(1877) 05 AHC CK 0004

Allahabad High Court

Case No: None

Madho		APPELLANT
	Vs	
Sital and Another		RESPONDENT

Date of Decision: May 9, 1877

Citation: (1875) ILR (All) 394

Hon'ble Judges: Spankie, J; Oldfield, J

Bench: Division Bench

Final Decision: Dismissed

Judgement

Spankie, J.
The plaintiff and defendant, Sadho, in this suit are the sons of one Sital, also a defendant.

2. The property in dispute is a dwelling-house purchased by Sital in 1861 and transferred by gift on the 13th September 1875, by him to Sadho.

3. The plaintiff sues to avoid the deed of gift in favour of Sadho, and claims a declaratory decree for a moiety of the house, on the ground that his father was not permitted by the Hindu law to make a gift of Immovable property to one son to the injury of the other.

4. The defendant Sadho contends that the plaint discloses no ground of action, and the property in suit having been acquired by Sital, he was at liberty to dispose of it as he pleased.

5. The Munsif held that, if the Hindu law did not allow the gift, the plaintiff had good cause of action. On the point of law it was not necessary to express an opinion, as the High Court determined it, laying down that the exclusive gift of self-acquired property to one son, when there were other sons, is illegal, Mahasukh v. Budri H.C.R. N.W.P. 1869, 57.

6. In appeal the Judge affirmed the decree, holding himself bound by the precedent cited by the Munsif H.C.R. N.W.P. 1869, 57, and believing that it represented the commonly received doctrine in these provinces, though the Calcutta Court had taken a diametrically opposite view of the law 10 W.R. 247, Bawa Misr v. Raja Bishen Prokash Narain Singh.

7. The defendant in special appeal urges, as in the first Court, that the property having been self-acquired by Sital, he was quite competent to make a gift of it in favour of one son, to the exclusion of the other.

8. The case cited as having been determined by this Court refers to no authority expressly. The learned Judges observe that the texts of the law support the doctrine that a man''s Immovable property, although self-acquired, is not within his power of disposal so absolutely, by gift in his lifetime, as to enable him to give it all to one son, or grandson, in exclusion of the rest. The Court also remarked that they had not to deal with the case of an unequal division of Immovable property, for the gift was an exclusive gift; as the learned Judges do not cite their authorities, we do not consider ourselves bound by the decision.

9. The learned pleader for the appellant, Pandit Ajudhia Nath, referred to various authorities and precedents of this, and the Presidency Court. Some of the cases cited* are not absolutely conclusive on the point before Rs. The judgment of the judicial committee of the Privy Council in Rungama, appellant, v. Atchama respondent 4 Moo. I.A. p. 1, determined a question relative to a second adoption of a son, the first adopted son being still alive. It appears, however, to recognise the competency of a father to dispose of property that was not ancestral, by an act "inter vivos" without the consent of all his sons, and so far the principle would extend to the case before us, the other case cited Nana Narain Rao, appellant v. Huree Punth Bhao, Sree Newas Rao, and Balwant Rao, respondents 9 Moo. I.A. 96, does not touch the matter now in dispute. It establishes a will which disposed of the testator''s self-acquired property unequally amongst his sons, but it does not go beyond this. The case decided by the Agra Sudder Dewany Adawlat in 1861, is of no authority S.D.A. Agra 1861, 223. It refers to no texts, and does not enter into the point, or any argument.

10. The precedent of the Calcutta Court, "Muddun Gopal Thakur and Ors. 6 W.R. 71, refers to a case in which the plaintiff''s grandfather originally acquired the lands in dispute. He had several wives and several sons. By deed of gift he gave the property in dispute to the plaintiff''s father, and provided for all his sons by other deeds of gift. The plaintiff''s father made a deed of sale of the property in favour of the defendant. It was held that, according to the Mitakshara, a father is not incompetent to sell Immovable property acquired by himself; also that landed property acquired by a grandfather, and distributed by him amongst his sons, does not by such gift become the self-acquired property of the sons1 so as to enable them to dispose of it by gift or sale, without the consent and to the prejudice of the grandsons. In this

decision the texts and authorities are directly referred to, and the question is exhaustively treated. The other case cited from the Weekly Reporter 10 W.R. 287, "Bawa Misr," follows this judgment: The question, however, was, whether the father could, by will, make an unequal distribution of his self-acquired estate amongst his heirs. But the principle of the Court''s ruling would apply to the suit before us, and both the decisions put the same interpretation on the texts in the Mitakshara, that we are disposed to do Para. 27, chapter I, Section 1, declares that it is a settled point, that property in the paternal or ancestral estate is by birth. The father is declared to be subject to the control of his sons in regard to the Immovable estate, whether acquired by himself, or inherited from his father or other predecessor, since it is ordained that though immovables or bipeds have been acquired by a man himself, a gift or sale of them should not be made without convening all the sons, they who are born, and they who are yet unbegotten, and they who are still in the womb, require the means of support, and no gift or sale should therefore be made. The respondent''s pleader relies on this passage, as being an absolute declaration that any such gifts, or sale of self-acquired property is illegal. But the words do not go quite so far as this. Such a sale or gift should not be made without convening all the sons. It would be wrong, and contrary perhaps, to the spirit of the Hindu law, to make such a sale, or gift, that might prejudice the rights of the sons, or tend to limit their means of support, but there is no declaration that the transaction would be absolutely void. The father, it is true, is to be subject to the control of his sons in regard to the Immovable estate, whether acquired by himself, or inherited from his father or other predecessor. But even this control appears to be limited. In Section 5 of the Mitakshara, in which the equal rights of father and son in ancestral property are discussed, para. 9 declares the grandson''s right of prohibition, if his unseparated father is making a donation, or a sale of effects inherited from his grandfather. But he has no right of interference if the effects were acquired by the father; on the contrary, he must acquiesce because he was dependent. Para. 10 goes on to explain the difference. Although the son has a right of birth in his father''s, and his grandfather''s property, still, as he is dependent on his father in regard to the paternal estate, and since the father has a predominant interest, as it was acquired by himself, the son must acquiesce in the father''s disposal of his own acquired property, but since both have indiscriminately a right in the grandfather''s estate, the son has a power of interdiction, but then only if the father'' be dissipating the estate.

11. In noticing the apparent contradiction between para. 27, Section 1, chap. I, and paras. 9 and 10, Section 5, chap. I. the learned Judges who decided the case of Muden Gopal 6 W.R. 71, remark that the apparent conflict is reconciled if the right of the sons in the self-acquired property of the father is treated as an imperfect right, incapable of being enforced at law. The words "should not" and "shall not" imply a prohibition, but not an absence of power to do the prohibited act. The learned Judges add that a colour is further given to this construction, by a passage in the

Mitakshara on the administration of justice, chap. IV, Section 1 para, 10. Macnaghten''s Hindu Law vol. 1. p. 227, where the author, in stating who are capable of maintaining actions, says: "In case of land acquired by the grandfather, the ownership of father and son is equal, and therefore if the father make away with the Immovable property so acquired by the grandfather, and if the son have recourse to a Court of Justice, a judicial proceeding, will be entertained between the father and the son." But the right of suit is not mentioned as extending to the case where a father alienates his own self-acquired Immovable property.

12. In the regular appeal (unreported Regular Appeal, No. 150 of 1874, decided on 11th May 1875), cited by the appellant''s pleader as having been determined in 1875 by this Court, the learned Judges have also remarked on these apparent contradictions, and they observed that the only rational mode which has been suggested of reconciling the apparently contradictory doctrine is to suppose that para. 27, Section 1, refers to acquisitions of Immovable property made by the father with the use and by the aid of ancestral funds. The community of interest which the son has with the father in the grandfather''s property, is the foundation of the restriction of the father''s power in respect thereof. But the son has no community of interest with the father in property acquired by him independently of ancestral funds, and consequently there can be no restriction on the latter''s freedom in dealing with it. But with due respect to the learned Judges who made these remarks, the true reason appears to be this, that as long as the father lives, the control remains with him. The sons, as we have seen, are dependent on the father. In chapter I, Section 5, para. 7, which declares "the dependence of sons," is affirmed in the following passage, "while both parents live, the control remains, even though they have arrived at old age," must relate to the effects acquired by the father or mother. This other passage "they have not power over it" (the paternal estate), "while their parents live," must be referred to the same subject (self-acquired property). In Sections 9 and 10, which we have already quoted above, the dependency on the father, and the predominant interest of the father in self-acquired property, is what restricts the son from exercising any interference with its disposal. This view of the question is borne out by a passage in chap. VIII of the Smriti Chandrika, a work of special authority of the Madras school, where the interest of the son in the father and grandfather''s property is treated of. In para. 21 it is asked how could there exist such inequality while the son possesses a right, by birth, in both his grandfather''s and father''s property. The reply is, that in the case of the grandfather''s property, the ownership, and also the independent power, are both equal in the father and son, whereas in the case of the father''s property, while he is alive and free from defect, he alone possesses independent power, and not the son.

13. We, however, are prepared to rest the reconciliation of the apparent contradiction, on the ground that there is nothing more than a prohibition implied in para. 27, Section 1, chap. I. There is no express declaration that a gift or sale so

made is ipso facto void, because the donor or vendor has no power to make it, and we also consider that the rulings of this Court on other points of Hindu law, have recognised the principle that, though prohibition of certain acts may be implied, yet, where it is not declared that there is absolutely no power to do them, those acts, if done, are not necessarily void. This recognition is partially supported by Sir Thomas Strange, who admits a certain discretion on the part of the father, to deal with self-acquired property, and also by a passage

Vide chap. IX on Partition.

in Macnaghten''s Principles of Hindu Law, chap
were he lays down, as the result of all author
that with respect to personal property of ever

description, whether ancestral or acquired, and with respect to real property acquired or recovered by the occupant, he (the father) is at liberty to make any alienation which he may think fit, subject only to spiritual responsibility."

14. Entertaining this view of the point in dispute, and finding, as we believe, that authority and precedent are with us, we have no hesitation in holding that the decision of the Judge is wrong, and that this exclusive gift by Sital the father, to his son Sadho, of the house in dispute, was not illegal under the Hindu law, and the facts not being disputed, the claim should have been dismissed. We accordingly decree this appeal and dismiss the claim, by reversing the judgments of the Courts below, with costs.

----------Foot Note----------

Mitakshra Chap. I, p. 27 Section 1, Chap. I, Sections 5, 10, 11. Moore''s Indian Appeals. Vol., p. 103; Vol. IX., p. 96. 6 W.R., p. 96 W.R., p. 71 10, W.R. p. 287, Agra S.D.A. 1861, 223, H.C. N.W.P.R.A. No. 150 of 1874, dated 11th May 1875