Daulat Rao Jai Ram Ji (Since Dead) Lrs.

Vs

Harish Chandra and Others

Civil Appeal No. 755 of 1967

(K. S. Hegde, A. N. Grover, D. G. Palekar JJ )

03.08.1972

JUDGMENT

HEGDE, J. -

1. This is a plaintiffs' appeal by certificate. Plaintiff Daulat rao who died during the pendency of this appeal sought several reliefs in suit No. 5-A of 1955 in the Court of the Second Additional District Judge, Amravati. But at present we are primarily concerned with relief No. 1 claimed in the plaint viz :

> "That it be declared that defendant No. 3 has no right or title to the property in Schedules A, B and 1/2 share in Schedule D and permanent injunction be issued to him not to interfere with plaintiff's enjoyment and possession of property shown in Schedules A, B and 1/2 share in Schedule D."

2. The relief claimed does not properly bring out the controversy between the parties. The plaintiff really wanted a declaration that he had not adopted the third defendant, Harishchandra and as such the said Harishchandra has no interest in the plaintiff's properties. The third defendant claimed that he had been adopted by the plaintiff on January 5, 1955. The trial court held that the adoption pleaded by the third defendant is neither true nor valid. The High Court of Bombay (Nagpur Bench) reversing the judgment of the trial court upheld the adoption put forward by the third defendant.

3. There was a controversy between the parties as to whether the plaintiff and his brother Champatrao, defendant No. 1 were members of an undivided family or whether they were divided. Both the trial court as well as the High Court came to the conclusion that there was partition between the plaintiff and his brother in the year 1948. That conclusion was not even challenged before the High Court. Hence there is no need to go into it.

4. In paragraph 7 of the plaint, the plaintiff had definitely averred that if the court is pleased to uphold the adoption put forward by the third defendant, he does not wish to remain joint with the third defendant. It was further averred therein that in the notice issued by him on January 29, 1955 to Defendants 1 and 3, he had expressed his intention to separate and he had effected severance between him and the third defendant. As an alternative relief he claimed partition of the properties that fell to his share in 1948 between himself and the third defendant. No proper issue was raised on this plea. Evidently the trial court having granted the main relief in favour of the plaintiff did not think it relevant to go into the alternative relief asked for. No arguments relating to that relief appear to have been advanced before the High Court. The High Court has also not considered that question. But in this Court Mr. V. S. Desai appearing for the appellants pressed that alternative contention. We

shall consider that contention at a later stage.

5. In order to decide the question whether the third defendant was in fact adopted by the plaintiff on January 5, 1955, and whether the adoption pleaded was a valid one, it is necessary to state a few more facts. The plaintiff and the 1st defendant Champatrao are direct brother. They are the sons of one Jairam. The plaintiff had two wives, Mankarnika (Defendant 4) and Deokabai (Defendant 5). He had no sons. But he had a daughter by name Vatsala (Defendant 6). This daughter had a son and a daughter. The plaintiff had also a mistress by name Savitri, who was defendant No. 7 in the suit. Champatrao had three sons : Abarao (Defendant 2), Harishchandra (Defendant 3) and Vasant (Defendant 8). Vasant had been adopted by one Khushalrao Deshmukh.

6. The case for Defendants 1 to 3 is that the plaintiff adopted defendant No. 3 on January 5, 1955 at Amravati in the compound of Dr. Mudaliar's nursing home. Thereafter a photo was taken. A deed of adoption was also written up on that day and registered on January 7, 1955. The plaintiff and Defendants 4, 5 and 6 denied the adoption pleaded. According to them the plaintiff had a paralytic stroke sometime in the year 1954. At that time he was treated by Dr. Mudaliar but he was nursed by his brother defendant No. 1. In about the beginning of January 1955, he had attack of pneumonia. Hence he was brought to the hospital of Dr. Mudaliar. While he was in that hospital, he was unconscious for several days; taking advantage of the physical and mental condition of the plaintiff, defendant No. 1 got up the adoption deed as well as several other documents.

7. The burden of establishing that there was a valid adoption which deflected the ordinary course of succession is undoubtedly on the party who pleads the case of adoption. In the instant case, there is almost conclusive evidence to show that the plaintiff had adopted the third defendant on January 5, 1955. Immediately after the adoption, as is usual in Maharashtra, a photograph of the adoptive father, the adopted boy as well as of other relations had been taken. The photographer has been examined. he has also produced the negative. There is no reason to disbelieve the testimony of the photographer. The photograph in question completely falsifies the story of the plaintiff that at about the time of the adoption, he was unconscious. It is seen from the photograph that the plaintiff was well-dressed when the photograph was taken. He was sitting erect and alert. Though he looks old and weak in the photograph, he looks quite cheerful. As regards the state of his health at about the time of adoption, the plaintiff has given various versions each contradicting the other. At one stage of his evidence he stated that he was only mentally feeble at that time because of the illness; at another place he deposed that he was unconscious for four or five days but he later asserted that he was unconscious for one full month. Hardly any reliance can be placed on the testimony of the plaintiff. The best witness who could have spoken to the physical and mental condition of the plaintiff was Dr. Mudaliar. Dr. Mudaliar has not been examined. No reason is forthcoming for his non-examination. Curiously enough instead of examining Dr. Mudaliar, the plaintiff has chosen to examine his compounder, whose evidence clearly discloses that he knew very little about the nature of the plaintiff's ailment. Some records said to have been maintained in Dr. Mudaliar's dispensary had been produced. Naturally the High Court was not able to attach any importance to those documents. Nor do we attach any importance to them.

8. We next come to the question of the adoption deed. The plaintiff admits that the signatures found therein are his. His explanation is that the said signatures were obtained by practising fraud on him and that he did not know the contents of the document when he signed the same. This is clearly falsified by the testimony of the Sub-Registrar who registered the document. The Sub-Registrar deposed that the adoption deed was presented before him by the plaintiff on January 7, 1955 and that the plaintiff admitted before him the correctness of its contents. There is no reason to disbelieve

the testimony of the Sub-Registrar who appears to be an independent witness. In addition to the evidence of the Sub-Registrar, the third defendant has examined two of the attesters to the adoption deed. One of the attesters to the adoption deed is a common relation of the plaintiff as well as of the first defendant.

9. The story put forward by the plaintiff as regards the execution of the deed is extremely artificial. It may be noted that at about the time, the plaintiff executed the adoption deed, he had also executed gift deeds in favour of his two wives, his mistress and his daughter. He himself presented all those documents for registration. Apart from averring in the plaint that those documents were fictitiously got up by the 1st defendant, the plaintiff has not even challenged the validity of those documents. Apparently he stood by those documents. The 1st defendant could not have had any interest in getting gift deeds in favour of the plaintiff's wives, his mistress and the daughter. The execution of these deeds undoubtedly go to strengthen the case of the third defendant that the plaintiff voluntarily executed the adoption deed.

10. Now coming to the factum of adoption, firstly there is an admission of that fact in the adoption deed executed by the plaintiff. Then we have the evidence of the photographer who speaks to the fact that a photograph of the persons who participated in the adoption was taken by him very soon after the adoption. Added to this we have the evidence of the priest who officiated at the adoption. As many as six witnesses had attested the adoption deed. Out of them, two have been examined. They speak to the adoption ceremony. They speak to the giving and taking of the boy. The High Court has accepted their testimony. We see no reason to differ from the conclusions reached by the High Court.

11. Some comment was made on the facts that the adoption is said to have taken place in the compound of Dr. Mudaliar's hospital and that too very near a latrine; no invitations had been issued for the adoption, there was no music and that there was no reception. In addition, it was also alleged that the ladies of the house who were alleged to have been present at the time of the adoption do not appear in the photo and that circumstance indicates that there was no adoption. These circumstances undoubtedly show that the adoption in question was not done with the concurrence of the wives of the plaintiff. It may be that the plaintiff had adopted the third defendant without the knowledge of his wives and with a view to avoid any obstruction by them he had gone to Amravati and adopted the third defendant. Possibly under the influence of his wives, he had later tried to resile from the adoption made.

12. This Court ordinarily attaches great deal of importance to the findings of fact reached by the High Courts. The findings reached by the High Court are probabilised by the circumstances appearing in the case and are supported by oral and documentary evidence. Under these circumstances, we are not called upon to reassess the evidence minutely. In the result we agree with the High Court that the plaintiff had adopted the third defendant on January 5, 1955. We do not agree with the trial court that there is no satisfactory evidence as regards giving and taking of the boy.

13. This takes us to the alternative relief asked for in the plaint. Obviously parties to the suit as well as the trial court as well as the High Court had exclusively focussed their attention on the question of adoption. The trial Judge having decided the main question in favour of the plaintiff probably thought it unnecessary to examine the alternative relief claimed. It must also be said that the issues framed did not directly touch the said relief. The High Court in its judgment after dealing with the question of adoption clearly says that "no other issue was canvassed in the appeal." But all the same,

the plaintiff had clearly declared his intention to be separated from the third defendant in paragraph 7 of the plaint. He had also claimed that a partition be effected by metes and bounds through court. In his written statement, the third defendant has admitted the plaintiff's right to get a share. The plaintiff's right to get a share is not open to any dispute. The plaintiff stood separated from the third defendant by the time the suit was filed. His share had to be determined as on the date he got separated from the third defendant. The plaintiff died in 1969 during the pendency of the litigation. His share devolved on his heirs according to law. It was contended on behalf of the contesting respondents that the plaintiff having not pressed the alternative relief claimed before the High Court, we should not go into that question at this stage and the parties should be allowed to work out their rights in a separate suit. We see no justification for that course. The deceased plaintiff was entitled to have his share worked out in the present suit itself. He having died during the pendency of the litigation his share devolved on his heirs. It is but appropriate that the rights inter se between his heirs should be worked out in this very litigation. We were told at the bar that the plaintiff died in 1969 after the Hindu Succession Act came into force. It is not possible for us to work out the rights of the parties in this Court. We think that under the circumstances of the case, it is appropriate to remand this case to the trial court to ascertain as to what was the share of the deceased plaintiff on the date he got separated from the third defendant, who are all his heirs and to what share each one of them is entitled to. The trial court will also divide by metes and bounds not merely the shares inter se between the deceased plaintiff and the third defendant but also between the heirs of the deceased plaintiff. Unless there was any disposition made by the deceased plaintiff of his share, the third defendant is also admittedly one of the heirs of the deceased plaintiff.

14. In the result this appeal is partly allowed and the case remanded to the trial court to carry out the directions given above. So far as the costs of the trial court and the High Court are concerned, the High Court has already directed the parties to bear their own costs throughout. We make a similar order as to the costs in this Court. In other words, the parties shall bear their own costs in this Court also.

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