Mst. Dhanpatti

Vs

Devi Prasad and Others

Civil Appeal No. 1285 of 1969,

(S. M Sikri, V. Bhargava, A. N. Grover JJ)

20.02.1970

JUDGMENT

HEDGE, J. -

1. In this appeal by special leave the only question that falls for decision is whether the High Court was right in its conclusion that the appellant is precluded from contesting the claim of the plaintiffs on the grounds that she had earlier made an election by which she is bound.

2. The suit from which this appeal arises is for partition. The facts found and undisputed at present are - that the suit house belonged to one Gokul. Her died several years back. Maharji, his wife, inherited his properties but she merely has widow's estate therein. On May 1, 1934, she gifted the house inherited by her from her husband to her two daughters, Dhanpatti (the appellant herein) and Sursati, the month of the plaintiffs. The gift deed recited that the donees will enjoy the properties bequeathed to them absolutely. Sursati died on February 19, 1969. Her mother Maharji lived up to 1953. After the death of Maharji the plaintiffs brought the present suit for partition of the suit house. The appellant resisted that claim on the ground that she being the nearest heir to her mother, Maharji, is exclusively entitled to the suit house. Her contention was accepted by the Trial Court as well as by the first appellate Court but in second appeal, a single Judge of the High Court of Allahabad reversed that decision on the ground that the appellant is precluded from claiming exclusive ownership of the house in view of the election made by her while accepting the gift made by her mother. The question for decision is whether this conclusion is sustainable in law.

3. The plaintiffs did not base their claim on the ground of election or on estoppel. They sued solely on the basis of their title founded on the gift deed executed by Maharji. No issue as regards election or estoppel was framed nor any contention in that regard urged either in the Trial Court or in the first appellate Court. The contention based on the doctrine of election appears to have been raised for the first time in the High Court. In our opinion the High Court erroneously entertained that contention.

4. So far as election is concerned, the law pertaining the same is set out is Section 35(1) of the Transfer of Property Act. That section reads :

> "Where a person professes to transfer property which he has no right to transfer, and as part of the same transition confers any benefit on the owner of the property, such owner must elect either to confirm such transfer or to dissent from it; and in the latter case he shall relinquish the benefit so conferred and the benefit so relinquished shall revert to the transferor or his representative as if it had not been disposed of subject nevertheless .....

> Where the transfer is gratuitous, and the transferor has before the election died or otherwise become incapable of making a fresh transfer, ... and in all cases where the transfer is for consideration, ...
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> to the charge of making good to the disappointed transferee the amount or value of the property attempted to be transferred to him."

5. Before there can be an election there must be (1) a transfer of a property by a person who has no right to transfer; (2) as a part of the same transaction, he must confer some benefit on the owner of the property and (3) such owner must elect either to confirm such transfer or to dissent from it. On the date Maharji made the gift, she was the owner of the property though she had only a limited estate in that property. It is true that she purported to convey an interest larger than she possessed in that property but then on that date the appellant was not the owner of the property. Therefore when Maharji conferred some benefit on the appellant and her sister under the gift deed, she was conferring some benefit on persons who had no title to the property on that date. At that time they had at best an expectancy. Therefore there was no question of any election. That apart, there is nothing to show that the appellant agreed to an absolute gift in favour of her sister Sursati. From the fact that she knew about the gift, no inference that she concerned to the same cad be drawn. Further as mentioned earlier, there was no pleading as regards election, no issue raised, no evidence led and no arguments advanced either in the Trial Court or in the first appellate Court. Therefore, there was absolutely no basis for the finding reached by the High Court that the appellant had elected to accept half the suit property absolutely in lieu of her right to succeed to the estate as the heir of Gokul on the death of her mother. The decision of this Court in Sahu Madho Das and Others v. Pandit Mukand Ram and Another, ((1955) 2 SCR 22) on which the High Court has placed reliance in support of its conclusion is of no assistance in this case. Therein on the basis of the pleadings, the evidence oral and documentary and the circumstances of the case, the Court came to the conclusion that the arrangement entered into was a family arrangement. No such case is either pleaded or proved in this case.

6. In the result this appeal is allowed, the judgment of the High Court is set aside and that of the District Court restored but in the circumstances of the case the parties shall bear their own costs both in this Court as also in the High Court.

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