(1945) 03 BOM CK 0003

Bombay High Court

Case No: Joint First Appeals No''s. 288 and 289 of 1940

Gangadharrao Gopalrao		APPELLANT
	Vs	
Ramchandra		RESPONDENT

Date of Decision: March 9, 1945

Citation: AIR 1946 Bom 146 : (1945) 47 BOMLR 889

Hon'ble Judges: Lokur, J; Bavdekar, J

Bench: Division Bench

Final Decision: Dismissed

Judgement

Lokur, J.

These two appeals arise out of a suit filed by the plaintiff to recover a moiety of the properties described in the plaint at serial Nos. 1 to 30 after a partition by metes and bounds, and also for exclusive possession of the properties described at serial Nos. 31, 32 and 33. The plaintiff also asks for a declaration that he is entitled to the moveable property allotted to the share of the deceased Keshavrao, and that he is entitled to receive the judi amount specified in the plaint.

2. The plaintiff Gangadharrao had three brothers, Sheshagirirao, Annarao and Keshavrao, and they formed a joint Hindu family. Sheshagirirao died without leaving a widow or any issue, and thereafter Annarao, Keshavrao and Gangadharrao lived in union. Defendant No. 1 Shreepad is Annarao''s son, and defendant No. 5, Rindabai, is Annarao''s daughter. Defendants Nos. 2, 3 and 4 are Shreepad''s sons. After Annarao''s death, defendant No. 1, Keshavrao and the plaintiff lived as members of a joint Hindu family. In 1917 defendant No. 1 Shreepad, who was then a student, executed a general power of attorney in favour of his uncles Keshavrao and Gangadharrao, as they were managing the joint family estate. After he completed his education, defend ant No. 1 gave a notice to his uncles on September 19, 1921, cancelling the power of attorney and demanding his one-third share in the joint family properties. Besides the ancestral joint family property, Keshavrao had inherited three lands, described in serial Nos. 31, 32 and 33 in the plaint, from his

wife.

3. It appears that, although Shreepad gave a notice to Keshavarao and Gangadharrao, he did not immediately file any suit to obtain possession of his one-third share in the family property. On February 27, 1923, Keshavarao and defendant No. 1, Shreepad, filed suit No. 92 of 1923 against the plaintiff Gangadharrao and his son Dattatraya to recover their two-thirds share in the ancestral joint family property by metes and bounds. Defendant No. 1 claimed therein certain property for himself as jesthamsha (elder''s share) on the ground that he belonged to the eldest branch of the family. The suit resulted in a compromise decree on July 15, 1926, whereby Shreepad and Keshavrao were awarded two-thirds share in the joint family property. It appears from the decree that the property claimed by Shreepad for jesthamsha was not given to him. The property was subsequently divided, and defendant No. 1 and Keshavarao were given possession of two-thirds share in the family property. In the compromise application it was stated that the property which Keshavrao had inherited from his wife belonged to him exclusively; but, as that property was not the subject-matter of the suit, this was not embodied in the decree.

4. Keshavrao died on March 28, 1936, and the plaintiff filed this suit to recover his property on the ground that he was his next heir in preference to defendant No. 1, who was his nephew. Defendants Nos. 1 and 5 resisted the claim. They contended that Keshavrao had died in union with defendant No. 1, and, therefore, his undivided share in the joint family property devolved upon him by survivorship, and also that by his two wills he had bequeathed his undivided share in the joint family property to defendant No. 1 and his self-acquired property to defendant No. 5. The plaintiff disputed the genuineness of the wills, and contended that Keshavarao did not execute them, and that at the time when he is alleged to have executed them he was lying unconscious and incapable of understanding the contents and the nature of the documents. The lower Court held that the wills propounded were not genuine, and that Keshavrao died in union with defendant No. 1. Plaintiff''s claim to a half share in the properties jointly held by defendant No. 1 and Keshavrao was, therefore, rejected ; but the plaintiff was given a decree for the properties, which Keshavrao had inherited from his wife. The plaintiff has preferred an appeal, No. 288 of 1940, against that part of the decree which disallowed his claim for half share in the property held by defendant No. 1 and Keshavrao, and defendant No. 5, Rindabai, has preferred appeal No. 289 of 1940 from that part of the decree which held that the wills of Keshavarao were not genuine and awarded to the plaintiff possession of the self-acquired property of Keshavrao. Both the appeals have been heard together, and this judgment will dispose of them.

5. Admittedly defendant No. 1, Keshavrao, and the plaintiff were undivided, till defendant No, 1 gave a notice to Keshavarao and the plaintiff on September 19, 1921. He says that he had just given the notice for the purpose of cancelling the

general power of attorney, which he had given to his uncles in 1917 ; but the notice itself contains an unequivocal intention on the part of defendant No. 1 to separate from his uncles, and get his one-third share in the ancestral joint family property separated by metes and bounds. Ordinarily such an expression of intention effects a severance in the co-parcenery, and if it is followed by a partition, then the co-parcenery is to be deemed to have come to an end when the notice expressing the intention to separate was given. This principle was laid down in Suraj Narain v. Ikbal Narain (1912) L.R. 40 IndAp 40:5 Bom. L.R. 456, in the following terms (p. 45):

What may amount to a separation or what conduct on the part of some of the members may lead to disruption of the joint undivided family and convert a joint tenancy into a tenancy in common must depend on the facts of each case. A definite and unambiguous indication by one member of intention to separate himself and to enjoy his share in severally may amount to separation. But to have that effect the intention must be unequivocal and clearly expressed.

But it is possible that, after such an intention is expressed, the parties may decide not to effect a severance, but to continue to be joint as before. In such a case the mere giving of a notice expressing an intention to separate is not sufficient by itself to put an end to the coparcenery. As observed by Sir George Rankin in Ram Narayan Sahu Vs. Musammat Makhna, in order to ascertain whether the family continued to be joint, or became separated, by an expression of the intention to sever the interests, the subsequent conduct of the parties must be looked to. Thus in Banke Bihari v. Brij Bihari I.L.R (1928) All. 519, where a member of a joint Hindu family sent a registered notice to the other members demanding a partition, but the intention to separate was given up a day or two later as the result of a subsequent agreement of the members at a family meeting and there was no disruption of the family in fact, it was held that the notice did not, by itself, operate to effect a separation in law. An unequivocal demand for partition, which has not been persisted in and has been withdrawn or abandoned with the consent of the other members of the family, cannot be treated as nevertheless effecting a separation.

6. After defendant No. 1 gave the notice, he did not insist upon his one-third share being separately put into his possession; but he joined Keshavarao in filing a suit against the plaintiff to recover two-thirds share in the ancestral joint family property, on behalf of both himself and Keshavarao, and that suit ended in a compromise. By that compromise, defendant No. 1 and Keshavarao were together given two-thirds of the joint family property. Thus the original idea of defendant No. 1 to separate from both of his uncles on taking his one-third share was given up with the consent of his uncles when the suit was compromised, and in its place he and Keshavarao together took a joint two-thirds share, leaving the remaining one-third to the plaintiff. In pursuance of the compromise decree, the plaintiff divided the joint family property in his possession into two parts, one of two-thirds share, and the other of one-third share, and offered the former to defendant No. 1

and Keshavarao ; but they objected to this method of partition, and contended that the plaintiff had included in his one-third share superior lands, and the partition had been unequal. They, therefore, proposed that the plaintiff should make three equal shares in the property, so that defendant No. 1 and Keshavrao might take two of them for their two-thirds share, and the remaining one-third should be taken by the plaintiff. The Court passed an order to that effect, and the plaintiff divided the property into three shares, of which two were selected by defendant No. 1 and Keshavrao.

7. Mr. Jahagirdar contends that by this method the property was divided into three distinct shares and although defendant No. 1 and Keshavrao got two of them, yet it cannot be said that those shares became combined into one. He contends that, even assuming that for the sake of convenience defendant No. 1 and Keshavarao got the two shares jointly, still they were tenants-in-common and not joint tenants, so that, after the death of Keshavrao, his share devolved by succession upon the plaintiff, and did not go by survivorship to defendant No. 1. This reasoning appears to be plausible, but what actually took place was that defendant No. 1 and Keshavarao took two-thirds share for themselves jointly. The device of dividing the property into three shares was resorted to merely to have an equitable partition of the whole property into one-third and two-thirds. The first partition effected by the plaintiff was found to be inequitable, as he had included better lands in his one-third share, and no choice was given to defendant No. 1 and Keshavarao. The Court, therefore, directed that defendant No. 1 and Keshavarao should be given an option to select any two-thirds, and that was possible only if the whole property was divided into three parts, and an option was given to defendant No. 1 and Keshavarao. This does not mean that the two parts which they took were taken as their separated shares. The subsequent conduct of the parties clearly shows that they intended to treat those two shares as their joint property. In the Record of Rights the two shares were entered jointly in the names of defendant No. 1 and Keshavarao. If they had taken their shares separately, as the property had been divided into three equal shares, there was no difficulty in entering the name of defendant No. 1 for one share and that of Keshavarao for the other. But, instead of doing so, they got the two shares taken by them entered in their names jointly. Mr. Jahagirdar argues that had they continued to be members of a joint family, the name of only the manager would have been entered against the two-thirds share, and there was No. necessity of entering the names of both the coparceners ; on the other hand, if defendant No. 1 and Keshavarao were tenants-in-common, and their names were entered against the lands in that capacity, then their shares would have been mentioned after their names. But the fact that the names of them both were entered against all the lands shows that they held them jointly. If they did not intend to continue as coparceners, they could have easily got their separated shares entered against their names individually. Moreover, in a suit filed by the plaintiff in 1930 (suit No. 2 of 1930) against defendant No. 1 and Keshavarao, they put in a joint

written statement on March 28, 1930, and therein they expressly stated that they were not divided, that they were enjoying the joint family property of their share as coparceners, and that there was no severance of coparcenery between them. This conduct clearly shows that they did not intend to put an end to their coparcenery, and even after the partition effected by the compromise decree, they two continued to remain as members of a joint Hindu family. We entirely agree with the view of the lower Court, and hold that, after Keshavrao''s death, his undivided share in the ancestral joint family property devolved upon defendant No. 1 by survivorship, and the plaintiff has no interest in it.

8. As regards the two wills said to have been made by Keshavarao on the date of his death, the lower Court has come to the conclusion that he was not in a sound and disposing state of mind, but was unconscious when the said documents were executed. Admittedly, when Keshavarao returned to Dharwar from Navalgund, where he was staying for some time with defendant No. 5, he was seriously ill, and was not in a position to move about. The evidence of defendant No. 1 and his wit-. nesses Anant, Channappa and Dattatraya is to the effect that Keshavarao was in full possession of all his faculties when he fixed his thumb impression on the two wills ; but all his witnesses are interested, and, as pointed out by the lower Court, their evidence cannot be believed on the point. Keshavarao had swelling all over the body, and yet these witnesses say that he was moving about, when he executed the wills. If that were so, there was no reason why the stamp paper on which the wills were written were not purchased by him in his own name. They were purchased by defendant No. 1 in his name. The plaintiff''s son Dattatraya and the plaintiff''s witnesses Shalambhat, Devangowda and Sidappa state that Keshavarao was lying unconscious some time before his death. If the execution of the wills was above board, the Sub-Registrar would have been sent for and registered wills would have been executed. A retired Magistrate was living in the neighbourhood, and at least he might have been sent for. The lower Court which had the benefit of observing the demeanour of the witnesses was impressed by the evidence of the plaintiff, and has come to the conclusion that Keshavarao was not in a sound and disposing state of mind, when the wills are said to have been executed. It is also significant that the thumb impressions on them were not taken clearly and look like mere smudges. It is urged that the drafts of the wills were prepared by Mr. Patwardhan pleader. Those drafts have not been produced, nor has Mr. Patwardiban been examined.

9. In this state of the evidence, we see no reason to differ from the view taken by the lower Court, and we agree with its finding that the wills are not genuine. Hence the decree in favour of the plaintiff in respect of the self-acquired property of Keshavarao must be upheld, and both the appeals dismissed with costs.