ALLAHABAD HIGH COURT

Lalta Prasad

Vs

Sri Mahadeoji Birajman Temple

(Grimwood Mears, CJ. P C Banerji, Piggott, JJ.)

07.04.1920

JUDGMENT

Grimwood Mears, C.J.

1. This appeal raises two interesting and important questions of Hindu Law. It was originally opened before Mr. Justice Piggott and myself, and subsequently we, deemed it proper to have the weight and assistance of Mr. Justice Banerji's wide knowledge and long experience.

2. The facts are quite simple and the points of law stand out in a form very convenient for a clear pronouncement. Lalta Prasad, the plaintiff in the court below and the appellant here, is the grandson of one Gajadhar Lal. Gajadhar Lal had a son,. who died during his life-time, and, in the year 1914, the appellant was about seventeen years of age. Gajadhar Lal and the mother of the appellant were not on good terms, and on the 18th of November, 1914, the appellant and his mother, apparently living away from the residence of the grandfather, commenced a suit for partition, the appellant, being the plaintiff in that case, suing by his mother as next friend. There is nothing to show that the grandfather ever knew of that suit, because, having made a will on the 22nd of November, 1914, he died on the 25th of November, 1914. The terms of the will were displeasing to the appellant, and one of the points taken in the court below and also argued before us was that the grandfather was not, at the time of the execution of the will, of sound disposing mind and that the will was consequently null and void. We examined the evidence on this part of the case and intimated to counsel that in our view, the appellant's contention in that respect was wrong, and thereupon we came at once to what are substantial points in dispute. One of the provisions of the will of the 22nd of November, 1914, was in these terms: "As all the expenses of the temples at Mauzas Bangawan and Ramapur, pargana Cawnpore, in which are seated the idols of Sri Mahadeoji and which (both) were built by my ancestors, have always been defrayed from the family -property, it is incumbent on me, the executant to set apart (a patron of the property for their expenses and management, so that the souls of my ancestors and the members of the family may be benefited thereby in the next worlds and my religious duties may be performed. With this

view dedicate the property entered in list B, which is a portion of the entire property owned by me, the executant, to Sri Mahadeoji installed in the temples " aforesaid. The said Sri Mahadeoji shall be the owner thereof neither Lalla Din alias Munna, nor any other person shall have-any right in it. It shall be the exclusive property of Sri Mahadeoji The management of the property shall be made by Lalta Din alias Munna, through his mother, Musammat Sheo Rana Kunwar, during the period of his minority, and by himself after he has become adult." There was also a question as ' to whether the family was joint or separate, and the history of the family was quite clear down to the year 1911. From 1911 until 1914, in fact, up to the death of the testator, there was no suggestion of any amicable partition, but it was said that partition was ipso facto effected by means of a suit instituted on the 18th of November. These, therefore, are the two points for decision.

3. First, whether the institution of the suit by the appellant with his mother as next friend by itself and of itself has the effect in law of creating an alteration of the status of the family so that the - family hitherto joint becomes at once a separate family. The second point is whether the bequest contained in the fifth clause of the will was a competent bequest for a Hindu karta to make, if it was decided that in the circumstances the testator was joint at the time of his death.

4. Now on the first question, it is, of course, accepted law that a person sui juris, who is a member of a joint Hindu family can effect partition and he can bring about that partition by a request to the courts, if other methods prove unavailing, and it has been held and must be taken to be a definite statement of the law that the institution of a suit for partition is such a clear unequivocal and distinct expression of determination that that in itself is sufficient to cause a severance of the joint family. *Girja Bai v. Sadashiv Dhwndiraj*[1] The point that arises here is whether a minor, who commences an action through, a next friend, stands in any other different position to that of a person sui jurisl "Now a minor may be. a youth who is so nearly approaching his majority that he. is capable of exercising some, perhaps, even a full measure of discretion upon so vital a question as partition. On the other hand, the minor may be a child three years old; but whether three years old or seventeen years of age, the law, requires that that minor shall be represented in the suit' by a next friend, and it has been argued before us that a mingr, so represented by a next friend, can, by the very institution of a suit, effect the same immediate legal consequences as would admittedly follow from a suit brought by a man sui juris. We cannot agree with that contention at all. It is evident that it would open up great dangers, a person might be appointed guardian of a minor, who was in a position of antagonism to the rest of the family, and who would, by reason of the rule of law contained in the above case, have the immense power by his or her own will alone of bringing about an immediate alteration of status in a family that might otherwise be quite united. The effect, therefore, we think, of an action brought by a minor through his next friend is not to create any alteration of status of the family, because a minor cannot demand as of right a separation; it is only granted in the discretion of the Court when, in the circumstances, the action appears to be for the benefit of the minor. See *Chelimi Chetty v. Subbammi*[2] There is one intermediate stage and that is the case of a minor who, during the pendency of a suit, becomes of full age and in that case the provisions of Order XXXII Rule

12, apply, and in the event of a minor, who has attained his majority, during the pendency of a suit for partition, coming to a court and insisting on his right to continue the action, it may very well be that, at the moment when he was, by reason of having attained his majority, regarded by the law as a person competent to make up his own mind upon the matter, it may well be that on his appearing before a court and electing to proceed with the suit that that .election would be deemed to have the same force as at the time attaches tar. the election of. a man of full age who commences an" action. for partition,. Inasmuch as in the present case the. suit abated by reason of the death of the grand father, the time never arrived for this appellant to show whether he was minded ,to continue the action and therefore we are of opinion that the joint family did not become separate by the institution of the action of the 18th of November, 1914.

5. Now the second point which was taken on behalf of the appellant was that the property, included in the will under the fifth head which in value was about l/30th of the family property, did not pass to the idol, because the grandfather had no power to will it away. In argument, it has been said that whatever power the karta of a joint Hindu family may have of making a gift inter vivos, he Has no power to make a bequest, because at the moment of his death, his rights' have passed to the surviving members of the Hindu family and then there is a conflict between the right of survivorship-and the alleged right under the will and that the right of survivorship prevails and in support of that contention we have been shown three authorities. The first one is to be found in *Vitle Butten v. Yamenamma*[4] In that case an adopted son sought to set aside a will made by his adoptive father who had purported to dispose of immovable ancestral property. Therefore, leaving out the immaterial fact that it was a between an adopted son and an adoptive father, we get a very similar set of circumstances in that case to those which we are considering today. The Court in that case say: "We are of opinion that the will in the case referred to cannot take effect, 'At the moment of death the right of survivorship is in conflict with the right by devise. Then the title by survivorship, being the prior title, takes precedence to the. exclusion of that by devise." They then proceeded to declare the will of no effect as a valid devise of property in favour of, the defendant. Now that case has been referred to with approval in *Suraj Bunsi Koer v. Sheo Persad Singh*[3] *Rathnam v. Sivasubramania*[5] and *Lakshman Dada Naik v. Ramchandra Dada NaikIn*[6] the last mentioned case their Lordships of the Privy Council approved of the practice of the High Court of Madras, who have by their decisions admitted that a copartner; can effectually alienate his share by gift but have ruled that he cannot dispose of it by will. Their Lordships further say:-" Its reasons for making this distinction between a gift and a devise are, that the co-parcener's power of alienation is founded on his right to a partition; that that dies with him; and that, the title of his co-sharers by survivorship vesting in them at the moment of his death, there remains nothing upon which the will can operate. This principle was invoked in the case of Suraj Bunsi Koer v. Sheo Persad Singh (1879) I.L.R. 5 Calc. 148 (161), and was fully recognized by their Lordships, although they decided the particular case, which was one of an execution against a mortgaged share, on the ground that the proceedings had then gone so far in the life-time of the mortgagee as to give, not with standing his death, a good title against his co-sharers to the execution purchasers. It follows from what has been said that the weight of positive

authority at Madras, as well as at Bombay, is against the proposition of the learned Counsel for the appellant. Their Lordships are not disposed to extend the doctrine of the alienability by a co-parcener of his undivided share without the consent of his co-sharers beyond the decided cases,"

6. With these cases to guide us it is clear that the plaintiff must succeed in this appeal on the ground that his grandfather by the will made on the 22nd of November, 1914, had no power to transfer the joint ancestral property to the idol, a devise which, it should be noticed, was to take effect after his death, he having in the will stated that he was to remain, as long as he lived, in possession of the property. In these circumstances the decision of the learned Subordinate Judge of Cawnpore must be overruled and the appeal allowed.

7. We allow the appeal, decree the plaintiff's claim by granting him the declaration, sought in his memorandum of appeal to this Court and direct that the respondents. Nos. 1 and 2 shall pay the plaintiff's costs of the appeal here and in the court below. As regards costs of the other defendants we do not interfere with the order of the court below.
Pramada Charan Banerji, J.

8. I am of the same opinion and agree with the judgment of the learned, Chief Justice on both the questions discussed in this appeal. The rule laid down by their Lord ships of the Privy Council in Girja Bai v. Sadashiv Dhundiraj (1916) I.L.R. 43 Calc. 1031, to the effect that the institution of a suit for partition of joiat family proparty has the effect of creating a separation of the joint family, cannot be applicable to a suit brought on behalf of a minor which has not matured into a decree. The reasons for the exception are stated in the judgment of the learned Chief Justice and I have nothing to add to them. The same view was held by the Madras High Court in Chelimi Chetty v. Subbamma (1917) I.L.R. 41 Mad. 442. As regards the other point which has been raised in this appeal, there can be no doubt that the manager of a joint Hindu family cannot by will devise any portion of the joint family property to take effect after his death, inasmuch as upon his death he ceases to be the manager of the family and has no estate left in him which can pass to the legatee under the will. This is manifest from the authorities which have been referred to in the judgment ' of the learned Chief Justice. I agree with the order proposed.

Pigott, J.

9. I concur.

Cases Referred.

1(1916) I.L.R. 43 Calc. 1031
2(1917) I.L.R. 41 Mad. 442
3(1879) I.L.R. 5 Calc. 148 (161)
4(1874) 8 Mad. H.C. Rep.,6
5(1892) I.L.R. 16 Mad. 353

6 (1880) I.L.R. 5 Bom. 48 (61)