(1926) 02 BOM CK 0002

Bombay High Court

Case No: None

Bhikhabhai Oghaddas Shah		APPELLANT
	Vs	
Purshottam Girdhardas Shah		RESPONDENT

Date of Decision: Feb. 3, 1926

Citation: AIR 1926 Bom 378

Hon'ble Judges: Macleod, C.J; Coyajee, J

Bench: Full Bench

Judgement

Macleod, C.J.

One Chhotalal Girdhar had an only son named Motilal, Both father and son were possessed of joint ancestral properties, moveable and immovable. On September 4, 1913, Chhotalal made a Will, Exhibit 100, and died on March 7, 1915. Motilal died unmarried on October 17, 1918, leaving at the time of his death his mother, Ruxmani, and his sister, Sanku. Sanku was married to the plaintiff in this suit, and died on October 8, 1920. Before that on July 30, 1919, Ruxmani passed a gift deed to the plaintiff. By his "Will Chhotalal, after setting out particulars of his property, stated that he was the owner thereof as long as he was living and free from illness, so that he might enjoy the property as he pleased, fie appointed in case of his death, his wife Ruxmani to be the owner and heir to the property that should remain after his death. She was to take all the property in her possession and perform his after death ceremonies, and, in case Sanku was not married, Ruxmani was to defray the expenses of her marriage according to her discretion out of his property, and that done, she was at liberty to deal with the surplus according to her pleasure. In case Ruxmani died without making any disposition of the property, the testator appointed his son, Motilal, to be the owner and heir to the immovable and moveable property which Ruxmani would leave.

2. It is to be noted, therefore, that the testator first of all, stated in his Will that the property was his own, and not ancestral; that he purported to bequeath the whole of his property to Ruxmani with full power of disposition, and, in case she made no

dssposition of the property, then over to Motilal. It was in pursuance of the powers given to her by Chhotalal''s Will that Ruxmani gifted the property to Sanku''s husband.

3. Defendant No. 1 is the brother of Chhotalal. The plaintiff brought this suit against him for possession of the property, alleging that Defendant No. 1 fraudulently took a sale deed of the property from Defendant No. 2. Defendant No. 1 pleaded that the property was ancestral, so that Motilal took the property by survivorship; that the Will of Chhotalal was void and inoperative as against Motilal; that, on Motilal''s death, Defendant No. 2 bad only a limited interest in the property as the heir of Motilal; that Defendant No. 1 was the reversionary heir to the property after the death of Defendant No. 2; that Defendant No. 2 had surrendered the property, in favour of Defendant No. 1 after receiving Rs. 3,000 from him as consideration; and that he had also made arrangements for, the residence and maintenance of Defendand No. 2, The main contention was that Chhotalal''s Will would operate on his own undivided share in the ancestral property, provided that Motilal consented to the Will being made.

4. The trial Court held that the will was made with the consent of Motilal. The appellate Judge said:

On a consideration of all the facts and circumstances, I find that Motilal was wanting in average intelligence. He was not an idiot or a fool, but had less than an average sense. He was twenty-eight years old when the Will was made, and, though he was the only son of a merchant possessing a family house and other property, he had not been married and he died unmarried. That shows what reputation he enjoyed outside for his capacity. If he was really a capable man of average ability, I do not think his father-would think of making a Will giving powers over the property to his mother in the lifetime of this only son. A consent given by a son of that type has, therefore, to be considered with caution.

When I turn to the Will, I find Chhotalal dealing with the property he was bequeathing as his property. There is nothing to show that he let the son expressly know in so many words that he was being practically deprived of his own interest in the property in favour of Ruxmani. It was an accident that he died soon after the Will. If he had been alive to-day, the position would have been that he would have been under the absolute control of Defendant No. 2.

All things considered I am not prepared to say that Motilal consented to his father making a W ill about his (Motilal''s) interest in the property also. He might have consented and indeed did consent to Chhotalal willing away his interest in the property in favour of his mother on condition that if she did not dispose of it during her life the residue would return to him. But I cannot think that when he put his attestation on Exhibit 100 he agreed to be penniless.

5. It does not appear to be in evidence that Motilal considered the question whether he was consenting : to his father''s Will operating on ancestral property. The Will was attested by Motilal, and in his attestation Motilal has added that he has attested the Will after reading and understanding it. He does not say that he has consented to it, nor is there any statement in the body of the Will itself that it was made with Motilal''s consent, It may well be that Motilal had not sufficient sense to understand the difference between ancestral property and self-acquired property, and that, when his father stated in the Will that the property was his own, he accepted that statement. I do not think his consent could be carried further than this, that he accepted the father''s statement that the property was not ancestral, and was, therefore, at the disposition of the testator. As a matter of construction, therefore, I am not prepared to hold that there was any consent of Motilal that his father should deal with ancestral property.

6. But, assuming for the moment that Motilal was perfectly well aware that the property was ancestral, so that he would succeed to the whole of the property, not as an heir but as a surviving coparcener on his father''s death, I do not think that, according to the principles of Hindu Law, any consent on the part of Motilal would be effective so as to divert the undivided share of Chhotalal in the family property on his death from the surviving coparcener. The question is dealt with in the 9th Edition of Mayne''s Hindu Law, at p. 582:

Whatever property is so completely under the contract of the testator that he may give it away in specie during his lifetime, he may also devise by Will. Hence, a man may bequeath his separate, or his self-acquired, property; and one who, by the extinction of coparceners, holds all his property in severalty, may devise it, even in Malabar and in Canara under Alya Santana law, so as to defeat the claims of remote heirs. The rule is however not universal; and though a manager can dispose of a small portion of the family property in favour of the female members of the family by gift inter vivos, he cannot do so by Will Parvatibai v. Bhagwant [1915] 39 Bom. 593. The Madras High Court in one case Patra Chariar v. Srinivasa Chariar [1917] 40 Mad. 1122 acting on an obiter dictum of the Privy Council Brlj Raj Sirgh v. Sheodan Singh [1913] 35 All. 337 has held that a disposition by Will of coparcenary property can be upheld, if the consent of all the coparceners, being adults, has been obtained. This decision sounds equitable enough; but it seems very questionable whether it is logically defensible, because, as has been pointed out, the testator''s interest in the property was extinct at the moment from which his will speaks. Its correctness has been questioned in a later Madras case : Subbarami Reddi v. Ramamma [1920] 43 Mad. 824.

7. The head-note in Subbarami Reddi v. Ramamma [1920] 43 Mad. 824

A Will made by a Hindu father who is joint with his infant son, bequeathing certain family properties to his widow for her maintenance, is invalid and inoperative as against the son, although it would have been a proper provision if made by the

father during his lifetime.

8. His Lordship the Chief Justice said (pp. 826 827, 828):

It has been contended before us, and certain general dicta of the Privy Council have been referred to, to the effect that testamentary capacity is co-extensive with the right of making gifts inter vivos. That that principle has not a universal application is shown by the decision of the Privy Council in Luksman Dada Nath v. Ramchandra Dada Naik [1903] 5 Bom. 48, which expressly approved the decision of the Madras High Court to which I have just referred. At that time the view that prevailed in the Madras High Court was that a coparcerner might during his lifetime make a gift of his undivided share, a view which has since been overruled, and the Madras High Court held in Vittla Butten v. Yamenamma [1874] 8 M.H.C. 6, that in spite of that ho could not disposs of his undivided share by Will.

With regard to the more recant decisions of this Court, beginning with Kudatamma v. Narasimha Charyulu [1907] 17 M.L.J. 528, that a managing member of a Hindu family may lawfully make certain gifts of ancestral properties to the female members of the family, I may merely point out that it is quite a different thing to say that he may do so during his lifetime and to contend that he may do so by a Will operating after his death. Where he doss so during his lifetime, he is acting as manager and as representative of the family. If he is to make such gifts by will to operate after his death, he is assuming a function which really belongs to the surviving coparceners, and he is purporting to exercise powers and perform duties which have devolved upon them, and it seems to me that if we were to admit the principle contended for, it might have very far-reaching results.

As regards the decision in Patra Chariar v. Srinivasa Chariar [1917] 40 Mad. 1122, I may observe that none of the authorities which I have cited are referred to there. Further, the case is distinguishable on the facts. In that case the alienation in favour of the daughter was made by the father with the consent of his adult son who was his coparcener and also with the consent of the testator''s wife who was the mother of an infant coparcener. We have no doubt been referred to certain cases in which the Privy Council have suggested that a will which would otherwise be invalid might become operative by virtue of the consent of those coparceners, but no such question has actually come before them for decision. Looking at the matter on principle, it might seem that a Will made by one coparcener with the assent of all the other coparceners would be like a settlement or family arrangement between all the coparceners to take effect from the death of the, coparcener who was the testator, unless that coparcener in the meantime revoked it. It is not necessary to consider that question in the present case. After hearing very fully the arguments, I am satisfied that the Privy Council has never had to consider either that question or the question now actually before us.

9. In Brijraj Singh v. Sheodan Singh [1913] 35 All. 337, the facts were entirely different. The joint family consisted in that case of a father and three sons, and although the document which the father executed purported to be a will, it was acted upon by all the parties while the father was alive, so that the effect was that partition was created in the joint ancestral properties In Anandrao Vinayak v. Administrator-General of Bombay [1896] 20 Bom. 450, the Court, was of opinion that, where it is doubtful whether the property with which the Will of a deceased Hindu purports to deal is ancestral or self-acquired, the assent of his only son to the provisions of the will, some of which are favourable and some unfavourable to his interest and that of his sons, will bind the latter as well as himself.

10. I take it that that decision only amounts to this : that the assent of the son to the provisions of his father''s Will is an indication that he considered that the Will operated on his self-acquired property. There is nothing in the decision in that case from which it can be deduced that the Court held in the case of a father and son being joint, that the son by his consent could validate his father''s Will to the extent of his father''s share in the family property. It seems to the entirely illogical and inconsistent with the principles of Hindu Law relating to joint family property, that a coparcener can dispose of his undivided share by Will, and if that is fundamentally opposed to Hindu Law, then the consent of the general body of coparceners could not validate a Will which would otherwise be inoperative.

11. But, on the facts of this case, it is clear that Chhotalal was not disposing of by Will his own undivided share in the family property. He was disposing of the whole family property, and, unless effect was given to that disposition during the lifetime of Chhotalal so as to give it the appearance of a family arrangement, it could not possibly operate after Chhotalal''s death.

12. For these reasons, I think the judgment was right. Both the appeals should be dismissed with costs. It is unnecessary to consider the cross-objections.

Coyajee, J.

13. I agree.