AIR 1968 Bom 323 : (1968) 70 BOMLR 89 : (1968) MhLj 407

Bombay High Court

Case No: A.F.A.D. No. 1148 of 1960

Mahadeo Gopal Mone		APPELLANT
	Vs	
Rameshwar Sadashiv Mone and Others		RESPONDENT

Date of Decision: June 28, 1967

Acts Referred:

- Transfer of Property Act, 1882 - Section 51

Citation: AIR 1968 Bom 323 : (1968) 70 BOMLR 89 : (1968) MhLj 407

Hon'ble Judges: Patel, J

Bench: Single Bench

Advocate: K.V. Joshi, for the Appellant; N.S. Shrikhande, for the Respondent

Judgement

(1) This is a second appeal by the widow of the plaintiff who succeeded substantially in the trial court but lost to some extent in the appellate court. The short facts necessary for the disposal of the appeal are as follows

(2) One Damodar died in 1918 leaving behind him his widow Laxmibai, two sons Sadashiv and Gopal and 5 daughters Vatsalabai, defendant No. 1, is the widow of Gopal: Sadashiv left two sons Rameshwar defendant No. 2 and Laxman; Laxman died in 1941 leaving behind him his son Sureshchandra, defendant No. 4. Mahadeo is the adopted son of Vatsalabai, defendant No. 1, and he is the present plaintiff. The record shows that Sadashiv separated from his father Damodar on April 21, 1914 and thereafter Damodar and his son Gopal continued in 1918 as stated earlier. As there was no male member in the family, apparently Rameshwar and Laxman succeeded to the property of Damodar as found by the learned Judges below, and Laxmibai and Vatsalabai had only rights of maintenance in the property. Rameshwar and Laxman partitioned the property which they obtained as heirs of Damodar by metes and bounds somewhere about 1937. At this time, in respect of the house. Schedule A, Rameshwar obtained Laxman''s share by payment of sum of Rs. 1100/-. Since then, Rameshwar effected improvements in the house, and

his case that he did so at a cost of Rs. 7200/-. Vatsalabai, widow of Gopal, adopted the plaintiff, as stated above, on December 21, 1954. Immediately after his adoption, he filed the present suit on September 12, 1955 for recovery of the estate of Damodar in the hands of Rameshwar and defendants 3 and 4 who succeeded Laxman after his death in 1941.

(3) The suit was resisted by Rameshwar and defendants 3 and 4 on the ground that the property had already passed out of the hands of the widow and as defendants 3 and 4 succeeded the heir Laxman, the sole coparcener on his death in 1941, the plaintiff could not divest them. They also claimed the costs of the improvements. Rameshwar contended that he had improved the property at a cost of Rs. 7200/- and in any event he was entitled to be compensated for the improvements. He further contended that he had purchased half share of Laxman and therefore he was entitled to keep that half share as an alienee of the last surviving coparcener. The learned trial Judge made a decree against these defendants in favour of the plaintiff, decreeing to him the property, i.e. the suit house, Schedule A and the suit lands at Wadghar and Chinchwali and the suit lands Survey Nos. 31 to 38, 42, 45, 51 and 52 at Lakhale as per Schedule C. He directed the property at Mur to be partitioned by the Collector awarding the plaintiff his half share. He also made a decree for mesne profits to be determined later on. Defendant No. 2 Rameshwar only appealed. In the appeal, the learned District Judge held that Rameshwar had purchased half share of Laxman in the house Schedule A at the time of the partition and, therefore, he was in the position of an alienee of that portion of the property and as such entitled to keep the property as against the plaintiff. He further held that Rameshwar had made improvements in the house at his own cost and since the adopted son was entitled to the property as at the date of the death of his grandfather he must reimburse him for the improvements made by him or take the price of the property and leave the property to him. This appeal is now filed by the plaintiff claiming that the decree made by the learned appellate Judge is erroneous.

(4) The first question is whether the plaintiff as the adopted son will be entitled to displace the title of Rameshwar to half the house acquired by him by his purchase from Laxman his co-heir of Damodar. Mr. Joshi relied upon the decisions in Shrinivas Krishnarao Kango Vs. Narayan Devji Kango and Others, and Krishnamurthi Vasudeorao Deshpande and Another Vs. Dhruwaraj, . On the other hand, in Vishnu Pandu Yadav and Another Vs. Mahadu Baburao Yadav Patil and Others, , wherein it was held that the alienees from the absolute owner at the date of alienation were not liable to be divested by the adopted son. Mr. Shrikhande argues that the decision in Vishnu Pandu Yadav and Another Vs. Mahadu Baburao Yadav Patil and Others, , has not been disapproved or over ruled by the Supreme Court and is still good law.

(5) First case of this High Court in this connection is Bhimaji Krishnarao Vs. Hanmantrao Vinayak and Others, . In a joint family of three brothers Hanmantrao was the last surviving coparcener, the two others Dattatraya and Krishnaji having died leaving behind them two widows Venkubai and Rukminibai. On December 6, 1932, Hanmantrao

conveyed some of the family properties to his daughters by way of gift and some other portions of his property to other defendants in the suit. On May 10, 1933, he gifted away one more property to one of his daughters. In the meantime on December 8, 1932 he had also sold some of the undisposed property to defendants 9 to 11, and later to defendants 12 to 15. On June 25, 1935 Rukminibai, the widow of Krishnaji, adopted plaintiff Bhimji who then raised the suit as the adopted son for a declaration that the alienations made by Hanmantrao were not binding on him. Relying upon the earlier decisions in Veeranna v. Savamma, ILR 52 Mad 298=AIR 1929 Mad 296 which was approved in AIR 1927 139 (Privy Council) and also the observations in that connection in AIR 1943 196 (Privy Council) this court held that Hanmantrao being the sole surviving coparcener had full right to treat the ancestral property as if it was his own and that the adoption of the plaintiff subsequently would not affect the property which already had passed out of the family by alienation. It has consistently been decided that the sole surviving male member of a joint family is the full owner of all the family properties in spite of an unexercised power of adoption possessed by the widow of a predeceased coparcener and such survivor can alienate all or any of the family properties absolutely and the son adopted after the alienator would not be in a position to challenge the same. This principle has been accepted by the Judicial Committee in the decisions above referred to and it is on this principle that Mr. Shrikhande relies in this decision in support of his contention that the half property in Schedule A which Rameshwar purchased from Laxman could not be affected by the present adoption.

(6) Mr. Joshi relied upon the decision in Shrinivas Krishnarao Kango Vs. Narayan Devji Kango and Others, and the later decision in Krishnamurthi Vasudeorao Deshpande and Another Vs. Dhruwaraj, .

(7) Before I proceed to consider these two decisions of the Supreme Court, I should refer to the decision of the Privy Council and two decisions of this Court which came to be considered by the Supreme Court. In AIR 1943 196 (Privy Council) the facts were as follows: Dhulappa had two sons Purnappa and Hanmantappa. Respondent Shankar belonged to the latter branch. Purnappa died in 1901 leaving Gundappa (died 1902), Bhikhappa (died 1905) and Narayan (died 1908). Bhikhappa left behind him Gangubai and a son Keshav, who died in 1917. After Narayan''s death in 1918 leaving a widow who remarried and his ancestral and separate property devolved on Keshav. On Keshav''s death respondent obtained the property from the Collector as most of it was Patilki Vatan land. Gangubai then adopted the plaintiff Anant. The Judicial Committee says (P. 238) "Keshav''s right to deal with the family property as his own would not be impaired by the mere possibility of an adoption ILR 52 Mad 398 = AIR 1929 Mad 296 ....." and then must vest the family property in the adopted son, on the same principle, displacing any title based merely on inheritance from the last surviving coparcener....." and at (241 of Ind App) = (at p 200 of AIR) "Neither this case nor AIR 1933 155 (Privy Council) brings into question the rule of Law considered in Bhubanshwari v. Nilcomal Lahiri (1884) 12 Ind App 137 and stated by the Board to be "According to the law laid down in the decided

cases, an adoption after the death of collateral does not entitle the adopted son to come in as heir of the collateral. Finally the Judicial Committee holding that adopted son will also take the two parcels of land which Keshav inherited from Narayan. The first case of the Bombay High Court is Jivaji Annaji Vs. Hanmant Ramchandra, . In this case two propositions were formulated (i) that any lawful alienation made by the last absolute owner is binding on the adopted son and (ii) that if the property goes by inheritance to a collateral and the adoption takes places after the death of the collateral, the adoption cannot divest the property which has invested in the collateral. In this case the decision of the Privy Council in AIR 1943 196 (Privy Council) was explained and distinguished. The second decision is Ramchandra Hanmant Vs. Balaji Dattu Kulkarni, . In this case the Full Bench held that if on the death of a last surviving coparcener or male owner his property has devolved upon his heir by inheritance and on his death has vested in his own heir, a subsequent adoption in the family of the surviving coparcener the last holder will not divest it from the last heir.

(8) The facts in Shrinivas Krishnarao Kango Vs. Narayan Devji Kango and Others, are as follows:-

Branch of the Kulkarni family consisted of two male members S. and K. The other branch was represented by Sw. K died in 1897 and S died in 1899. K left surviving him a widow and S left surviving him son G. who also died in 1901 leaving a widow. G"s widow adopted D on 16-12-1901. SW, the member of the other branch, died in 1903 and thereafter died his widow, and his estate devolved on D. D died on May 6, 1935, leaving three sons and widow. The plaintiff was adopted by the widow of K on April 26, 1944. The plaintiff then raised the suit and claimed not only the estate which belonged to S and K, but the estate of SW which had vested in D, and after his death in his heirs. The Court, having held that so far as the joint family property was concerned, the plaintiff was entitled to a share in the same, proceeded to consider the question how far the estate which the successor i.e. D of such collateral i.e. SW has taken, be affected by the adoption. The respondent in the Supreme Court relied upon Jivaji Annaji Vs. Hanmant Ramchandra, which had decided that the doctrine of relation back does not extend to properties which are inherited from a collateral. The appellants before their Lordships contended that the observations of the Privy Council in AIR 1943 196 (Privy Council) were contrary to the decision of the Full Bench and the decision therefore was erroneous in respect of the above proposition. Only the correctness of this proposition was considered by the Supreme Court. Similarly AIR 1943 196 (Privy Council) was also examined only in connection with this proposition. This becomes clear from the passage where their Lordships say at page 693 of Bom LR)=(at page 388 of AIR). "We are of opinion that the decision in AIR 1943 196 (Privy Council) in so far as it relates to properties inherited from collaterals is not sound, and that in respect of such properties the adopted son can lay no claim on the ground of relation back". It is no doubt true that prior to this observation, in the same paragraph they have said, "when an adoption is made by a widow of either a coparcener or a separated member, then the right of the

adopted son to claim properties as on the date of the death of the adoptive father by reason of the theory of relation back is subject to the limitation that alienations made prior to the date of adoption are binding on him, if they were for purposes binding on the estate. Thus transferees from limited owners, whether they be widow or coparceners in a joint family, are amply protected.....". However having regard to the contention which was being canvassed before their Lordships and the specific terms in which the question was posed and decided, these observations, in my view, should be confined only to the question which was being discussed. It is hardly possible to say that their Lordships intended to overrule a long series of decisions in which it was held that the surviving coparcener had full powers of alienation. There is no reference to the decision in ILR 52 Mad 398 =AIR 1929 Mad 296, to the decision in 54 Ind App 248; AIR 1927 139 (Privy Council) and the second proposition in AIR 1943 196 (Privy Council) before it, nor is there any reference to the two decisions of the Bombay High Court which had taken that view.

(9) The facts in Krishnamurthi Vasudeorao Deshpande and Another Vs. Dhruwaraj, were these. N died in 1892 leaving two daughters one of whom was K, and T widow of B, predeceased son, K and her sister took the property as heirs equally, K having died in 1933, her son V succeeded to the property. V died in 1934 leaving defendants her heirs. T adopted the plaintiff who sued for possession. Defendants contended that K being full owner, became fresh stock of descent and they had inherited the property from V. After citing the passage which I have quoted from Shrinivas Krishnarao Kango Vs. Narayan Devji Kango and Others, Mr. Justice Raghubar Dayal, says (p. 168 of Bom LR)=(At p. 62 of AIR). "It follows from these observations that if A is an owner of property possessing a title defeasible on adoption, not only that title but also all other persons claiming under him will extinguish on adoption". What I have said in respect of the decision in Shrinivas Krishnarao Kango Vs. Narayan Devji Kango and Others, applies here equally well. It is not possible, therefore to hold that even alienations by sole surviving coparcener could be affected by a later adoption.

(10) In this connection, I may also point out two of the decisions of this Court in the same volume which have a bearing to some extent on the question at issue. They are Vithalbai Gokalbhai Patel v. Shivabhai Dhoribhai Patel, 52 Bom LR 30=AIR 1950 Bom 239 and Narayan Vs. Padmanabh, . In these cases the adoptive father had made a will bequeathing his entire property to his other close relations. His widow after his death made an adoption and in both these cases the Court, relying upon the earlier Privy Council decisions, held that the property having been carried out of the family, could not be taken by the adoptive son. If this principle applies to the alienation by the adoptive father himself, it is difficult to see why the principle cannot apply to the alienation by a sole surviving coparcener who takes the property as absolute owner. Of course, there is this distinction that the adoption relates back to the time of death of the adoptive father and his alienation is deemed to be prior to the adoption even if it be by a will, while in the case of adoption after his death the alienation by the successor would technically be deemed to be after his coming into existence though the adoption is made later by reason

of the doctrine of relation back. Admittedly, the doctrine has its limitations. It seems to me, therefore, that the observation on which reliance is placed cannot apply to cases of alienation by the sole surviving coparcener. The learned District Judge in my view was right in holding that in so far as the property purchased by Rameshwar from Laxman is concerned i.e. half share in the house he cannot be divested by the plaintiff.

(11) It is then argued that the learned Judge was in error in holding that the defendants would be entitled to get the expenses of improvement. It is argued that no issue as to costs of improvement was framed with the result that prejudice is caused to the plaintiff. I am not prepared to accept this suggestion. Issue No. 7 (A) framed by the trial Court covers the question now to be decided. The trial Court held in favour of the plaintiff on the ground that the improvements were made to property out of the income of the properties of Damodar taken by Rameshwar. The learned appellate Judge has differed from that finding and has held that in his opinion Rameshwar had made the improvements out of his own moneys and, therefore he was entitled to the amount spent by him. There can therefore, be no question of remanding the proceedings to the lower Court for determination of a fresh issue.

(12) It was then argued that, in any event if Rameshwar has spent his money he was not entitled to get the amounts spent for improvement of the property. It is argued that Section 51 of th Transfer of Property Act has no application to a case like the present one. In support of that contention, the decision of the Calcutta High Court in L.A. Creet Vs. Firm Gangaraj-Gulraj and Others, to the effect that a trespasser is not covered by Section 51 was cited before me. That case is entirely different and it is erroneous to say that Section 51 is sought to be applied as if Rameshwar was in the position of a trespasser.

(13) Apart from this, in order to decide the question whether the defendant is entitled to compensation for the improvements effected by him, the preliminary consideration is what is the plaintiff entitled to. The adoption of the plaintiff, according to the authorities, relates back to the date of death of his father and he is entitled to displace the titles acquired by inheritance, by the successors. That, however, does not mean that the successors who inherited the property took the estate as trespassers. They only took the estate subject to a contingency that by an adoption they may be divested. They were not trustees for the future adopted son. It is well known that adoptions mostly are made for the estate involved and not for the spiritual benefit of the departed which at one time was the essential purpose. It is also recognised that divesting of the estate after a long lapse of time sometimes as much as thirty or fifty years of the inheritance having gone to third persons did great injustice to others for no fault of theirs. Judicial decisions therefore tried to prevent to some extent the injustice consistently with the doctrine of Hindu Law. Unless therefore there is anything in the Hindu Law, Rameshwar ought to get compensation for improvements.

(14) What the plaintiff is entitled to would be the properties as at the date of the death of Damodar. As the learned appellate Judge has observed, there was not much other property which came to Rameshwar from the income of which large amounts could have been spent by Rameshwar on the improvement of the property. The learned Judge has held that the amount spent by Rameshwar was out of his own earnings. If this is so, on the principle that the plaintiff is not entitled to an account of the management of the estate from Rameshwar, and the further fact that he is entitled to the estate as left by Damodar the plaintiff must make good the amount spent by Rameshwar on the property.

(15) It is impossible to agree with the contention of Mr. K. V. Joshi that the defendant may take away the broken bricks and mortar after demolishing the improvements if he wants to. He argues that at best, he is entitled to take away the improvements. That puts him exactly in the position of a trespasser who has innocently made an encroachment on the property of another. It is impossible in the absence of any binding authority to hold that there is any principle of Hindu Law which compels me to take this view. The authorities clearly indicate that the holder of the property is a full owner and if so he is entitled to deal with the property. If so, I see no reason to hold that Rameshwar is not entitled to the costs of the improvement. I also do not see any reason why the order regarding payment of compensation should be set aside. Even in the case before the Supreme Court in Shrinivas Krishnarao Kango Vs. Narayan Devji Kango and Others, as to the joint family property, this what the Supreme Court says:

"In the result, it must be held that the plots, S. Nos. 634 and 635, S. Nos. 639, 640 and 641 and S. Nos. 642, 644 and 645 are ancestral properties, and that the plaintiff is entitled to a half share therein. As substantial super structures have been put thereon, the appropriate relief to be granted to the plaintiff is that he be given half the value of those plots as on the date of the suit".

It clearly shows, therefore, that the Court, while decreeing the adopted son"s suit for possession of the share in the joint family property is entitled to make such equitable orders as justice demands. In the present case, the appellate Judge has given option to the plaintiff to choose whether he will pay compensation of Rs. 3600/- to Rameshwar for obtaining the share or take the value of the half share in the house as at the date of the suit.

(16) Mr. Joshi, however, contended that the option of receiving only a sum of Rupees 1,000/- given to the plaintiff as a value of his share in the ancestral house which has been improved by Rameshwar is highly inadequate. The learned Judge has said that the plaintiff himself valued the house at Rs. 2,000/- and he therefore, is entitled only to Rs. 1,000/- as his half share. It must however, be noticed that the plaintiff"s valuation is merely on approximation and it could not be the proper value of his share. Rameshwar purchased the half share of Laxman in the house as it then was for a sum of Rs. 1100/- and it is difficult to hold that in 1956 when the plaintiff filed the suit, the value could only be Rs. 1100/-. I would, therefore, modify the decree of the appellate Court by directing

that if the plaintiff exercises the option of the receiving the value of the house in its then condition as at the date of the suit, then he should get such amount as is fixed by the executing Court as the price of the house.

(17) Subject to this modification, the appeal is dismissed with costs. So far as the cross-objections are concerned, they are not pressed and are dismissed with costs.

(18) Appeal dismissed.