

Malik Harkishan Singh - - - - - *Appellant*

v.

Malik Partap Singh deceased and others - - - *Respondents*

FROM

THE COURT OF THE JUDICIAL COMMISSIONER OF THE
NORTH-WEST FRONTIER PROVINCE

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 2ND MAY, 1938.

Present at the Hearing :

LORD WRIGHT.

SIR SHADI LAL.

SIR GEORGE RANKIN.

[*Delivered by* SIR SHADI LAL.]

Hira Singh, the father of the plaintiff-respondent Partab Singh, resided originally in Dera Khalsa, a village situated in the Rawalpindi District. He admittedly constituted a joint Hindu family with his two sons, Narain Singh and Partap Singh. The family owned ancestral property consisting of a house and agricultural land. In 1872, when Narain Singh was about eight years old and Partap Singh about six years, Hira Singh migrated with his sons from his ancestral village to Abbottabad. He acquired some property at Abbottabad and also carried on business there. Partap Singh was educated by his father, first, at Abbottabad, and then at Lahore. He completed his education in 1888, when he went with the Black Mountain Expeditionary Force as a contractor for supplying articles of food and other necessaries to the troops. He earned money in his business of contract, and on his return to Abbottabad, he handed it over to his father. He subsequently went to Rawalpindi and supervised the ancestral property in Dera Khalsa, while his elder brother lived with his father at Abbottabad and helped him in the management of the business there.

It appears that Hira Singh and his two sons continued to live as a joint family until January, 1918, when Hira Singh died. After the expiry of about nine years Hira Singh's elder son, Narain Singh, died in 1927, leaving his son Harkishan Singh, who is the appellant before their Lordships.

The action, which, has led to the present appeal, was brought by Partap Singh against his nephew, Harkishan

Singh for partition of the property situated at Abbottabad and Dera Khalsa on the allegation that the entire estate belonged to the joint Hindu family consisting of the plaintiff and the defendant, Harkishan Singh, and that the plaintiff is entitled to a moiety thereof. The claim was resisted by Harkishan Singh, who denied the plaintiff's status as a member of the joint family, and pleaded that the property at Abbottabad belonged originally to Hira Singh and Narain Singh as members of a joint family, and that it passed, by survivorship, on the death of Hira Singh to Narain Singh, and on the latter's death to his son, Harkishan Singh. As regards Partap Singh, the defendant did not adopt a consistent attitude. While stating that Partap Singh had separated from the other members of the family, he was not quite clear as to whether Partap Singh was allotted any property on separation. At one stage of the case he said that all the property in the Rawalpindi District was awarded to Partap Singh, but he subsequently claimed a share even in that property. Indeed, neither party has given a consistent version of the position of the sons of Hira Singh *inter se*, and no reliance can be placed on their statements.

It is by no means a rare thing that a person makes a statement that he is a member of a joint family with his relative, but has reasons of his own for making that statement. It is not his statement, but his actings and dealings with the estate, which furnish a true guide to the determination of the question of the jointness or otherwise.

The Trial Judge, upon a consideration of the evidence before him, found that the plaintiff had ceased to be a member of the joint family, but his view was not accepted on appeal by the Court of the Judicial Commissioner at Peshawar, who held the family to be joint, and granted a preliminary decree for partition in favour of the plaintiff.

From that decree the defendant has brought this appeal to His Majesty in Council, and the main questions, which their Lordships have to determine, are whether the plaintiff and the defendant constituted a joint Hindu family at the date of the institution of the suit, and whether the property at Abbottabad belonged to that family. There is no proof of actual partition of the joint estate at any time, but there is no doubt that there can be a partition of the joint property without an actual division of the property by metes and bounds. According to the Mitakshara law, by which the parties are governed, partition consists in defining shares of the coparceners in the joint property, and a physical division of the property is not necessary. Once the shares are defined, there is a severance of the joint status. The parties may then make a physical division of the property or they may decide to live together and enjoy the property in common. But the property ceases to be joint immediately the shares are defined, and thenceforth the parties hold it as tenants in common.

The defining of shares may be expressed by an agreement between them containing a declaration of their shares in the estate. Even an agreement between the members of a

joint family, whereby they appoint arbitrators for dividing the joint family property among them, amounts to a severance of the joint status of the family from the date of the agreement, *Syed Kasam v. Jorawar Singh*, 49, I.A. 358, *Balmukund Lal v. Musammat Sohano*, I.L.R. 8 Patna 153. The fact that no award has been made is not evidence of the renunciation of the intention to separate. Nor can the legal construction or legal effect of an unambiguous document defining shares of the members of the family be controlled or altered by evidence of the subsequent conduct of the parties, *Balkishen Das v. Ram Narain Sahu*, 30, I.A. 139.

Their Lordships do not find any such agreement defining the shares among the members of Hira Singh's family. The oral evidence adduced by the parties is of a partisan character; but the documentary evidence, though meagre, furnishes a clue to the relations between Hira Singh and his son Partap Singh until 1918 when the former died. It appears that the father used to write letters from Abbottabad to his son at Rawalpindi, which were couched in affectionate terms. He made enquiries about the ancestral property in which he took a personal interest. There is no indication in the correspondence that the son had been separated from the father and was treated by him as the sole proprietor of the property at Dera Khalsa.

It is common ground that the father and his two sons were joint when they migrated to Abbottabad, and the learned counsel for the appellant is unable to suggest any time during the lifetime of the father when the plaintiff separated from the other members of the joint family and thereby ceased to have any interest in the coparcenary property.

It is contended that a cinema was built by Narain Singh after the death of his father, and that the plaintiff did not contribute to the expenses of the building and has therefore no right to a share in it. But the site, upon which the cinema was built, was acquired by the father in 1886 on a lease of ninety-nine years on a rental of five rupees a year. The cost of the building came out of the profits of the business at Abbottabad which was started by the father. There is no reason for holding that Narain Singh alone was joint with his father in the business, and that on the latter's death it devolved upon the former by survivorship. Whether it was a part of the joint property of all the members of the joint family, or separate property of the father, both the sons were, on his death, equally interested in the business and its assets. The defendant cannot, therefore, sustain his claim to be the exclusive owner of the cinema.

Their Lordships have examined the arguments advanced by the learned counsel for the parties, and are not prepared to dissent from the conclusion reached by the Court of the Judicial Commissioner. They will, therefore, humbly advise His Majesty that the appeal should be dismissed with costs.

In the Privy Council

MALIK HARKISHAN SINGH

2.

MALIK PARTAP SINGH DECEASED
AND OTHERS;

DELIVERED BY SIR SHADI LAL

Printed by His Majesty's STATIONERY OFFICE PRESS,
POOOCK STREET, S.E. I.
1938