APPELLATE CIVIL

Before Tek Chand and Shamsher Bahadur, JJ.

KANHIYA AND OTHERS,—*Appellants*

versus

MOHABATA AND OTHERS,—*Respondents*

Regular Second Appeal No. 95 (P) of 1955

1960

Feb., 23rd

Abandonment—Ingredients and implications of—Relinquishment by a co-sharer—Proof of—Onus to prove abandonment—On whom lies—Custom—Remarriage of widow—Whether causes forfeiture of her life interest.

Held, that 'abandonment' means the act of intentionally relinquishing a known right absolutely and unconditionally and without reference to any particular person or persons. In this case it has to be a voluntary relinquishment of possession of the property by its owners with the intention of terminating their ownership but without vesting it in any other person. A person abandoning his property gives up all hope, expectation or intention of recovering his property. The property, after it is abandoned, results in complete divestitute of the title of its owner and having ceased to be his property it becomes the subject of appropriation by the first taker or by its occupant who reduce it to his possession. Abandonment is not a surrender of property because the latter term connotes its relinquishment to another. It is an act whereby a person gives up his ownership without creating proprietary rights in another person.

Held, that there are two primary elements of abandonment, namely, the intention to abandon and the external act by which effect is given to the intention and both these elements must concur. The intention must be clear and unmistakable indicating that it is the onwnership which is being relinquished and not the possession or any other subordinate right consistent with the retention of ownership. A person abandoning permanently divests himself of his title. The act of abandonment from its very nature has to be voluntary, absolute and unconditional, excluding element of coercion and pressure of any kind.

In order to see that the plea of abandonment is proved in a particular case, the Courts have to ascertain the existence of affirmative and unmistakable evidence leading to the exclusive inference of intentional relinquishment of property and repudiation of one's ownership. Mere non-user over a long period unaccompanied by any other evidence showing clear intention, will not be held sufficient to constitute an abandonment. By itself, therefore, an absence from land for a long time will not amount to an abandonment though this circumstance may have a considerable probative force. In such a case the party asserting abandonment has to show that the owner left the premises without any intention to repossess or reclaim them for himself. Abandonment of immovable property necessarily implies non-user, but non-user *per se* does not create abandonment, no matter how long it continues. A non-user must, therefore, be accompanied with an intention on the part of the owner to give up the property and for good. The Courts may, however, turn to surrounding circumstances in order to find out whether the renunciation was voluntary and intentional and the external act evidencing abandonment was motivated by the intention to abandon. Thus a mere failure to occupy land for an indefinite time does not necessarily constitute an abandonment of title or possession, unless there is evidence sufficient to sustain a finding that the property was left without any intention to possess it and the person abandoning was indifferent as to what may become of it in the future and who may take possession of it or claim title to it. When the expression "abandonment" is used in relation to property, it signifies the complete relinquishment of title, possession or claim, virtually indicating that the property is being thrown away. Abandonment is not equivalent to inaction. A person abandons property when he forsakes it entirely, renounces it utterly and gives it up permanently, with an intent never again to claim any right or interest therein.

Held, that although a co-sharer is competent to relinquish his share in a joint holding, the evidence of such relinquishment, where the property is originally left in the possession of a co-sharer, must be clear and unequivocal.

Held, that the courts do not presume in favour of abandonment and the onus rests on the party pleading abandonment to establish his plea.

Held, that according to agricultural custom the remarriage of a widow causes a forfeiture of her life interest in her husband's estate which then reverts to the nearest heir of the husband.

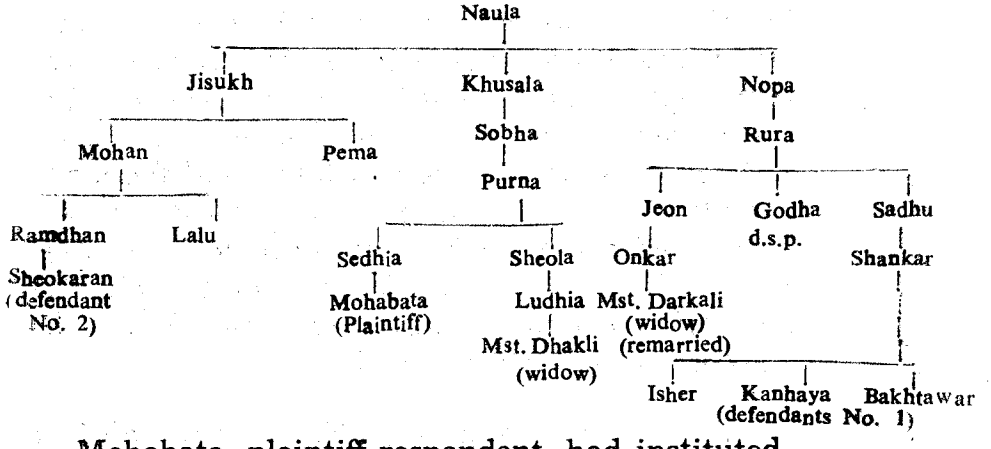
Regular Second Appeal from the decree of Shri Sant Ram Garg, District Judge, Sangrur, camp Narnaul, dated the 13th day of December, 1954, reversing that of Shri Om Parkash, Sub-Judge, 1st Class, Narnaul, dated the 27th June, 1950, and decreeing the plaintiff's claim as prayed for with costs.

D. C. GUPTA, ADVOCATE, for the Appellant.

GURBACHAN SINGH AGGARWAL, ADVOCATE, for the Respondent and OM PARKASH GUPTA, READER, HIGH COURT, for the minors respondents.

JUDGMENT

TEK CHAND, J.—In order to understand the facts of this case, the following pedigree-table will be helpful :— Tek Chand, J.



Mohabata, plaintiff-respondent, had instituted a suit for joint possession of agricultural land against Isher, Kanhaya and Bakhtawar, sons of Shankar, who were collectively designated as defendants No. 1. The plaintiff alleged that he was a co-owner in equal share in the several parcels of suit-land along with defendants No. 1. The

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plaintiff alleged that 40 years before the last settlement of 1962 Bk. the ancestors of the plaintiff had entrusted their share of the land in village Antari to the ancestors of defendants No. 1 on the condition that on their return to the village they would take back its possession. They left for village Manota which is said to be at a distance of eight or ten miles from village Antari.

Defendants No. 1 denied the above allegations of the plaintiff. Sheokaran, who represented the third branch, was impleaded as defendant No. 2. As will appear from the pedigree-table, Naula, the common ancestor, had three sons who are represented by Mohabata, plaintiff, and Mst. Dhakli; Isher, etc., defendants No. 1, and Sheokaran, defendant No. 2. According to the plaintiff, who has one-sixth share in the entire suit-land, Mst. Dhakli, widow of Ludhia, entered into a Karewa form of marriage and thereby, she forfeited her life-interest in one-sixth portion of her first husband's estate which reverted to Mohabata, plaintiff, whose share thus becomes one-third in the entire land. The plaintiff also contended that Sheokaran's ancestors had abandoned their right in one-third of the suit-land and therefore, the plaintiff became entitled to one-half of his share, and the other half belonged to defendants No. 1. According to this calculation the plaintiff has claimed joint possession of one-half of the suit-land from defendants No. 1.

Sheokaran, defendant No. 2, had filed a written statement denying the plaintiff's contention, but has not taken any further interest in the litigation. The pleadings gave rise to the following issues :—

(1) Whether the pedigree given in para 1 of the plaint is correct.

(2) Whether the plaintiff has got one-half share in the land in suit.

(3) Whether the ancestors of the plaintiff entrusted the land in suit to the ancestors of defendants No. 1, 40 years back before the settlement of 1962, on this condition that they could get it back on their return.

(4) Whether the plaintiff has abandoned his rights in the land.

(5) Whether the gift and the mortgage in dispute are valid.

(6) Whether Sheokaran is owner of one-third of the land in suit and what is its effect ?

The first issue was not pressed before the trial Court and was, therefore, decided in plaintiff's favour. It also held that the ancestors of the plaintiff had abandoned their rights in the land, having absented themselves from the village for more than 40 years, and the possession of defendants No. 1 had, therefore, become adverse. Issues Nos. 2, 3 and 4 were decided against the plaintiff and in favour of the defendants No. 1. Issues Nos. 5 and 6 were not disposed of, being redundant. On the above findings, the trial Court dismissed the plaintiff's suit with costs. The plaintiff Mohabata went up in appeal which was allowed and his claim was decreed with costs.

This appeal has been preferred by defendants No. 1. This case hinges upon issues 2, 3 and 4 which being inter-connected may be disposed of together. The main contention of the appellants

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before us is that the plaintiff's ancestors had abandoned their land many years ago and thereby they had effectively deprived themselves from claiming the land. If the plea of abandonment was not accepted, the learned counsel for the appellants contended that the plaintiff's share in the land was only one-sixth and he was not entitled to a decree for joint possession in excess of his share. Before examining the evidence led by the respective parties on the question of abandonment, it will be appropriate to keep in view the ingredients and implications of the doctrine of abandonment.

The courts do not presume in favour of abandonment and the onus rests on the party asserting abandonment. It is, therefore, incumbent upon the party pleading abandonment to establish his plea. In this case, defendants No. 1, the appellants before us, who set up abandonment, have to prove the same by unequivocal and decisive evidence. 'Abandonment' means the act of intentionally relinquishing a known right absolutely and unconditionally and without reference to any particular person or persons. In this case it has to be a voluntary relinquishment of possession of the property by its owners with the intention of terminating their ownership, but without vesting it in any other person. A person abandoning his property gives up all hope, expectation or intention of recovering his property. The property, after it is abandoned, results in complete divestiture of the title of its owner and having ceased to be his property it becomes the subject of appropriation by the first taker or by its occupant who reduces it to his possession. Abandonment is not a surrender of property because the latter term connotes its relinquishment to another. It is an act whereby a person gives up

his ownership without creating proprietary rights in another person.

There are two primary elements of abandonment, namely, the intention to abandon and the external act by which effect is given to the intention and both these elements must concur. The intention must be clear and unmistakable indicating that it is the ownership, which is being relinquished and not the possession or any other subordinate right consistent with the retention of ownership. A person abandoning permanently divests himself of his title. The act of abandonment from its very nature has to be voluntary, absolute and unconditional, excluding element of coercion, and pressure of any kind. In order to see that the plea of abandonment is proved in a particular case, the Courts have to ascertain the existence of affirmative and unmistakable evidence leading to the exclusive inference of intentional relinquishment of property and repudiation of one's ownership. Mere non-user over a long period unaccompanied by any other evidence showing clear intention, will not be held sufficient to constitute an abandonment. By itself, therefore, an absence from land for a long time will not amount to an abandonment though this circumstance may have a considerable probative force. In such a case the party asserting abandonment has to show that the owner left the premises without any intention to re possess or re claim them for himself. Abandonment of immovable property necessarily implies non-user, but non-user *per se* does not create abandonment, no matter how long it continues. A non-user must, therefore, be accompanied with an intention on the part of the owner to give up the property and for good. The Courts may, however, turn to surrounding circumstances in order to find out

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whether the renunciation was voluntary and intentional and the external act evidencing abandonment was motivated by the intention to abandon. Thus a mere failure to occupy land for an indefinite time does not necessarily constitute an abandonment of title or possession, unless there is evidence sufficient to sustain a finding that the property was left without any intention to re-possess it and the person abandoning was indifferent as to what may become of it in the future and who may take possession of it or claim title to it. When the expression "abandonment" is used in relation to property, it signifies the complete relinquishment of title, possession or claim, virtually indicating that the property is being thrown away. Abandonment is not equivalent to inaction. A person abandons property when he forsakes it entirely, renounces it utterly and gives it up permanently, with an intent never again to claim any right or interest therein.

The previous history of this property and the other evidence and circumstances of the case fall far short of the proof required for a conclusion in favour of abandonment. I may first refer to a copy of Jamabandi, Exhibit D. 1, of 1958-59 Bk. showing exclusive possession of Sedhu, Godha and Jeona, sons of Rura, ancestors of defendants No. 1, over the land in suit and the plaintiff and the ancestors of defendant No. 2 were shown as *mafruran*, i.e., deserters or absentees. On 25th of Chet, 1959 Bk., the Patwari in connection with mutation No. 39 made a report that Sedhia and Sheola sons of Purna, ancestors of the plaintiff, had been mistakenly recorded as absentees. And Sedhu, Godha and Jeona, sons of Rura, had stated before the Deputy Superintendent that the absentees would be entitled to take possession of their share whenever they like to return, and till then

their share would remain in possession of Rura's sons as trustees. It was also stated that Sedhia, etc., were absent since 1940 Bk. While sanctioning the mutation on 24th of Bhadon, 1960 Bk., the Deputy Superintendent of Settlement recorded that the sons of Rura had admitted before him that Sedhia and Sheola were residing in village Manota and the share of the absentees was a trust with them and they would be entitled to resume the land on their return. If, therefore, the land had been left with the ancestors of defendants No. 1 by the ancestors of the plaintiff in trust to re-occupy it on their return, it cannot be said that there was 'abandonment' as the term is understood in law.

On 25th of Bhadon, 1960 Bk., mutation No. 164 was also sanctioned. Before the Deputy Superintendent, Settlement, Sedhu and Jeona, sons of Rura, ancestors of defendants No. 1, made a statement that Ram Dhan and Lalu, father and uncle of defendant No. 2, had been absent since 1934 Bk. and they and the sons of Purna (plaintiff's ancestors) had been in possession of the estate. It was also stated that the sons of Purna were not present at the time of mutation, but their share was left in trust with them, i.e., the sons of Rura. Later, on 18th of Maghar, 1992 Bk., the estate left by Sedhia was mutated in the name of his son Mohabata, plaintiff, and the estate of Ludhia was mutated in the name of his widow Dhakli. The Jamabandi produced along with the plaint contains the names of the plaintiff, Mst. Dhakli, and of defendants No. 1 as co-sharers. It is clear from the above that at no stage any attempt was made on the part of defendants No. 1 in getting the name of the plaintiff removed from the revenue papers as a co-sharer. If the plaintiff's ancestors had in fact abandoned the land, defendants No. 1 would have seen to it that the names

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of the plaintiff or his ancestors were removed and they themselves would have been entered as exclusive owners and not merely as co-sharers.

During escheat proceedings started on 22nd of Assoj, 1986 Bk., Isher, son of Shankar, one of the contesting defendants, admitted that the real proprietors had come in the month of Bhadon, 1986 Bk., and agreed to appear when summoned in the proceedings. In the objection petition, Exhibit P. II, filed by Isher, defendant, on his own behalf and also on behalf of his brothers, he admitted that the proprietors of the estate, meaning plaintiff's ancestors, were themselves alive and therefore, no question of escheat would arise. Exhibit P. 4 is copy of application of Isher, defendant, stating that Mohabata, plaintiff, and Ludhia, his cousin, were alive in village Manota and prayed for issuance of interrogatories in their names. In the escheat proceedings, the contesting defendants throughout had been sustaining the right of the plaintiff.

Reliance was placed on mutation No. 200, Exhibit D. 4, by the learned counsel for the appellants to show that Sedhia and Sheola, sons of Purna, should be entered as absentees since 1936 Bk. and the land should be entered in the names of Rura's sons, Sedhu and Jeona. This mutation was made in the absence of the plaintiff's ancestors and they cannot be held bound by a unilateral act of the ancestors of the contesting defendants. By their act they had repudiated what previously they had admitted to be the land left in trust with them. The repudiation of a trust by the contesting defendants cannot prove abandonment on the part of the plaintiff's ancestors. The admissions and the conduct of the ancestors of the contesting defendants sufficiently disprove their theory of abandonment.

It is true that the plaintiff's ancestors had not been cultivating the land in village Antari for a very long time and had gone to live in village Manota to cultivate the land of their maternal uncles. This by itself is a circumstance which by no means is conclusive to show abandonment. Non-user for a long time *per se* is not sufficient to establish abandonment, especially in a case like the present where admittedly the land had been left in trust with the ancestors of the contesting defendants. I therefore, agree with the conclusion of the lower appellate Court that the ancestors of the plaintiff never abandoned their share in the property in dispute and that they had in fact entrusted it to the ancestors of the defendants with the stipulation that they could resume it when they liked.

There is abundant authority for the proposition that although a co-sharer is competent to relinquish his share in a joint holding, the evidence of such relinquishment where the property is originally left in the possession of a co-sharer must be clear and unequivocal,—*vide Kirpa v. Jiwa* (1) following *Ram Chand* v. *Kirpa Ram*, (2) In the latter decision, Robertson J. said—

> "It is common knowledge that the right of absentees, especially in the cases in which their lands are left in the hands of co-sharers, to return even after prolonged absence and resume their lands is very largely recognized in this province."

The next question canvassed before us by the learned counsel for the appellants is as to the

(1) 48 P.L.R. 1910.
(2) 120 P.R. 1908

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share of the plaintiff, which according to him, could not exceed one-sixth. In this case, Sardara P.W. 1, Chandra P. W. 2, and Mohabata plaintiff had stated in the witness-box that Mst. Dhakli had contracted remarriage after the death of Ludhia. These witnesses were not cross-examined by the defendants on this point and, therefore, I agree with the conclusion of the lower appellate Court that remarriage of Mst. Dhakli had been proved. According to agricultural custom the remarriage of a widow causes a forfeiture of her life interest in her husband's estate which then reverts to the nearest heir of the husband,—*vide* Rattigan's Digest of Customary Law, para. 32. Thus the plaintiff has come to hold one-third share from the date of Mst. Dhakli's remarriage. It is admittedly the case of the plaintiff and also of the contesting defendants and this has also been found by the lower appellate Court that the ancestors of defendant No. 2 Sheokaran had abandoned their land even before 1960 Bk. (*vide* mutation No. 164). That being so, the plaintiff would be entitled to one-half share in that land. Thus the total share of the plaintiff comes to one half in the entire land. In my view, therefore, the District Judge came to a correct conclusion on both the points in issue and had rightly set aside the decree and Judgment of the Subordinate Judge and had decreed the plaintiff's claim with costs.

I find the appeal devoid of merit and I would, therefore, dismiss it with costs throughout.

SHAMSHER BAHADUR, J.—I agree.

R. S.