Phoolchand and Anr

Vs

Gopal Lal

Civil Appeal No. 1313 of 1966

(K. N. Wanchoo, R. S. Bachawat, V. Ramaswami - I JJ)

10.03.1967

JUDGMENT

WANCHOO, J.

This is an appeal on a certificate granted by the Rajasthan High Court and arises in the following circumstances. Phool Chand appellant had filed a suit in 1937 for partition of his one-fifth share in certain properties mentioned in the schedule to the plaint. The defendants to the suit were Sohanlal, father of the appellant, Gopal Lal, brother of the appellant, and Rajmal, minor adopted son of Gokalchand (deceased) who was another brother of the appellant and Smt. Gulab Bai, mother of the appellant. There were two other defendants with whom we are not concerned now. The suit was resisted by the defendants and a large number of pleas were raised with which we are also not concerned now. That suit was fought right upto the Mahkma Khas (Privy Council) of the former State of Jaipur and a preliminary decree of partition was passed specifying the shares of the appellant and the four defendants mentioned above on August 1, 1942. Before, however, a final decree could be passed one the report of the Commissioner in terms of the preliminary decree, Sohan Lal died on May 13, 1974 and soon after his widow, Smt. Gulab Bai also died on November 22, 1947. Disputes seem to have arisen about the shares allotted to these two persons. It appears that Gopal Lal claimed that his father Sohan Lal had made a will in his favour on June 2, 1940, according to which he bequeathed all his property to Gopal Lal. Phool Chand challenged the genuineness of the will. As to the share of Smt. Gulab Bai, Phool Chand claimed that she had executed a sale deed dated October 19, 1947 and registered on January 10, 1948 by which she sold all her share in movable and immovable properties which came to her by the decree of August 1, 1942 to Phool Chand. Gopal Lal, however, contended that Smt. Gulab Bai was not entitled to sell the share which she got in the ancestral property as she was a limited owner and therefore her share must be held to have devolved on Gopal Lal, Phool Chand and Rajmal. These disputes were brought before the court soon after the deaths of Sohan Lal and Smt. Gulab Bai, but nothing seems to have been done for many years. It was only on July 12, 1961 that the trial court decided the disputes, with respect to the shares of Sohan Lal and Smt. Gulab Bai. It come to the conclusion that the will had not been proved. It also upheld the sale deed in favour of Phool Chand appellant. Inconsequence the trial court redistributed the share indicated in the preliminary decree of August 1, 1942. By this re-distribution, the share of Phool Chand was increased from one-fifth to one-half; the share of Gopal Lal was increased from one-fifth to one-fourth, and the share of Rajmal was increased from one-fifth to one-fourth. The trial court however did not prepare another formal preliminary decree on the basis of this re-distribution of shares.

Thereupon Gopal Lal went in appeal to the High Court and wanted stay of proceedings relating to preparation of final decree. In these proceedings Phool Chand objected that the appeal was not

maintainable as no decree had been prepared by the trial court and no copy of the decree had been filed along with the memorandum of appeal. The High Court thereupon passed an order adjourning the matter to enable Gopal Lal to move the trial court to draw up a formal decree. Gopal Lal thereafter moved the trial court for amending the preliminary decree. But that application was rejected in September 1962. Thus the appeal of Gopal Lal in the High Court proceeded without a copy of the decree being on the record.

A preliminary objection was raised in the High Court on behalf of Phool Chand appellant on the date of hearing that as no copy of the decree had been filed along with the memorandum of appeal, the appeal was not maintainable. It was also objected that in any case there could be no second preliminary decree and that the order of the trial court varying the shares in the preliminary decree could be appealed from, if at all, after the final decree had been prepared. The High Court repelled both these contentions and held that the order of July 12, 1961 varying specification of shares in the preliminary decree passed on August 1, 1942 was a decree in the facts and circumstances of this case and Gopal Lal could appeal from it. The High Court further held that as the trial court had refused to frame a formal decree on the basis of this variation of shares it was not possible for Gopal Lal to file a copy thereof with the memorandum of appeal, but that would not take away the right of Gopal Lal to appeal.

The next point raised in the High Court was that the trial court was wrong in holding that under the Jain custom a widow had the same right as a male co-parcener in ancestral property coming to her share on partition. It was therefore contended that the sale deed by Smt. Gulab Bai in favour of Phool Chand appellant was invalid and her one-fifth share descended on the remaining three defendants to the suit, namely, Phool Chand, Gopal Lal and Rajmal. The High Court accepted the contention and held that Smt. Gulab Bai being a limited owner could not sell the property. The third contention raised before the High Court was that the will of Sohan Lal in favour of Gopal Lal was genuine and the trial court's finding that it was not proved was not correct. The High Court accepted this contention also. The result was that the High Court redistributed the shares and declared that Phool Chand was entitled to four-fifteenths share of the property, Gopal Lal to seven-fifteenths share and Rajmal to four -fifteenths share. The High Court decree being one of variance, it granted certification to Phool Chand to appeal to this Court.

Learned counsel for Phool Chand appellant has attacked the findings of the High Court on all three points. He first contends that as a copy of the decree was not filed along with the memorandum of appeal the appeal was incompetent and relies in this connection on the decision of this Court in Jagat Dhish Bhargava v. Jawahar Lal Bhargava (1). In that case it was observed that every memorandum of appeal has to be accompanied by a copy of the decree appealed from, that this requirement of O. XLI r. 1 of the Code of Civil Procedure is mandatory and in the absence of a copy of the decree the filing of the appeal would be incomplete, defective and incompetent. That no doubt is the correct position in law; but as was pointed out in that case, there many be circumstances where an appeal may be competent even though a copy of the decree may not have been filed along with the memorandum of appeal. One such exceptional case was dealt with in Jagat Dhish Bhargava's case(1). We consider that the present case is the appeal could be maintained. We have already indicated that the trial court did not frame a formal decree when it varied the shares and naturally Gopal Lal was not in a position to file a copy of the decree when he presented the memorandum of appeal to the High Court. Even when time was granted by the High Court and Gopal Lal moved the trial from framing a formal decree, the trial court refused to do so. In those circumstances it was impossible for Gopal Lal to file a copy of formal decree. It is unfortunate that when the matter brought to the knowledge of the High Court it did not order the trial court to frame

formal decree; if it had done so, the appellant could have obtained a copy of the forma decree and filed it and the defect would have been cured. We do not think it was necessary for Gopal Lal to file a revision against the order of the trial court refusing to frame a forma decree, for Gopal Lal's appeal was pending in the High Court and the High Court should and could have directed the trial court in that appeal to frame a decree to enable Gopal Lal to file it and cure the defect. In such circumstances we fail to see what more Gopal Lal could have done in the matter of filing a copy of the decree. The fact that the trial court refused to frame a formal decree cannot in law deprive Gopal Lal of his right to appeal. The defect in the filing of the appeal in the circumstances was not due to any fault of Gopal Lal and it cannot be held that he should be deprived of the right to appeal, if he had it, simply because the court did not do its duty. We therefore agree with the High Court that in the circumstances the absence of the copy of decree would not deprive Gopal Lal of his right to appeal.

The next contention is that there cannot be two preliminary decrees and therefore when the trial court varied the shares as indicated in the preliminary decree of August 1, 1942 there was no fresh preliminary decree passed by the trial court. It is not disputed that in a partition suit the court has jurisdiction to amend the shares suitably even if the preliminary decree has been passed if some member of the family to whom an allotment was made in the preliminary decree dies thereafter : (see Parshuram v. Hirabai). So the trial court was justified in amending the shares on the deaths of Sohan Lal and Smt. Gulab Bai. The only question then is whether this amendment amounted to a fresh decree. The Allahabad High Court in Bharat Indo v. Yakub Hassan (2) the Oudh Chief Court in Kedernath v. Pattu Lal(3), and the Punjab High Court in Joti Prashad v. Ganesh Lal(4) seem to take the view that there can be only one preliminary decree and one final decree thereafter. The Madras, Bombay and Calcutta High Courts seem to take the view that there can be more than one preliminary decree : (see Kasi v. V. Ramanathan Chettiar(5) Raja Peary Mohan v. Manohar(6), and Parshuram v. Hirabai.

We are of opinion that there is nothing in the Court of Civil Procedure which prohibits the passing of more than one preliminary decree if circumstances justify the same and that it may be necessary to do so particularly in partition suits when after the preliminary decree some parties die and shares of other parties are thereby augmented. We have already said that it is not disputed that in partition suits the court can do so even after the preliminary decree is passed. It would in our opinion be convenient to the court and advantageous to the parties, specially in partition suits, to have disputed rights finally settled and specification of shares in the preliminary decree varied before a final decree is prepared. If this is done, there is a clear determination of the rights of parties to the suit on the question in dispute and we see no difficulty in holding that in such cases there is a decree deciding these disputed rights; if so, there is no reason why a second preliminary decree correcting the shares in a partition suit cannot be passed by the court. So far therefore a partition suits are concerned we have no doubt that if an event transpires after the preliminary decree which necessitates a change in shares, the court can and should do so; and if there is a dispute in that behalf, the order of the court deciding that dispute and making variation in shares specified in the preliminary decree already passed is a decree in itself which would be liable to appeal. We should however like to point out that what we are saying must be confined to partition suits, for we are not concerned in the present appeal with other kinds of suits in which also preliminary and final decrees are passed. There is no prohibition in the Code of Civil Procedure against passing a second preliminary decree in such circumstances and we do not see why we should rule out a second preliminary decree in such circumstances only on the ground that the Code of Civil Procedure does not contemplate such a possibility. In any case if two views are possible - and obviously this is so because the High Courts have differed on the question - we could prefer the view taken by the High

Courts which hold that a second preliminary decree can be passed, particularly in partition suits where parties have died after the preliminary decree and shares specified in preliminary decree have to be adjusted. We see no reason why in such a case if there is dispute, if should not be decided by the court which passed the preliminary decree, for it must not be forgotten that the suit is not over till the final decree is passed the court has jurisdiction to decide all disputes that may arise after the preliminary decree, particularly in a partition suit due to deaths of some of the parties. Whether there can be more than one final decree does not arise in the present appeal and no that we express no opinion. We therefore hold that in the circumstances of this case it was open to the court to draw up a fresh preliminary decree as to of the parties had died after the preliminary decree had before the final decree was passed. Further as there was dispute between the surviving parties as to devolution of the shares of the parties who were dead and that dispute was decided by the trial court in the present case and thereafter the preliminary decree already passed was amended, the decision amounted to a decree and was liable to appeal. We therefore agree with the view taken by the High Court that in such circumstances a second preliminary decree can be passed in partition suits by which the shares allotted in the preliminary decree already passed can be amended and if there is dispute between surviving parties in that behalf was that dispute is decided the decision amounts to a decree. We should however like to make it clear that this can only be done so long as the final decree has not been passed. We therefore reject this contention of the appellant.

This brings us to the question whether the appellant was entitled to the share of Smt. Gulab Bai by virtue of the sale deed dated October 19, 1947 in his favour. Now it must be remembered that we are concerned in the present case with only the sale of the share allotted to Smt. Gulab Bai out of the ancestral property by the preliminary decree passed on August 1, 1942. The trial court held that High Courts had recognised the custom amongst Jain-Agarwala's that the rights of Jain widows were absolute and not in the nature of a limited owner. It relied on Tulsiram Khirchand v. Chunnilal Panchamsao Parwar(1). The High Court however held otherwise and we are of opinion that the High Court was right. It is true that in Tulsiram's case(1), the Nagpur High Court stated that "the widow takes an absolute estate among Jains in general and not merely in some particular sub-sects." The two cases relied on in Tulsiram's case(1) were cases of non-ancestral property, namely, (i) Mt. Sano v. Puran Singh(2) and (ii) Trimbakdas v. Mt. Mathabai(3). It is not clear whether the property in Tulsiram's case(1) was ancestral or - non-ancestral. In any case we cannot read Tulsiram's case(1) as laying down that a Jain widow has absolute rights even in the share she gets on partition out of ancestral property. We may in this connection refer to Mulla's Hindu Law, 13th Edn. p. 585, para 616 where it is stated that "in the absence of custom to the contrary, a Jain widow takes a limited interest in her husband's estate similar to the widow's estate. A custom, however, to the contrary has been proved in several cases that amongst Agarwala Jains the widow takes an absolute estate in the self-acquired property of her husband and that she has full power of alienation in respect of such property. But there is no custom which entitled her to an absolute estate in ancestral property left by her husband. In the latter case she takes only a widow's estate. " This appears to us to be a correct statement of the law. We are concerned in the present appeal with the share which Smt. Gulab Bai got out of the ancestral property by the preliminary decree of August 1, 1942; she obviously had only a limited estate or a widow's estate in that share and not an absolute estate. Therefore she could not sell it in the manner in which she sold to the appellant. The High Court therefore was right in holding that the appellant could not take advantage of the sale of the share of the widow and it must descent on the remaining three surviving parties equally, namely, Phool Chand, Gopal Lal and Rajmal. The contention therefore on this head also fails.

Then we come to the question whether the will by Sohan Lal in favour of Gopal Lal was genuine. We have already indicated that the trial court held that it was not, while the High Court was of

opinion that it was genuine. The trial court based its finding mainly on some inconsistency in the statements made by Laxmichand, an attesting witness, on two different occasions. It seems that in this suit Laxmichand duly proved the will but on an earlier occasion he had stated that he had not attested the will. There was another attesting witness who also was produced, namely, Chhotey Lal, whose evidence did not suffer from any infirmity. Besides that Basanti Lal, the scribe of the will, was also produced, though he was not present at the time of the execution of the will. His evidence is that he prepared the draft of the will on the instruction of Sohan Lal and handed over the written document either to Gopal Lal or to Sohan Lal. Finally there was the statement of Gopal Lal to prove due execution of the will for he was present when it was executed though he was not an attesting witness. Thus except for the inconsistency in the two statements of Laxmichand the evidence of the due execution of the will was over-whelming.

But it is urged that Gopal Lal in whose favour the will was made had taken a prominent part in its execution and Sohan Lal was an old man of about 70 years when the will was executed and therefore we should require strict proof of the due execution of the will. There are several circumstances which in our opinion clearly show that the will was duly executed by Sohan Lal in favour of Gopal Lal.

Firstly, Phool Chand was obviously a thorn in the side of the father and had dragged him into litigation. The will ways that Phool Chand separated from the father long before and picked up quarrels with him. It further says that Phool Chand had no regard for his duty as a son and had been behaving with the testator in a most improper and shameful way. It goes on to say that the testator was fed up with the improper behavior of Phool Chand. The testator then says in the will that contrary to it, Gopal Lal lived with him, served him and was obedient to him and he was impressed with the services of Gopal Lal. He therefore wanted his property to go to Gopal Lal and was taking the will in order that Gopal Lal may not be put to any trouble after his death and might live comfortably. The will therefore appears to be a very natural will in the circumstances. Sohan Lal obviously did not provide for his wife for she had been allotted one-fifth share in the property already by the trial court's preliminary decree. As for Rajmal Minor, it appears that he was the natural son of Phool Chand and there was dispute whether he had been adopted by Gopalchand's widow, though the dispute was eventually settled in favour of Rajmal minor by the court. In these circumstances we would not expect Sohal Lal to make any provision for Rajmal minor either who had got one-fifth share on the basis of adoption. The will therefore appears to us to be very natural and the fact that Gopal Lal took part in the execution has under the circumstances no significance. It is true that Sohan Lal was about 70 years old when the will was executed. But he lived almost seven years after the execution of the will and it is no one's case that he was in any way mentally or physically incompetent to make the will when he did so in 1940. It may be added that the will was later registered also, though the Register has not been examined as a witness. Finally there is the circumstances that the appellant knew about the will as far back as March 1941 but he never seems to have talked to his father Sohan Lal about it. In these circumstances we agree with the High Court that the due execution of the will has been proved.

The last point that had been urged on behalf of the appellant is that Gopal Lal was not entitled to any movable or immovable ancestral property by virtue of the will, as a Hindu cannot will away joint family property. We are of opinion that there is nothing in this contention. The present suit had already been filed by the appellant in 1937 and immediately on the filing of the suit there was severance of status among the members of the joint Hindu family, even if Phool Chand had not separated earlier as stated by Sohan Lal in the will. Further a preliminary decree had also been passed by the trial court in April 1938 by which various shares were allotted to various members of

the family. In these circumstances Sohan Lal was perfectly competent to will away the share he got out of the joint family property and that is what he did. He has stated in the will that Gopal Lal would be the rightful owner of his self-acquired immovable property. He further stated that Gopal Lal would be the rightful owner of his share in the ancestral property and finally he stated that Gopal Lal would be the rightful owner of all of his articles, i.e. jewellery, ornaments, clothes, utensils, and other domestic articles. The last clause relating to movable property clearly refers both to the share that Sohan Lal got in the movable property by severance of status and specification of shares in the preliminary decree and to any self-acquired movable property. There is therefore no force in this contention.

The appeal therefore fails and is hereby dismissed with costs.

V. P. S. Appeal dismissed.

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