BOMBAY HIGH COURT

Parvatibai Shankar

Vs

Bhagwant Pandharinath Pathak

(B Scott, Kt., C.J. Shah, J.)

22.06.1915

JUDGMENT

Basil Scott, C.J.

1. The first question which arises in this case is whether there has been a valid disposition by way of legacy in favor of certain female relations of the testator Pandharinath, for if that point is decided in favour of the appellant, it will dispose of the whole case. The learned Judges both in the Subordinate Court and in the District Court have taken as the fundamental proposition upon which the case must be decided, that whatever property is so completely under the control of the testator that he may give it away in specie during his lifetime, he may also devise by will. That is the form in which the proposition is adopted by the Subordinate Judge. In the District Court the proposition is stated as follows: "A : Hindu who is of sound mind, and not a minor, can by gift dispose of all property in which he has an absolute interest and can, by will, dispose of all property which he may give away in his lifetime;" and it is said that because the author of the Mitakshara states that "it is a settled point, that although property in the paternal or ancestral estate is by birth, the father has independent power in the disposal of effects other than immoveables, for indispensable acts of duty and for purposes prescribed by text of law, as gifts through affection support of the family, relief from distress, and so forth," the testator here had power by way of affection to make legacies in favour of his female relations out of what was admittedly ancestral property. There is, so far as we are aware, no decided case in which it has been held that the power of a Hindu father stated in pl. 27, Chap. 1, Section 1 of the Mitakshara, above referred to, enables him for the purposes therein mentioned to dispose of ancestal property, even though not immoveable, by will. On the other hand, it has been decided by the Madras High Court, one of the Judges being Mr. Justice Muttusami Ayyar, that a legacy cannot be treated as an executory gift made for religious uses : see *Rathnam v. Sivasubramania*[1] and that was based upon an earlier decision in *Vitla Butten v. Yamenamma*[2] where it was held that a member of an undivided family cannot bequeath even his own share of the joint property, because at the

moment of death the right by survivorship is in conflict with the right by bequest, and the title by survivorship, being the prior title, takes precedence to the exclusion of that by bequest. This point was considered by the Privy Council in *Lakshman Dada Naik v. Ramchandra Dada Naik*[3] where it was said:" It has been ingeniously argued that partial effect ought to be given to the will by treating it as a disposition of the one-third undivided share in the property to which the father was entitled in his lifetime...and the learned counsel for the appellant have insisted that it follows as a necessary consequence (from the power of alienation by gift inter vivos) that such a share may be disposed of by will, because the authorities which engrafted the testamentary power upon the Hindu law have treated a devise as a gift to take effect on the testator's death, some of them affirming the broad proposition that what a man can give by act inter vivas he may give by will." Reference is then made to the case of *Vitla Butten v. Yamenamma*[4] above referred to, the reason of that decision being stated to be that "the coparcener's power of alienation is founded on his right to a partition; that the right 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." Their Lordships conclude the discussion of the question in these terms: "The question, therefore, is not so much whether an admitted principle of Hindu law shall be carried out to its apparently logical consequences, as what are the limits of an exceptional doctrine established by modern jurisprudence. Their Lordships do not think it necessary to decide between the conflicting authorities of the Bombay and the Madras High Courts in respect of alienations by gift, because they are of opinion that the principles upon which the Madras Court has decided against the power of alienation by will are sound, and sufficient to support that decision."

2. It is admitted by the learned pleader for the respondent that none of the cases referred to by the learned Judge as instances of gifts falling within the power stated in pl. 27, Chap. 1, Section 1 of the Mitakshara are cases of testamentary disposition. In *Hanmantapa v. Jivubai*[5] which was referred to by the same learned pleader, the disposition was by gift in inter vivos, and the decision in *Bachoo v. Mankorebai*[6] affirmed in appeal by the Privy Council , was a case in which the gift had been made before the death of the testator. We are, therefore, of opinion that the decision of the lower appellate Court cannot be supported. The legacies were directed to be paid by the testator out of property which he had no power to dispose of by will. We, therefore, reverse the decree of the lower appellate Court and dismiss the suit. We think that under the circumstances the parties should bear their own costs.

Cases Referred.

1(1892) I.L.R. 16 Mad. 353
2(1874) 8 M.H.C.R. 6
3(1880) L.R. 7 I.A. 181, 193

4(1874) 8 M.H.C.R. 6
5(1900) 2 Bom. L.R. 478 : I.L.R. 24 Bom. 547
6(1904) 6 Bom. L.R. 268 : I.L.R. 29 Bom. 51