(1927) 11 BOM CK 0027

Bombay High Court

Case No: Second Appeal No. 418 of 1924

Shamu Bin Shripati, by his guardian Radha kom Shripati Kalwat and Another		APPELLANT
	Vs	
Babu Aba Kalwat and Others		RESPONDENT

Date of Decision: Nov. 15, 1927

Citation: (1928) ILR (Bom) 300

Hon'ble Judges: Patkar, J; Madgavkar, J

Bench: Division Bench

Advocate: A.G. Desai, for the Appellant; P.B. Shingne, for Respondents Nos. 1, 2 and 4., for the Respondent

Final Decision: Allowed

Judgement

Madgavkar, J.

The question in this appeal relates to the validity of the will made in 1917 by the Plaintiff-Appellant''s father, Raoji, under which he purported to dispose of four properties--two properties, B and D, to his son the Plaintiff-Appellant, and two properties, A and C, to Defendant No. 6, Dhondu, the sister of his deceased mistress, through whom the other Defendants-Respondents claim.

2. All the four properties in the will, along with a iifth,. belonged originally to Jagoji. In 1878 Jagoji passed a registered document (Exhibit 100) in favour of his two illegitimate sons, Raoji and Sakharam. The Plaintiff-Appellant contended that Raoji obtained these properties of Jagoji by survivorship and could not dispose of them by will. The Respondents contended that they were in law the self-acquired properties of Jagoji with power in him to dispose of them by will. The parties, it is conceded, are Sudras.

3. It is a curious defect in the case that the pleadings and the evidence are silent as to the question of Sakharam''s interest in the properties and the dates of

Sakharam''s death and of the Plaintiff''s birth. Both the lower Courts have found that there was no partition in Raoji''s life-time between Raoji and the Plaintiff-Appellant.

4. The argument for the Appellant is three-fold. First, that Jagoji and his two illegitimate sons, Raoji and Sakharam, constituted a joint Hindu family such that ,Raoji had a co-parcenary interest from his birth in the properties. Secondly, if not, that Jagoji had the power to admit an illegitimate son such as Raoji as a eo-parcener and is proved to have exercised his power.

5. Thirdly, that, whether Raoji obtained the properties after Jagoji''s death by survivorship or by inheritance, they became in Baoji''s hands ancestral property, which could not be disposed of by will. For the Respondents it is contended that the document (Exhibit 100) is either a will or a deed of gift and caused the properties to be self-acquired when they came into the possession of Raoji, whether during the life-time of Jagoji or after his death, that no presumption of jointness can be made in the case, and that the properties must therefore be inferred to have been self-acquired at the date of the will in 1917. It is also argued that the propositions of Hindu law set up for the Appellant are untenable and not supported by either the text or cases and in fact are opposed to the fundamental notion of a Hindu co-parcenaxy which can only come into being by birth with sapinda relationship as a test.

6. It is preferable clearly to decide the facts to which the law has to be applied. The document Exhibit 100 of 1878, before Raoji was born and any dispute arose, was registered. The accuracy and truth of its contents are not questioned. The document runs as follows:

We have no legitimate son or daughter. We have kept your mother as a mistress since she was 12 or 13 years old and you have been born to her and you are to us like our legitimate sons with right of heirship to our properties moveable and immoveable. But we have separated relatives who have no claim whatever to our estate and perhaps after our death they might obstruct you and we therefore make this deed.

7. After enumerating and describing the properties the document proceeds:

Of all these properties above, you and I have been till now managing jointly and should so manage hereafter; and after my death both of you should manage it in the same manner from generation to generation and from son to grandson.

8. This document is, in our opinion, clearly neither a will nor a deed of gift. It is a declaration of certain facts in regard to the properties and certain rights both during the life-time of Jagoji and after. It is in fact a declaration that Jagoji''s other relatives have no claim on the properties, that Raoji and Sakharam are his illegitimate sons by the mistress, whom he had kept for a long time, and have been treated by him exactly like his legitimate sons living in a joint family, and that after his death these

two alone are entitled to the properties.

9. Accordingly, the question arises as to what happened to the properties on his death. It is observable that there is no mention in the evidence that the properties were ever actually divided by Raoji and Sakharam or that Sakharam ever lived separately from Raoji. On the contrary although there is no evidence as to what happened to the fifth property, it appears that Raoji had been and was, until his death in 1917, in possession of four out of the five properties. Coupling these facts with the facts recited in the deed, it appears to us a reasonable inference that Sakharam and Raoji in fact lived together jointly after Jagoji''s death as they had been living before, and that they enjoyed the properties in exactly the same manner that their father wished them to do.

10. As to the dates of Sakharam''s death and of the Plaintiff''s birth there is no evidence. In fairness to the Respondents and to take the most favourable case from their point of view, it may be assumed that the Plaintiff was born after Sakharam died. The question arises as to the nature of the properties, particularly, the properties A and C now in question, on the death of Jagoji.

11. In support of the proposition of law for the Appellants that a natural father and illegitimate sons could form and were a co-parcenary, there is neither text nor case. The learned pleader for the Appellant relies on certain observations of Nanabhai Haridas J. in Sadu v. Baiza and Genu (1878) 4 Bom. 37 at pp. 45, 46, 52. and argues that the proposition for which he contends is a logical inference from the proposition laid down in that case. It has been frequently observed that no law is logical, least of all the Hindu law of succession and inheritance. The actual decision of the Full Bench was merely that a legitimate and an illegitimate son who were joint and undivided in estate could succeed as co-parceners to their sudra father''s property, the illegitimate son taking a half share of the legitimate son. On the other hand, the observations of their Lordships of the Privy Council in Jogendro Bhupati Hurrochundra Mahapatra v. Nityanand Man Sing (1890) 18 Cal. 151 at p. 155, P.C. approving of the Bombay case above, are opposed to the argument for the Appellant. After quoting the verses of the Mitakshara Ch. I, Section 12, their Lordships observe as follows (p. 155):

Now it is observable that the first verse shows that during the life-time of the father, the law leaves the son to take a share by his father''s choice, and it cannot be said that at his birth he acquires any right to share in the estate in the same way as a legitimate son would do.

12. If it is the essence of a co-parcenary that the right comes into existence with, from and because of birth, these observations are fatal to the argument for the Appellant. In the Full Bench decision Ishwar Dadu v. Gajaibai (1925) 50 Bom. 468 at pp. 527-528. I have pointed out the distinctions between, firstly, the principle of law, secondly, the ratio decidendi, and thirdly, the observations in the judgment, which

last are not binding. In any case, speaking for ourselves, we are not prepared to take the further step in law we are invited for the Appellant to take in this appeal, and to hold that, because an illegitimate brother succeeds to the property in preference to the widow of the deceased legitimate brother and in this sense forms a co-parcenary with the latter, therefore a father and his illegitimate sons living with him, such as Jagoji with Raoji and Sakharam in the manner recited in Exhibit 100, are members of a joint Hindu family in the only legal sense in which the term is used, with all its Jegal implications and consequences; or that Jagoji had such a power in law which he could exercise. But on the death of Jagoji the position was, in our opinion, altered. Assuming that Raoji and Sakharam each took one-half, it is not proved that they separated or lived otherwise than they had lived before in Jagoji''s life-time. The two brothers after Jagoji''s death formed, in our opinion, a joint Hindu family in regard to the properties in the deed which they inherited from Jagoji; if so, whatever the date of the Appellant''s Tjirth, even if it was after the death of Sakharam, the properties in suit were joint family properties in the life-time of Sakharam, and they remained so after Sakharam''s death; and even if the Plaintiff was born afterwards, Raoji had no power to dispose of them by will.

13. In this view the decree of the trial Court was in our opinion right. The appeal is allowed, the decree of the lower appellate Court set aside, and the decree of the trial Court restored with costs throughout against the Defendants-Respondents.