parties ceased to be joint from the date of the instrument dated December 27, 1943 (*See* the decision of this Court in *Nanni Bai* v. *Gita Bai*[1]).

(1) [1959] S. C. R. 479.

We proceed to consider the next question arising in this appeal, namely, whether Mst. Subhagwati was entitled to a share in the joint family properties equal to that of a son and whether the alleged partition effected by Ex. D-4 was invalid because no such share was allotted to her. It is not disputed on behalf of the respondents that according to the Mitakshara Law of the Benares School a wife is entitled, on partition between her sons, to a share equal to that of a son. But the contention put forward on behalf of the respondents is that by signing the document, Ex. D-4 Mst. Subhagwati acquiesced in the division of the properties between her sons without claiming any share for herself and it must consequently be taken that Mst. Subhagwati relinquished her share. It was pointed out that Ex. D-4 was executed on December 27, 1943 and for a period of 11 years Mst. Subhagwati did not take any action to impeach that document. We are unable to accept the argument put forward on behalf of the respondents as correct. There is no issue in the trial court regarding the alleged acquiescence of Mst. Subhagwati, nor was it pleaded on behalf of the respondents that there was an agreement by which Mst. Subhagwati gave up her share in favour of the other coparceners. On the contrary, it is alleged in para 9 of the Written Statement that Subhagwati was not entitled to any share and therefore the partition alleged to be effected by Ex. D-4 was not prejudicial to the interests of plaintiff no. 1. To put it differently, there is no pleading on the part of respondents of acquiescence by Mst. Subhagwati and there is no issue on the question of acquiescence. We are accordingly unable to accept the argument of the respondents that there was acquiescence on the part of Mst. Subhagwati or that she relinquished her share in favour of the other coparceners and the finding of the High Court on this point is erroneous.

We pass on to consider the next question arising in this appeal, namely, whether Hemkumar was entitled to a greater share of joint family properties for the reason that he was the eldest brother on the principle of "Jethansi". But the doctrine of "Jethansi" or "Jeshtbhagam" is now obsolete and unenforceable. The principle of Hindu Law is equality of division and the exceptions to that rule have almost, if not altogether, disappeared. One of the exceptions was in favour of the eldest son, who was originally entitled to a special share on partition, either a tenth or a twentieth in excess of the others, or some special chattel, or an extra portion of the flocks (Apastamba, II, 6, 14, 10-13; Baudh., II, 2, 2-5; Gaut., XXVIII, 11, 12; Vas., XVII, 42-45; Manu, IX. 112, 114, 156). But unequal partition of ancestral or joint property was from early times condemned. The Smritichandrika, the Vyavahara Mayukha and the Viramitrodaya declare that unequal partition is forbidden in the Kali age (Smritichandrika, III, 16; V. May., IV, iv, 11; Viramit.,

A III, 16 (Setlur's ed., 319). The Commentary of Mitakshara on Yajnavalkya. II. 117 is briefly as follows :

"अयं विषमो विभागः शास्त्रदृष्टस्तथापि लोकविद्विष्टत्वान्नानुष्ठेयः । अस्वर्ग्यं लोक विद्विष्टं धर्म्यमप्याचरेन्न तु-इति निषेधात् । यथा-महोक्षं वा महाजं वा श्रोत्रियायोकल्पयेत्—इति विधानेपि लोकविद्विष्टत्वादाननुष्ठानम् । यथा वा-
B मैन्द्रावरुणं गां वशामनुबन्ध्यामालभेत—इति गवालम्भनेविधानेपि लोक-विद्विष्टत्वादननुष्ठानम् । उक्तं च-यथा नियोगधर्मो नो नानु-बन्ध्याबधोपि वा । तथोद्धारविभागोऽपि नैव संप्रति वर्तते ।। इति । ... तस्माद्विषमो विभागः शास्त्रदृष्टोपि लोकविरोधाच्छ्रुतिविरोधाच्च नानुष्ठेय इति सममेव विभजेरन्निति नियम्यते । मिता on या 11-117.

C

"Unequal division though found in the sastras (*e.g.* Manu IX. 105, 112, 116, 117, Yaj. II. 114) should not be practised because it has come to be condemned (or has become hateful to) by the people, since there is the prohibition (in Yaj. I. 156) that an
D action, though prescribed in the sastras, should not be performed when it has come to be condemned by the people, since such an action does not lead to the attainment of Heaven. For example, though Yaj. I. 109 prescribes the offering of a big ox or a goat to a learned brahmana guest, it is not now practised because people have come to hate it; or just as, although there
E is a Vedic text laying down the sacrificing of a cow 'one should sacrifice a barren cow called anubandhya for Mitra and Varuna', still it is not done because people condemn it. And it has been said 'just as the practice of niyoga or the killing of the anubandhya cow is not now in vogue, so also division after giving a
F special share (to the eldest son) does not now exist".

As between brothers or other relations, absolute equality is now the invariable rule in all the States, unless, perhaps, where some special family custom to the contrary is made out (For example, see the decision of the Madras High Court in *M.Y.A.A. Nachiappa Chettiar* v. *M.Y.A.A. Muthu Karuppan Chettiar*(1),
G

On behalf of the respondents, however, reliance was placed upon the special custom of "Jethansi" said to be prevalent in the caste of Agharias to which the parties belong. Reference was made to the evidence of D.W. 4, Baratram, D.W. 5, Sitaram, D.W. 6, Yalobra and D.W. 7, Khewlal to show that there was
H such a custom in the caste whereby the eldest son was given a greater share in the property of the father. Mr. Sarjoo Prasad took us through the evidence of these witnesses but we are not

(1) A. I. R. 1946 Mad. 398.

satisfied on their evidence that the custom pleaded for has been established. It is well-established that a custom must be proved to be ancient, certain and reasonable if it is to be recognised and acted upon by Courts of law; and being in derogation of the general rules of law the custom must be construed strictly (See *Hur Purshad* v. *Sheo Dyal*) (1). In the present case, the evidence adduced on behalf of the respondents to prove the alleged custom is unsatisfactory and conflicting. D.W. 4, Baratram stated that the custom of "Jethansi" was prevalent in Agharias community but he admitted when cross-examined, that he was not present at any partition. He further said that there was "no fixed custom about Jethansi and the eldest brother could be given more or less". D.W. 5, Sitaram said that "I got 16 acres of Jethansi land in a partition between my own brother." The total area of land was 100 acres. He admitted that there was no written document about the custom. D.W. 6, Yalobra said that his brother Sita Ram got Jethansi land of 16 acres out of a total area of 100 acres. When cross-examined, he said that no more than Dashanshi was given "and the people who divided did not tell any account of it". The evidence of Khewlal, D.S. 7 is that there was partition among his brothers and the eldest brother Din Dayal was given 5-6 acres of land as Jethansi. The total area of the land to be divided was 100 acres. No documentary evidence of partition has been adduced on behalf of the respondents and the oral evidence is vague and uncertain. We are accordingly of the opinion that the custom of Jethansi alleged on behalf of the respondents has not been established by proper evidence and the finding of the High Court is vitiated because it is not supported by proper evidence. We accordingly reject the argument of the respondents that Hemkumar was entitled to a larger share of the joint family properties on the basis of the alleged custom of Jethansi in his caste.

A B C D E F G H

On behalf of the respondents reference was made to the evidence of D.W. 1 Dinamani and D.W. 2 Dindayal that there was an actual partition of joint family properties not on December 27, 1943 when Ex. D-4 was executed but about two months later and specific allotments were made to each of the coparceners. There is, however, no pleading in the Written Statement on behalf of the respondents that apart from the document, Ex. D-4 there was a partition of the joint family properties. We are satisfied in this case, upon examination of the evidence, that the intention of the parties was that document Ex. D-4 should be the sole evidence of partition and since we have held that Ex. D-4 is not admissible in evidence on account of non-registration to establish when the property was so partitioned, it is manifest that no oral evidence is admissible to prove any subsequent parti-

(1) 3 I. A. 259, at p. 285.

A tion having regard to the provisions of s. 91 of the Evidence Act. It is clear therefore that the appellants are entitled to a preliminary decree for partition of joint family properties.

For the reasons expressed we hold that this appeal should be allowed and the suit brought by the two appellants should B be decreed. The appellants, Subhagwati and Shiromani are each entitled to ¼th share in the joint family properties and there should be a preliminary decree drawn up for the partition of ¼th share of the joint family properties for each of the appellants, Mst. Subhagwati and Shiromani. The question as to what are the joint family properties which are to be the subject-matter of partition would be determined by the trial court in proceedings C for the final decree. We accordingly allow this appeal with costs.

Civil Appeal No. 750 of 1965 :

For the reasons given by us in Civil Appeal No. 749 of 1965 D we set aside the judgment of the High Court in Second Appeal No. 568 of 1960 and C.S. No. 36-A of 1956 filed by Dinmani is dismissed. We accordingly allow this appeal with costs. There will be one hearing fee for both this appeal and Civil Appeal No. 749 of 1965.

G.C. *Appeal allowed*