

Brahmvart Sanathan Dharam Mahamandal, Kanpur and Others

Vs

Prem Kumar and Others

Civil Appeals Nos. 636-639 of 1971

(D. Chinnappa Reddy, R. B. Misra JJ)

10.05.1985

JUDGMENT

R. B. MISRA, J. -

1. These appeals by certificate are directed against the common judgment and order of the High Court of Judicature at Allahabad dated May 14, 1963. As the appeals raise common questions of fact and law they are being disposed of by a common judgment.
2. The circumstances leading up to these appeals are as follows. One Lala Gurdin acquired considerable landed property in villages Patara, Mubarakpur Lata, Madanpur, Gosra and Jeora Nawabganj in Kanpur. He had no male issue. He died on December 10, 1861 leaving behind his widow Smt. Amrit Kuer and three daughters; Smt. Hazaro Kuer from his predeceased wife, and Smt. Mewa Kuer and Smt. Prago Kuer from Smt. Amrit Kuer. After the death of Gurdin his entire estate came into the hands of his widow, Smt. Amrit Kuer. Amrit Kuer also died on August 1, 1880. During her lifetime she made certain alienations but those alienations are not relevant in the present appeals. After her death the three daughters of Lala Gurdin succeeded to the estate left by Smt. Amrit Kuer, as limited owners. Soon after the succession the three daughters divided the property amongst themselves and they came in possession of one-third share each. When Smt. Prago Kuer, one of them, died on July 8, 1907 the estate remained with the two surviving daughters. When Smt. Hazaro Kuer, the other daughter, died on January 24, 1914 the estate remained in possession of Smt. Mewa Kuer, the last surviving daughter. She also died on June 14, 1923.
3. During their lifetime the three daughters had been making various alienations of the property that daughters had been making various alienations of the property that fell to their exclusive share Smt. Mewa Kuer also made a number of alienations in favour of different times. We are concerned in the present appeals with sale deeds July 27, 1901; July 17, 1914 and October 19, 1915. The sale deed dated July 27, 1901 was executed by Smt. Mewa Kuer to one Ram Narain in respect of the entire Mahal Mewa and 2 anna 8 pie share in Mahal Katri. Ram Narain's successors in their turn sold the suit property by means of two sale deeds one dated July 14, 1919 in favour of Rai Sahib Lala Gopi Nath who is dead and is represented by defendants 19 to 23 in suit No. 25 of 1935 and the other dated January 2, 1920 in favour of Brahmavart Sanathan Dharam Mahamandal, Kanpur, hereinafter referred to as the trust, and arrayed as defendant 8 in suit No. 25 of 1935.
4. Smt. Mewa Kuer further executed a sale deed on July 17, 1914 in favour of two brothers, Kundan Lal Tiwari and Balbhadar Tiwari, hereinafter referred to as the Tiwari brothers, in respect of nine specific plots in Mahal Hazaro Kuer. Ram Dayal son of Smt. Mewa Kuer also joined Smt. Mewa Kuer in the execution of this sale deed. Tiwari brothers in their turn sold some of the property to

Gopi Nath on February 21, 1920. Tiwari brothers also executed a gift deed dated October 12, 1919 in respect of 8 bighas and odd pertaining to Mahal Prago Kuer and 5 bighas and 16 biswas in Mahal Hazaro Kuer to the aforesaid trust. Smt. Mewa Kuer and Ram Dayal again executed a sale deed dated October 19, 1915 in respect of 8 anna share in Mahal Prago Kuer and one anna 4 pie share in Mahal Katri to defendants 4 and 5 in suit No. 25 of 1935.

5. After the death of Smt. Mewa Kuer, the last surviving daughter, on July 14, 1923 the succession opened in favour of daughter's sons of Lala Gurdin, Maharaja Bahadur, and Bijay Bahadur, the sons of Smt. Hazaro Kuer, and Ram Dayal the son of Smt. Mewa Kuer. Ram Dayal also died in 1931 leaving behind his son Madho Dayal. After the death of Ram Dayal the reversioners sought to challenge the various alienations made by the limited owners, some by Smt. Amrit Kuer and the others made by the daughters of Lala Gurdin. Suit No. 25 of 1935 was filed by Kunwar Maharaja Bahadur and Kunwar Bijay Bahadur along with their financier Sukhraj Bux Singh for possession in respect of their two-third share of the property, for demolition of the valuable construction raised on the said property and for recovery of mesne profits against the transferees or the subsequent purchases from those transferees. Suit No. 34 of 1935 was filed by Madho Dayal son of Ram Dayal for the same reliefs in respect of the remaining one-third share. The alienation were challenged by the plaintiffs on the allegations that there was no legal or pressing necessity for the transfers and that transfer by one of the daughters without the consent of the remaining daughters was void ab initio and no title passed on to the transferees. It was further alleged that the transferees from the limited owners themselves had no valid title and so they could not pass a better title to others and thus those transfers were also bad.

6. The suits were contested by the various defendants by filing separate written statements. It is, however, not necessary to give details of the various written statements filed in the case, suffice it to say that the defence in the main was that the transfers were for legal and pressing necessity and that there has been a complete partition among the three daughters of Lala Gurdin and each one of them was in separate possession of one-third share of the estate and, therefore, each was competent to transfer the property without the consent of thither limited owners, that some of the defendants viz. the trust defendant 8 in suit No. 25 of 1935 had raised a double storied building of Sanathan Dharam Degree College, Principal's quarter, quarters for the teachers, hostel for the students, dispensary and library building at a heavy cost of rupees 4 to 5 lacs. Likewise defendants 19 to 23 in Suit No. 25 of 1935 had raised a costly residential building, swimming pool etc. at a cost of more than a lac of rupees. It was further asserted that the transfer by one daughter without any objection from thither daughters will be presumed to have been made with the consent of the other daughters. The defendants also sought the protection of Section 43 of the Transfer of Property Act inasmuch as after the death of the two daughters. Smt. Mewa Kuer became the sole heir and the transfers made by her during the lifetime of the grant by estoppel. The Additional Civil Judge who tried the suit found that sale deed dated July 27, 1901 was for legal necessity but as it was executed without the consent of the other two daughters it was invalid and not binding on the plaintiffs. As regards the sale deeds dated July 17, 1914 and October 19, 1915 the learned Judge found them to be for legal necessity. These sale deeds had been executed by Smt. Mewa Kuer when her two sisters had died. Consequently the trial court dismissed suit No. 25 of 1935 in respect of the sale deeds dated July 17, 1914 and October 19, 1915. This suit was however, decreed against defendants 19 and 20 to 23 for recovery of Rs. 3200 in respect of the plaintiffs' share on the present market value of the land of Khewat No. 4 (area 8 bighas) Mahal Mewa Kuer, village Jeora Nawabganj and for recovery of Rs. 10,200 as plaintiffs' two-third share on the present market value of the 30 plots (total area 15 bighas 17 biswas) entered as Khata Khewat No. 7 defendant 8. Those defendants were directed to pay the said amount within six month of the judgment becoming final. In case of default the plaintiffs shall

become entitled to recover the said amount. The learned Judge did so in view of Section 51 of the Transfer of Property Act on the ground that those defendants had made valuable constructions as bona fide purchases.

7. The learned Judge has recorded findings with respect to various other transfers against various defendants but they are not relevant for the purposes of the present appeals. Suit No. 34 of 1935 filed by Madho Dayal in respect of his one-third share was also partly decreed and partly dismissed. As against defendants 8, the trust, it was decreed for recovery of Rs. 5100 as plaintiff's one-third share on the present market value of 30 plots (total area 15 bighas 17 biswas) entered as Khata Khewat No. 7 of Mahal Mewa Kuer village Jeora Nawabganj. It was also decreed against defendants 21 and 22 to 25 for recovery of Rs. 1600 on account of one-third share of plaintiffs on the present market value of the land of Mahal Mewa Kuer, village Jeora Nawabganj. But it was dismissed in respect of Mahal Hazaro Kuer, and Mahal Prago Kuer of village Jeora Nawabganj as the plaintiffs' father was also an executant of the sale deeds along with Mewa Kuer.

8. The judgment of the learned Judge gave rise to appeals by the plaintiffs and cross-objections by the present defendants-appellants against the part of the judgment and decree which went against them. The High Court reversed the finding of the trial court with regard to the sale deeds dated July 17, 1914 and October 19, 1915 and held that they were not for legal and pressing need. It, however, confirmed the finding of the trial court with regard to the sale deed dated July 27, 1901 but held that the plaintiffs should be given an opportunity to make an election under Section 51 of the Transfer of Property Act, as to whether they would like to pay the compensation for the super-structures standing on the land in question or to sell their share in the land. Consequently, the High Court allowed the appeals of the plaintiffs in part and remanded the case to the trial court to afford an opportunity to the plaintiffs to make election under Section 51 of the Transfer of Property Act. As the sale deeds dated July 17, 1914 and October 19, 1915 were not for legal necessity the subsequent transfers made by the transferees of Mewa Kuer were also bad.

9. Shri V. K. S. Chaudhary assisted by Shri S. S. Khanduja contended that :

(1) The High Court erred in holding that the alienations made by one daughter to the exclusion of the other daughters was a bad transfer inasmuch as :

(a) the property having been divided by the three daughters the alienation made by one of them for legal necessity was valid and binding on the other, and

(b) the property having been divided there was implied consent of the other daughters for alienations.

(2) The sale by one daughter without the consent of the other in any case is not void but voidable.

(3) The appellants in any case were entitled to the protection of Section 43 of the Transfer of Property Act.

(4) The High Court erred in interfering with the exercise of discretion of the trial court under Section 51 of the Transfer of Property Act.

(5) In any case the High Court erred in directing the determination of market value of the property on the date of choice and not on the date of the transfer.

10. In support of his first contention that the transfer by one daughter without the consent of the other daughters was valid the learned counsel sought to rely upon the original texts. Shri J. P. Goel, counsel for the plaintiff-respondents, however, supported the judgment of the High Court by referring to the Privy Council decisions and the decisions of this Court. As the point involved in this case is no more *res integra* but has been well settled by the decisions of the Privy Council and of the Indian High Courts we did not permit the counsel to enter into archaeological survey of the original text books. The learned counsel for the appellants, however, tried to distinguish those cases on the ground that those cases mostly were the cases of co-widows but in the instant case we are concerned with the transfers made by the daughters. In our opinion what is applicable to co-widows is equally applicable to the case of daughters. No distinction can be made on that account.

11. The Hindu Law by N. R. Raghavachariar, Fifth Edn., 1965, p. 585 summarised the legal position in the following terms;

Where two widows succeed as co-heiresses to their husband's estate, one of them cannot alienate the property without the consent of the other even though the alienation is for the necessity of the estate. They are entitled to obtain a partition of separate portions of the property and deal as each pleased with her own life interest, but she cannot alienate any part of the corpus of the estate by gift or will so as to prejudice the rights of the survivor or of a future reversioners. If they act together, they can burden the reversion with any debts contracted owing to legal necessity, but one of them acting without the authority express or implied of the other cannot prejudice the right of survivorship by burdening or alienating any part of the estate. The mere fact of partition between the two, while it gives each a right to the fruits of the separate estate assigned to her, does not imply a right to prejudice the claim of the survivor to enjoy the full fruits of the property during her lifetime and a mortgage by a Hindu widow even for necessary purposes, when she has not even asked for co-widow, and the mere fact that there has been enmity between the co-widows is no justification for the failure to take the consent of the co-widow. But in cases where the concurrence of a co-widow has been asked for to a borrowing by the other for necessary purposes and unreasonably refused, a mortgage for such debt granted only by one widow might be held binding on what may be termed the corpus of the estate.

The question of alienation and co-widows has been exhaustively considered with reference to the whole case-law thereon in a decision of the Madras High Court in *Valluru Appalasuri v. Sasapu Kannamma* (49 MLJ 479 : AIR 1926 Mad 6 : 90 IC 881) (referred to with approval by the Privy Council in *Gauri Nath Kakaji v. Mt. Gaya Kuar* (AIR 1928 PC 251 : 55 IA 399 : 26 ALJ 1174 : 55 MLJ 339)) in which following propositions of law were laid down :

- (1) The estate of co-widows or other co-heiresses in Hindu Law is a joint estate, but it is unlike other joint estates. It is indivisible. Strictly it can never be divided so as to create separate estates such that each sharer is the owner of her share and at her death the reversioner's estate falls in. Such a division is impossible in law.
- (2) Such partition as is permissible is merely for the convenience of their enjoyment by the shares and may be of two kinds :
 - (i) so as to last during the lifetime of both the widows.
 - (ii) so as to bind them until the death of all of them. In the latter case if one of the widows dies before the other without alienating the property, it passes to the heirs of

her private property and not to the other co-widow, or their reversioners

(3) By the very nature of the arrangement, there can be no survivorship, if the partition is of the second kind. But if it is of the first kind, it cannot affect the right of survivorship of the other.

(4) One of the co-widows can alienate her share, which may be defined or undefined according as there is a partition or not. If the alienor dies before the co-widow, the alienation ceases to be operative, if there is no partition; or if the partition is of the first kind, the property goes to the co-widow by survivorship. But if the partition is of the second kind, the property continues to be enjoyed by the alienee; until the other widow dies.

(5) Except for the limited purposes mentioned above, i.e., during the lifetime of the alienor in a partition of the first kind, or during the lifetime of all the co-widows in a partition of the second kind, there can be no alienation by a widow of her interest : and whether there is necessity or not, an alienation by one co-widow cannot bind the reversioner.

(6) If an alienation for necessity is to bind the reversioners, all the co-widows must join in it.

12. In this view of the legal position it is not open to the counsel for the appellant to take up the matter afresh by referring to the original texts. The general law is now so well-settled that it scarcely requires restatement. If a Hindu dies leaving behind two widows they succeed as joint tenants with a right of survivorship. They are entitled to obtain partition of the separate portions of property so that each may enjoy her equal share of the income accruing therefrom. Each can deal as she pleases with her own life interest but she cannot alienate any part of the corpus of the estate by gift or will so as to prejudice the right of survivorship of a future reversioner. If they act together they can burden the reversion with any debts owing to legal necessity but one of them acting without the authority of the other cannot prejudice the right of survivorship by alienating any part of the estate. The mere fact of partition between the two while it gives each a right to fruits of separate estate assigned to her, it does not imply a right to prejudice the claim of the survivor to enjoy full fruits of the property during her lifetime.

13. It was, however, contended for the appellants that in the circumstances of the present case consent of the other daughters will be presumed. The alienations made by the daughters separately to different persons was never challenged by the other daughters. Even the reversioners did not challenge those alienations long after the death of the last limited owner Smt. Mewa Kuer in 1923 and even if the partition between the daughters had no effect on the reversion it can safely be presumed that the transfer made by one of the daughters of the property exclusively in her possession had the consent of the others. We find considerable force in this contention. This aspect of the case has been completely lost sight of by the High Court. The transfer made by one daughter without the consent of the other is only voidable at the instance of the other co-limited owners or at the instance of the reversioners. In any case Smt. Mewa Kuer after the death of her two sisters came into exclusive possession of the entire estate left by Smt. Amrit Kuer, widow of Lala Gurdin. Therefore, the transferees would be entitled to the protection of Section 43 of the Transfer of Property Act which substantially amounts to satisfying the equitable principle of 'feeding the grant by estoppel'. This question however loses its importance if once we presume the consent of the other

sisters in the circumstances of the present case.

14. It was contended for the appellants that the plaintiffs had accepted the amount evaluated by the trial court for the land before the filing of the appeal in the High Court and, therefore, it was not open to the plaintiffs to challenge the amount of compensation fixed by the trial court, and in case the amount of compensation could not be fixed at the market value prevailing at the time of making the choice because the prices of constructions and the lands had gone exorbitantly high and it will not be possible either for the plaintiffs or for the defendants to pay the price according to the present market value. No wonder in these circumstances the plaintiffs accepted the amount of compensation fixed by the trial court.

15. The counsel for the respondents, however, contends that the acceptance of the amount fixed by the trial court was without prejudice to their rights and, therefore, they cannot be estoppel from challenging the same. In view of the fact that the trust has made valuable constructions involving a cost of 5 to 6 lac rupees of the college building, the principal's quarters, teacher's quarters, hostel, library, dispensary, etc., in our opinion it will be inequitable in the circumstances of the case to ask the appellants to pay the present market value of the land. The acceptance of the amount to making a choice within the meaning of Section 51 of the Transfer of Property Act. From the materials on record and the attending circumstances it is obvious that the reversioners were neither in a position to pay for the improvements nor inclined to do so and this is why they accepted the amount determined by the trial court. In the circumstances of the case we are satisfied that the High Court was not justified in remanding the case to the trial court to afford another opportunity to the plaintiffs to make a fresh choice.

16. The learned counsel heartedly sought to challenge the findings of the High Court in respect of the sale deeds dated July 17, 1914 and October 19, 1915 on the ground that it had lost sight of the reasons given by the trial court for holding that those transfers will be presumed to have been executed for legal necessity in view of the circumstances enumerated by the trial court. What quantum of evidence will satisfy a particular court to come to a conclusion is entirely in the discretion of the court. It is not possible to interfere with the findings of the High Court with regard to the two sale deeds dated July 17, 1914 and October 19, 1915.

17. For the foregoing discussion the appeals must succeed. They are accordingly allowed in part and the judgment of the High Court remanding the case to the trial court for affording another opportunity to the plaintiff-respondents to make election is set aside and the judgment of the trial court with regard to sale deed dated July 27, 1901 is restored. There is, however, no order as to costs.

</html