Lakshmi Chand Khajuria and Others

Vs

Ishroo Devi

Civil Appeal No. 2330 of 1968

(A. C. Gupta, P. S. Kailasam JJ)

31.03.1977

JUDGMENT

KAILASAM, J. –

1. This appeal is preferred by the defendant in the suit on a certificate of fitness granted by the High Court of Jammu & Kashmir under Article 133 of the Constitution.

2. The respondent, Ishroo Devi, filed a suit for a decree for possession of all three items of property mentioned in the plaint and for future mesne profits. It was alleged that the three items of property mentioned in the plaint were the self-acquired properties of one Purohit Mani Ram. He executed a will on May 25, 1959, out of his own free will in favour of the respondent. The original will was attached to the plaint. Purohit Mani Ram died on March 24, 1960, at Jammu and the respondent claimed to be the sole owner of the properties.

3. The first appellant is the son, the second appellant is the wife and the third appellant is the grand-daughter of Purohit Mani Ram. In the plaint it is alleged that the first appellant after the death of Purohit Mani Ram got rent deed executed in his favour and also recorded mutations in his name and dispossessed the respondent. The respondent also claimed that the three items of property were the separate properties of Purohit Mani Ram and that he entitled to dispose of them under a will. In the written statement the appellants averred that the properties belonged to the joint family of which the first appellant and his father, Purohit Mani Ram were members and as the properties were joint family properties, they cannot be disposed of by will. It was further alleged that the will was a forged one and is fictitious.

4. The respondent examined Janak Lal Sehgal, an advocate of the Supreme Court, and the scribe of the will, one Bodh Raj. PW 1, the advocate, stated that Mani Ram executed the will on May 25, 1959, in favour of the respondent. He saw Mani Ram affixed his signature on the will. The words (in vernacular) under which Janak Lal had signed as witness, were under the words (in vernacular) where Purohit Mani Ram had signed. Janak Lal had given the date with his own hand where he had signed as witness. The witness also testified that the mental condition of Purohit Mani Ram was good and he executed the will of his own free will and no pressure or fraud was played on him. PW 2 Bodh Raj, is the scribe of the will. He stated that he wrote the will at the instance of Mani Ram and after reading the will and explaining it to the testator, the testator affixed his signature and admitted it to the correct. According to the witness the will was executed on May 25, 1959, and on the same date the signature of the testator and those of the witnesses were affixed. At the time of the examination the witness stated that the physical and the mental condition of the testator was good and that he read out the will at the house of Janak Lal Sehgal and obtained the signatures of Mani

Ram and that of PW 1, the advocate. PW 3, Lodra Mani, stated that Mani Ram was the A.D.C. of Maharaja Pratap Singh and was in service for Maharaja's Puja and that the Maharaja was giving lot of money to Purohit Mani Ram as present. The witness also stated that item 1 of the properties was constructed by Mani Ram with his own income.

5. On behalf of the appellants a handwriting expert, Philip Hardless, and three witnesses were examined in addition to the first appellant.

6. The trial Court accepted the evidence of PW 1, the advocate, and PW 2, the scribe and held that the will was proved. Holding that items 1(b) and 2 of the plaint schedule properties were ancestral properties found that Mani Ram had no authority to dispose of these two items of properties by will. Therefore while decreeing the suit as regards items 1(a) of the plaint schedule properties dismissed the claim as regards items 1(b) and 2.

7. On appeal by the appellants Bench of the Jammu & Kashmir High Court agreeing with the finding of the trial Court and accepting the testimony of PW 1, the advocate, and PW 2, the scribe of the will, found it to be genuine and executed by Mani Ram. The appellate Court also confirmed the finding of the trial Court that the item 1(a) of the property is self acquired property of Mani Ram while items 1(b) and 2 are the ancestral properties. While confirming the decree of the trial Court as regards item 1(a) it allowed the respondent's claim regarding item 1(b) and 2 to the extent of one-half share holding that under Section 27 of the Jammu & Kashmir Hindu Succession Act, Mani Ram was entitled to dispose of his interest in the joint family property by will. Aggrieved by the decision of the Bench of the Jammu & Kashmir High Court the appellants have preferred this appeal.

8. Though the concurrent finding of both the Courts below is that the will was a valid one and was executed by Mani Ram of his own free will and when possessed of all his faculties Mr. Pai, the counsel for the appellants, strenuously contended that the finding should not be accepted. He submitted that a look at the signature of Mani Ram in the will and his signatures in admitted documents would prove that the signature will is not that of Mani Ram. He next contended that the will was antedated in order to escape the prohibition against alienation introduced by an Ordinance which came into force in July, 1959. Thirdly, he submitted that the will is a most unnatural one as it had not provided for the son, or the wife or near relatives but had given the entire property to a distant relation. Fourthly, he submitted that in a suit which was filed by the son for partition against Mani Ram, the latter gave an undertaking not to alienate his properties and taking into account the account the proceedings it is most unlikely that he would have executed the will at the time which it purports to be as he would have mentioned about his execution of the will in the proceedings. We have examined all these points very carefully and we find that there is not substance in any one of them.

9. The plea that the will was executed after July, 1959, when there was a prohibition against the alienation and it was pre-dated is without any substance. The will is dated May 25, 1959, and a contemporaneous record of the substance of the will is made by PW 2 in one of his regularly kept books. We see no need for pre-dating of the will and the basis of the argument that the will was not executed on the day on which it purports to be is without substance.

10. Regarding the next contention that the will is an unnatural one it has to be seen that the son had filed a suit for partition and in the written statement the father had gone so far as to disown his paternity. It is common ground that the relationship between Mani Ram and his son was greatly

strained and it is not surprising that he has disowned him in unmistakable terms in the will. The submission that the will would not have been executed in mid 1959 is based on the plea that he had made a statement in December, 1959, that he had not alienated any property. The son in the suit prayed for an order against Mani Ram restraining him from alienating the joint family properties except with the permission of the Court. A consent order was passed directing Mani Ram not to alienate joint family properties. There was no need for Mani Ram to mention about the will for it is not an alienation and in any event the will according to Mani Ram did not relate to joint family properties. The non-disclosure of the execution of the will is understandable because Mani Ram did not want anyone particularly his son to know about his dispossessing of the property by will. This ground also is without substance.

11. The main ground of attack was that on the face of it, it is apparent that the signature is not that of Mani Ram. The appellant court has found that Mani Ram was an illiterate person and that he had no standard signature. His signature is not well-formed, but his signature in the Vakalatnama and in the will bear striking resemblance as found by the Bench of the High Court. Though there are certain dissimilarities between the signature in the will and in those of admitted documents we are unable to say that the signature in the will is not that of Mani Ram. In this connection we have examined the evidence of the handwriting expert who gave evidence on behalf of the appellants. We feel that his qualifications are not such as to accept him as a handwriting expert. He had hardly done any work as an expert after 1950 and we find in his deposition that he exceeded the limits as an expert and supported the appellants in matters which were not within his province. We have no hesitation in agreeing with the High Court and rejecting his testimony. A comment was made on the fact that the date and endorsement in the will is in a different ink and probably was not written at the same time. In this connection a discrepancy in the evidence of the scribe, PW 2, as to where actually the date was noted whether it was in his house or that of the lawyer's was made much of. We do not think that this discrepancy would affect the truth of the matter. It is seen that PW 2 in his record entered summary of the will on the same day. It is significant that in the cross-examination no question was asked challenging the genuineness. The entry with regard to the will was made by PW 2 in the Register which is a public register and on examination we find there is nothing suspicious about it. It may also be noted that the first appellant, the son of Mani Ram has not stated that the signature found in the will is not that of his father. Apart from all these circumstances we find the evidence of PW 1, a respectable advocate, who speaks of his advising in the preparation of the will, his seeing the executant sign the will in his presence can be safely accepted. Excepting that a statement which he made as a witness was rebutted by a District Judge nothing else has been suggested against him. We have no hesitation in accepting the evidence of these two witnesses, as the two lower courts have done. There is no ground at all for rejecting the evidence PW 2, the scribe, whose evidence has been accepted by both the courts. The scribe had immediately noted the gist of the will in one of his regularly kept records which has not been challenged. We have, therefore, no hesitation in accepting the finding of the two lower Courts that the will is a genuine one and was executed by Mani Ram of his own free will.

12. Mr. Pai, counsel for the appellants, submitted that the High Court was in error in holding that item 1(a) of the properties is the self-acquired property of Mani Ram. According to the learned counsel the hereditary profession of Mani Ram was that of a priest and whatever he earned while practising that profession and all his acquisitions should be held to be joint family property. The evidence is that Mani Ram was not only a priest but worked in three posts. He was a priest and at the same time was in the private office of the Maharaja and was also an A.D.C. of the Maharaja and the Maharaja used to give presents to him. It is in evidence that the Maharaja had given the land and himself constructed the Kothi before giving it to Mani Ram. In support of the contention that the

income derived from practice of a hereditary profession should be construed as ancestral property, the learned counsel referred us to two decision in Ghelabhai Gavrishankar v. Hargowan Ramji (ILR 36 Bom 94 : 13 Bom LR 1171 : 12 IC 928), and Hanso Pathak v. Harmandil Pathak (AIR 1934 All 851 : 151 IC 11 : 1934 ALJ 1197). Neither of the cases support the contention of the learned counsel. In the first case the question that arose for consideration was nature of the office of a hereditary priest. It was held that the hereditary right of the priest is immovable property. Chandavarkar, J. pointed out that hereditary priesthood vested in particular families is regarded as vritti or immovable property but we do not find any support for the contention that the income of the hereditary priest will also be hereditary property. In fact in Hanso Pathak v. Harmandil Pathak it has been made clear that in the United Provinces the income received as amounts paid by Yajamans at their discretion either by way of charity or by way of remuneration for personal services rendered by the priest, cannot be claimed as of right, and cannot amount to a family property. Chief Justice Sulaiman expressed his view that the income received as amounts paid by people at their discretion either by way of charity or by way of remuneration for personal services rendered cannot be claimed as of right, and cannot amount to family property. Mukerji, J. in a concurring judgment after distinguishing Ghelabhai Gavrishankar v. Hargowan Ramji held that the income is "Vidyadhana" which is the same thing as "gains of science" or what has been acquired by exercise of learning and cannot be divided by partition. We agree with the view thus expressed by the Allahabad High Court and find that the income from the practice of a hereditary profession will not be joint family property.

13. Mani Ram was getting Rs. 100 as A.D.C. and was in addition drawing a salary of Rs. 140 a month as an employee in the private Department of the Maharaja. Thus he had ample means to acquire item 1(a) of the property from his self-acquisition. On the other hand there is hardly any evidence to prove that he had any ancestral nucleus. It is stated that the family had some jewels an cash which were kept in the safe of the Maharaja and there is nothing to indicate that anything out of the cash or jewellery was used in purchasing item 1 of the property. It was also contended that the property that belonged to Mani Ram was only the house and not the land attached to the house. We have no hesitation in rejecting this desperate plea. The result is we confirm the findings of the Court below that item 1(a) of the property is the self-acquisition and the decree of the Appellant Court so far as item 1(a) is concerned is confirmed.

14. Regarding items 1(b) and 2 the Appellant Court has found that they are joint family properties. It is admitted by both the parties that under Section 27 of the Jammu & Kashmir Hindu Succession Act, 1956, the interest of the coparcener in a joint Hindu family property can be disposed of by will. Section 27 provides that any Hindu may dispose of by will any property which is capable of being disposed of by him in law, The Explanation to the Section makes it clear that the interest of a male Hindu in a Mitakshara coparcenary property be deemed to be property capable of being disposed of by him within the meaning of the sub-section. As the joint family consisted of Mani Ram and his son, the first appellant, the Appellant Court gave a decree in favour of the respondent so far as one-half share of items 1(b) and 2 of the properties are concerned. The counsel for the appellant submitted that the Appellant Court was in error in determining the interest of the testator as one-half share in the two items of joint family property. He submitted that according to Mitakshara law except in Madras when there is a partition between the son and his father, mother is entitled to a share equal to that of the son. In support of his contention the learned counsel referred to Mulla's Hindu Law, 14th Ed. p. 403, paragraph 315, where it is stated that while the wife cannot demand a partition, but if a partition does take place between her husband and his sons, she is entitled to receive a share equal to that of a son and to hold and enjoy that share separately even from her husband. To the same effect is the passage in Mayne's Hindu Law, 11th Ed., p. 534, paragraph 434,

where it is stated "According to the Mitakshara law, the mother or the grandmother is entitled to a share when sons or grandsons divide the family estate between themselves, but she cannot be recognised as the owner of such share until the division is actually made, as she has no pre-existing right in the estate except a right of maintenance". Reference was also made to the decisions reported in Dular Koeri v. Dwarkanath Misser (ILR 32 Cal 234), where it was held that under the Mitakshara law when partition of joint family property takes place during the father's life-time at the instance of the son, the mother of the son is entitled to a share equal to that of her husband and her son; and she is entitled to have the share separately allotted, and to enjoy that share when so allotted. In Sumrun Thakoor v. Chunder Mun Misser (ILR 8 Cal 17 : 9 CLR 415), it was held that under the Mitakshara law where a partition takes place between a father and a son, the wife of the father is entitled to a share. in Hosbanna Devanna Naik v. Devanna Sannappa Naik (ILR 48 Bom 468 : AIR 1924 Bom 444 : 26 Bom LR 424), it was held that a step-mother is entitled to a share on partition between the father and his sons. In Pratap Singh v. Dalip Singh (ILR 52 All 596 : 1930 ALJ 793 : 125 IC 762), in a partition between a Hindu father and his son it was held that the wife of the father has a right to a share equal to that of the father or the sons. In Madras though Mitakshara law is applicable it has been held that on a partition between the sons and that father, the mother is not entitled to any share. (Mulla's Hindu Law, 14th Ed., p. 403 - "Madras State. - In Southern India the practice of allotting shares upon partition to females has long since become obsolete."). So far as Jammu & Kashmir is concerned there is no decision regarding the interest of a male Hindu in coparcenary property.

15. This question as to what is the interest of Mani Ram in the joint family property at the time of his death was not raised before the High Court. In fact, the case of the first appellant was that the joint family consisted of himself and his father alone, though in the partition suit filed by him he claimed one-third share conceding that his father and mother are entitled to the other two-third share. Though the question was not raised in any of the Courts below, we feel that being a pure question of law, interests of justice require that the question be decided. The High Court will decide the interest which Mani Ram had in the joint family property at the time of his death which he could dispose of by his will. In remitting this question to the High Court, we decree the suit of the respondent in respect of one-half share of item 1(a) and one-third share in items 1(b) and 2 of the plaint schedule properties as to that extent her share is not questioned. The question as to what is the extent of the interest as regards items 1(b) and (2) of the plaint schedule properties which can be bequeathed by Mani Ram in favour of the respondent is remitted to the High Court for its determination. If the High Court finds that the respondent is entitled to one-third share it will decide accordingly. If it comes to the conclusion that Mani Ram was entitled to bequeath a greater share it will grant a decree accordingly. There will be no order as to costs. Appeal disposed of accordingly.

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