Veerattalingam and Others

Vs

Ramesh and Others

Civil Appeal No. 2231 of 1988

(L. M. Sharma, K. Ramaswamy JJ)

18.09.1990

JUDGMENT

SHARMA, J. –

1. This appeal by special leave is directed against the decree passed by the High Court in favour of the plaintiff-respondents in a suit for partition.

2. The property in suit belonged to Smt. Rathinammal, who after executing a registered will died in 1942. According to the terms of the will, her two sons Natesan, defendant 1, and Subramanian, plaintiffs' witness 2 (PW 2), were to remain in possession of the properties without any power of alienation and had to pay the taxes and conduct regularly certain religious festivals; and thereafter their sons were to manage the properties on similar terms. The will further provides that after their attaining majority the great grandsons, i.e. the son's sons' sons of the testatrix will get the properties as absolute owners.

3. Subramanian, the younger son of the testatrix, who has been in the present suit examined as the second witness on behalf of the plaintiffs, has one son Arunachalam, defendant 15. The three plaintiffs, Ramesh, Ganesh and Sivalingam are the sons of defendant 15. Defendant 1 got four sons and ten sons' sons. The main dispute in the suit is about the share which the plaintiffs are entitled to, under the terms of the will. They claim that they being the only grandsons of Subramanian have half share in the properties, the remaining half going to the grandsons of defendant 1, namely, defendants 5 to 14. On behalf of the defendants it is pleaded that the suit properties have to be divided amongst all the 13 great grandsons of the testatrix in equal shares. The defendants also contended that the suit was fit to be dismissed as defendant 1 and defendant 15 had finally partitioned the properties in 1975, and no question of a further partition arises. The maintainability of the suit was also challenged on the ground of minority of the plaintiffs as also on the basis of the rule against perpetuity.

4. The trial court rejected the plea based on the rule against perpetuity. Having regard to the interest of defendant 1, his brother Subramanian and Arunachalam, defendant 15, the court held that the alleged partition of 1975 was illegal and not binding on the plaintiffs. So far the shares of the plaintiffs and defendants 5 to 14 are concerned, agreeing with the defence case, the court held that the parties would take the properties as per capita. However, the suit was dismissed on the ground that the plaintiffs were still minor.

5. On Appeal by the plaintiffs, the High Court confirmed the finding of the trial court that the 1975 partition was illegal. On the question of the shares of the parties, the High Court agreed with the

plaintiffs and held that the division would take place as per stirpes. Taking into account the fact that during the pendency of the appeal two of the plaintiffs had attained majority, the High Court passed a decree in their favour for one-sixth share each. So far the third plaintiff is concerned, the High Court declared his right without passing a decree for partition. The defendants are challenging the decision of the High Court by the present civil appeal.

6. The learned counsel for the appellants has contended that as per the terms of the will the great grandsons of the testatrix have inherited the suit properties as per capita and the conclusion of the High Court on this aspect is illegal. The English version of the operative portion of the will has been quoted in paragraph 7 of the judgment of the trial court and is not challenged by either party before us. After mentioning the right and the duties of her sons the testatrix has stated the position of her grandsons and great grandsons thus :

> "They (that is, sons' sons) have also to pay the taxes and out of their income conduct the aforesaid festivals regularly. Then their male issues after attaining majority, have to take possession of the said properties in equal shares and enjoy them with all powers of alienation."

It has been stated by the learned counsel for the parties before us that the words "the said properties in equal shares" are the English version of the words Samabhagamaga adainthu. The learned counsel for the appellants translated this portion of the will as stating that,

> "they (that is, the sons' sons) shall pay the taxes due to the government and will carry on the charitable/religious activities without fail and their male issues would on attaining majority get the properties in equal portion (Samabhagamaga adainthu) and will possess, own and enjoy it absolutely."

The crucial expression is Samabhagamaga adainthu which according to the learned counsel for the parties means in equal portions. The question is as to whether in view of this provision in the will, the entire properties left by the testatrix are to be divided equally amongst all her great grandsons; or, the three plaintiffs shall amongst themselves take half, the remaining half going to their cousins.

7. The High Court has interpreted the crucial part of the will, mentioned in the preceding paragraph, as directing the plaintiffs on the one hand and the defendants 5 to 14 on the other respectively to "share equally out of each branch". It has been assumed that the properties finally descended on the two branches in equal shares, and consequently parties belonging to the two branches inherited the properties as stirpes. The main reason for the High Court for taking such a view is that the terms of a will which was the subject matter of interpretation in the case of Boddu Venkatakrishna Rao v. Boddu Satyavathi ((1968) 2 SCR 395 : AIR 1968 SC 751) were more or less similar, which this Court construed in the manner as suggested by the plaintiffs in the case before us. We are not in agreement with the approach of the High Court.

8. It is well settled that a court while construing a will should try to ascertain the intention of the testator to be gathered primarily from the language of the document; but while so doing the surrounding circumstances, the position of the testator, his family relationship and the probability that he used the words in a particular sense also must be taken into account. They lend a valuable aid in arriving at the correct construction of the will. Since these considerations are changing from person to person, it is seldom profitable to compare the words of one will with those of another or to try to discover which of the wills upon which the decisions have been given in reported cases, the

disputed will approximates closely. Recourse to precedents, therefore, should be confined for the purpose of general principle of construction only, which, by now, are well settled. There is still another reason as to why the construction put on certain expressions in a will should not be applied to a similar expression in the will under question for, a will has to be considered and construed as a whole, and not piecemeal. It follows that a fir and reasonable construction of the same expression may vary from will to will. For these reasons it has been again and again held that in the matter of construction of a will, authorities or precedents are of no help as each will has to be construed in its own terms and in the setting in which the clauses occur (see Ramachandra Shenoy v. Mrs. Hilda Brite ((1964) 2 SCR 722, 736 : AIR 1964 SC 1323)). The risk in not appreciating this wholesome rule is demonstrated by the case before us.

9. Assuming that the will in the case of Boddu Venkatakrishna Rao v. Boddu Satyavathi ((1968) 2 SCR 395 : AIR 1968 SC 751) was somewhat similar to that in the present case, the High Court, following the construction given on the will in the reported case, has held in the judgment under appeal that the great grandsons of the testatrix shall be taking the properties as per stirpes. While so doing the court failed to notice that the relevant facts and circumstances of that case were widely different from those in the present case. There, the testatrix who was a childless widow, had bequeathed under the will life estates to two children who were defendants 4 and 5 in the case and whom she had brought up from their infancy, and subject to the same, the property was to go to their children after their death. The conclusion of the High Court on the construction of the will, with which this Court agreed, was expressed thus,

> "the bequest in favour of defendants 4 and 5 was that of a life estate with a vested remainder in favour of their children and that the children should take the vested remainder per stirpes and not per capita."

10. In the case before us no life estate was created in favour of anybody, otherwise there would not arise any question of the plaintiffs' getting any share in the property even on their attaining majority during the lifetime of their father and uncle. The High Court has also, under the impugned judgment, observed that a Hindu is not ordinarily expected to create a joint tenancy but, failed to appreciate that there is only a presumption, to this effect, which cannot override the provisions of the will, if the language is unambiguous and clear. In the present case there is no manner of doubt, and it is not denied by any party that neither the sons nor the grandsons of the testatrix got any life estate in the properties. It is the agreed case of the parties that as soon as plaintiffs and defendants 5 to 14 become major they are entitled to get the property absolutely without waiting for the death of their respective fathers or grandfathers. We should, therefore, interpret the will without being influenced by the meaning given to the will in the reported case.

11. The devolution of the property under the will takes place on the plaintiffs and defendants 5 to 14 for the first time "under equal shares". Since this is the first occasion for the shares in the property to be defined the expression "equal shares" must refer to the entire properties left by the testatrix which will have to be divided equally amongst all the thirteen great grandsons by the testatrix. In other words, they take the properties as per capita.

12. Admittedly the third plaintiff has also attained majority during the pendency of the present appeal and has, therefore, become entitled to a share in the properties now. The suit, is accordingly decreed in favour of all the plaintiffs, - their share being one-thirteenth each.

13. The plea that the disposition under the will was hit by the rule against perpetuity was rejected by

the trial court in paragraph 7 of its judgment on the ground that the sons of the testatrix, namely, the first defendant and the plaintiff's witness 2 also their respective sons defendants 2 to 4 are alive. The point was not pressed in the High Court. The view of the trial court appears to be correct, and does not require reconsideration at this stage. In the result, the appeal is allowed in part as indicated above. The suit is accordingly decreed in favour of all the three plaintiffs. The share of the three plaintiffs and the ten defendants, that is, defendants 5 to 14, shall be one-thirteenth each in the suit properties. There shall be no order as to costs.

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