BOMBAY HIGH COURT

Govind Dhondo Kulkarni

Vs

Vishnu Keshav Kulkarni

(Dixit and Jahagirdar, JJ.)

17.11.1947

JUDGMENT

Dixit, J.

1. This is an application for leave to appeal to His Majesty in Council and the facts giving rise to the application are briefly these.

2. The applicant claiming to be the adopted son of one Dhondo Govind Kulkarni filed a suit to recover by partition possession of his half share in the suit property. The plaintiff's claim was opposed on several grounds. It was contended that the plaintiff was not adopted in fact, that the plaintiff's adoption was invalid and that in any case the suit property, with the exception of two houses and two lands, was not joint family property. The plaintiff valued his claim in the Court of first instance at Rs. 12,012-8-0. The trial Court held that the plaintiff had proved his adoption but his adoption was invalid. The trial Court also held that the whole of the property in suit was joint family property. But since the plaintiff's adoption was invalid, the trial Court dismissed the plaintiff's suit. From that decision the plaintiff filed F.A. No. 169 of 1941 in this Court and this Court set aside the decree of the Court below and declared that the plaintiff's adoption by defendant No. 1 was proved and was valid. This Court further held that out of the immoveable properties described in the plaint, only the first house in paragraph 1, Clause A, and the two kulkarni watan lands R.S. Nos. 256/5 and 311/7 at Kudnur described in paragraph 1, Clause C, were joint family properties. The result was that the plaintiff's claim was allowed with respect to some of the properties and that his claim in respect of the remaining properties was rejected. The plaintiff how applies for leave to appeal to His Majesty in Council and the question is whether we should grant him the certificate he has applied for.

3. This question has to be answered by reference to Section 110 of the Code of Civil Procedure. That section, so far as material, provides :

In each of the eases mentioned in Clauses (a) and (b) of Section 109, the amount or value of the

subject-matter of the suit in the Court of first instance must be ten thousand rupees or upwards, and the amount or value of the subject-mutter in dispute on appeal to His Majesty in Council must be the same sum or upwards, and where the decree or final order appealed from affirms the decision of the Court immediately below the Court passing such decree or final order, the appeal must involve some substantial question of law.

4. The first requirement according to Section 10 is that the value of the subject-matter of the suit in the Court of first instance must be Rs. 10,000 or upwards. This part of the requirement is satisfied. The further requirement is that the value of the subject-matter in dispute on appeal to His Majesty in Council must also be the same sum or upwards. The applicant in his affidavit stated that the value of the subject-matter on appeal to His Majesty in Council was Rs. 10,043-5-6. This will appear from an affidavit filed by him on December 3, 1947. The opponents have not by a counter-affidavit challenged this valuation. It is, therefore, clear that the value of the subject-matter in dispute on appeal to His Majesty in Council is also Rs. 10,000 or upwards. The first requirement of Section 110 is, therefore, fulfilled.

5. The next question is whether it is necessary for the applicant to show that the appeal involves some substantial question of law. It is urged on behalf of the applicant that it is not necessary for him to show that the appeal involves a substantial question of law, because it is contended that the decree appealed from did not affirm the decision of the Court immediately below the Court passing such decree. The expression "the decision" occurring in Section 110 means "the decree." See *Rajah Tasadduq Rasul Khan v. Manik Chand* [1]A simple case of affirmance would be where the decree appealed from confirms the decree of the Court immediately below the Court passing such decree. A case in the opposite sense would be where the decree appealed from reverses the decree of the Court immediately below the Court passing such decree; Another case may arise where the decree appealed from varies or modifies the decision of the Court immediately below the Court passing such decree, and the question is whether in such a case it is necessary for the applicant to show that the appeal involves some substantial question of law.

6. The expression "affirms" occurring in Section 110 has given rise to sharp conflict of judicial opinion. One view is that if the decree appealed from varies the decision of the lower Court to the prejudice of the applicant, it is not a decree of affirmance, but another view is that it would be a decree of affirmance if the variation is in favour of the applicant. In *Raja Brqjasunder Deb v. Raja Rajendra Narayan Bhanj Deo*[2] a special bench of the Patna High Court took the view that where the decree of the High Court reversed in part the decision of the lower Court whilst maintaining it with regard to the remainder of the claim, the decree of the High Court cannot be said to affirm the decision of the Court below. A reference to that decision shows that the learned Judges of the Patna High Court reviewed the case-law upon the point. In that case the case in

Kapurji v. Pannaji was cited, but it was not apparently followed.

7. On behalf of the opponents it is urged, relying upon Kapurji Magniram's case, that this question is concluded by authority. In that case the facts were that this Court varied the decree of the lower Court in favour of the applicant and the applicant being dissatisfied with the decision desired to appeal to their Lordships of the Privy Council. In the appeal the applicant challenged a havala item of of Rs. 18,000 upon which there was a concurrent finding both of the trial Court as well as of this Court. Sir Amberson Marten, after referring to the case in *Annapurnabai v. Ruprao*[3] and the case in *Bhagwan Singh v. The Allahabad Bank Ltds*[4] refused the application. It is true that in that case there were concurrent findings of the Courts upon the havala item of Rs. 18,000 which was the item in dispute on appeal to His Majesty in Council. But the fact remains that although there was in that case a variation in the decision of the lower Court, leave was refused.

8. In the present case the dispute before their Lordships of the Privy Council would be concerning the claim of the plaintiff with respect to properties in regard to which his claim has been rejected by both the Courts. The trial Court dismissed the plaintiff's suit on the ground that the plaintiff's adoption was invalid. This Court while holding that the plaintiff's adoption was valid held that the whole of the property with the exception of two houses and two lands mentioned in clauses A and C of paragraph 1 of the plaint was the self-acquired property of the contending defendants. The question whether certain property is joint family property or self-acquired property is, I think, essentially a question of fact. The appeal, therefore, does not involve a queston of law, much less a substantial question of law. But Mr. Bengeri on behalf of the applicant argues, relying upon Section 233, Sub-section (2), of Sir Dinshah Mulla's Principles of Hindu Law, 1940 edition, that in this case a substantial question of law does arise. According to the plaintiff's guardian the income from the two lands which are held to be ancestral lands would at present be about Rs. 200 or Rs. 250. It is not suggested that the house property yields any income. This Court, therefore, after taking into consideration the income of what can be said to be joint family property came to the conclusion that remaining property could not have been acquired with this nucleus. A reference to the judgment shows that this Court accepted the principle of the ease in *Babubhai Girdharlal v. Ujamlal Hargovandas*[5] and in support of the view this Court also accepted the principle laid down in Vythianatha v. Varadaraja [1938] Mad. 696. It is, therefore, clear that the house property and the two lands which were held to be ancestral property was not sufficient to form a nucleus with the help of which new properties could have been acquired. The principle of Babubhai Girdharlal's case has been accepted by their Lordships of the Privy Council in the recent judgment of the Board in *Appalaswami v. Suryanamyanamurti*[6] It may be of interest to note that the judgment has been delivered by Sir John Beaumont who decided the case in Babubhai Girdharlal v. Ujatnal Hargovandas. Having regard to these

considerations, we are unable to hold that the appeal raises a substantial question of law.

9. In this case the variation in the decision of the Court below is in favour of the applicant. The view which we take is that even though the decree appealed from varied the decision of the lower Court, the decree must be regarded to be one of affirmance. That being our view, it is necessary for the applicant to show that the appeal involves some substantial question of law. But as, in our opinion, the applicant is unable to show that the appeal involves a substantial question of law, we must refuse the leave asked for.

10. The result is that the application fails and the rule must be discharged with costs.

Jahagirdar, J.

11. I agree.

12. The principal question in this application is whether the decree appealed from affirms the decision of the trial Court. The petitioner has filed the suit to recover possession of his half share by partition alleging that he is the adopted son of one Dhondo Govind Kulkarni who died joint with the other defendants. His contention was that he was adopted by defendant No. 1, the widow of Dhondo, and he had a share in the joint family property. The defendants contended that the plaintiff's adoption had not taken place and was invalid and that the bulk of the suit property was the self-acquired property of the defendants. The trial Court held that the plaintiff's adoption had taken place but was invalid on account of the unchastity of defendant No. 1 and that the entire suit property was joint family property. But it dismissed the suit as it came to the conclusion that the adoption was invalid. The petitioner went in appeal to the High Court. The High Court held that the adoption was valid and it also found that the bulk of the property in suit was the self-acquired property of the contending defendants. It, therefore, allowed the appeal in respect of the property which was found to be joint family property, and it may be stated here that the property which is found to be joint family property is a very small portion of the entire suit property.

13. Now, the petitioner has filed this application for leave to appeal to the Privy Council and he contends that as the decree of the High Court has varied the decree of the trial Court, he is entitled to go in appeal without being put to the necessity of showing that there is some substantial question of law. The question, therefore, is whether the decree against which he wants to prefer an appeal can be said to have affirmed the decision of the trial Court.

14. Apart from authorities if we merely look at the section, it appears to me clear that the present decree is a decree of affirmance. The wording of Section 110, last paragraph, of the Code of Civil Procedure is this :Where the decree or final order appealed from affirms the decision of the Court immediately below the Court passing such decree or final order, the appeal must involve

some substantial question of law.

15. Now, what is the decree here appealed from ? The decree appealed from cannot be that part of the decree which has allowed the appeal in favour of the petitioner. It must be that part of the decree which has affirmed the decision of the Court immediately below the Court passing such decree. So here the decree appealed from is that part of the decree of the High Court which confirmed the decree of the trial Court dismissing the plaintiff's claim with regard to the bulk of the suit property which has been held to be separate property of the contending defendants. On this point the decisions of the trial Court and the High Court are concurrent. The trial Court dismissed the entire suit and the Appeal Court has also dismissed the plaintiff's suit so far as the property held to be the self-acquired property of the defendants was concerned. It is, therefore, clear that with regard to the property which is the subject-matter of the appeal to the Privy Council, the decisions of both the Courts are concurrent. It was possible to have argued, though it was not argued here, that the decisions of the two Courts are different. The trial Court had held that the entire suit property was the joint family property, whereas the High Court has held that the bulk of the property was the self-acquired property of the contending defendants. But it has been authoritatively decided that the word "decision" in paragraph 8, Section 110, of the Code of Civil Procedure, means a decree and not a judgment. See Rajah Tasadduq Rasulhhan V. Manik Chand (1902) L.R. 30 I.A. 35 s.c. Bom. L.R. 100(Supra). Therefore, though the reasons for the ultimate decision of the suit may be entirely different, the decree of the trial Court as well as the appellate Court is the same, viz. it dismissed the suit of the plaintiff with regard to the self-acquired property. Mr. Bengeri, the learned advocate for the petitioner, relies upon the Privy Council ease in Annapuranabai v. Ruprao (1924) L.R. 51 I.A. 319(supra) and contends that as the decree of the trial Court is varied by the High Court, he is entitled as a matter of right to go in appeal to the Privy Council whether that portion of the decree of the High Court varying the decree of the trial Court is in favour of the petitioner or not. And Mr. Bengeri also relies upon two full bench cases of Patna and Allahabad High Courts (Raja Brajasunder Deb v. Raja Rajendra Narayan Bhanj Deo(1941) I.L.R. 20 Pat. 459(Supra) and Jaggo Bai v. Harihar Prasad Singh [1941] All. 180, F.B. where this Privy Council ruling in Annapurnahai v. Ruprao has been interpreted. According to those two High Courts whenever there is a variation of the decree by the High Court, whether it is in favour of the petitioner or not, the petitioner gets a right to appeal to the Privy Council without being put to the necessity of showing any substantial question of law. But the Bombay High Court in Kapurji v. Pannaji has taken the view that if the variation is in favor of the petitioner, it cannot be said that the decree of the High Court has varied the decree of the trial Court within the meaning of Section 110, Civil Procedure Code. The head-note in that case runs thus :Under Section 110 of the Civil Procedure Code, to warrant the grant of leave to appeal to His Majesty in Council, there must be a substantial question of law in cases where there

are concurrent findings of facts which are appealed from. It is not enough that the decree of the lower Court is varied by the High Court on points not covered by the appeal to the Privy Council.In this case Annapurnahai v. Ruprao was cited and their Lordships did not interpret the ruling to mean that any slight variation of the decree with regard to the property, which is not the subject-matter of the appeal before the Privy Council would entitle the petitioner to go in appeal. This decision is binding on us. And again the Madras and Lahore High Courts, in *Kailasa v. Rasivishwanatham*[7] and *Wahid-ud-Din v. Makhan Lal*[8]have held that if the decree is varied in favour of the petitioner and if the petitioner goes in appeal against that part of the decree which confirmed the decision of the trial Court, then the decree of the High Court is one of affirmance and not of variation.

16. Now, looking broadly it appears to me that the view taken by the Bombay, Madras and Lahore High Courts is the correct one. Supposing the entire appeal has been dismissed, it would not have given the petitioner a right to appeal, and it would be very strange that if the appeal is partly allowed in his favour, he gets the right to appeal as a matter of course. We, therefore, think that the petitioner in this particular case is not entitled to a certificate unless he satisfies us that there is a substantial point of law.

17. It is contended by Mr. Bengeri that it is shown here that there was some nucleus which was yielding an income of Rs. 100 to Its. 125 and his contention is that the moment he proves that there was some nucleus there should be a presumption that all the property of the family which has been subsequently acquired is the joint family property, whether the nucleus was capable of yielding any income or not.

18. But this is not what the cases have laid down. The latest pronouncement of their Lordships of the Privy Council is in Appalaswami v. Suryanarayanamurti [1947] A.I.R.P.C. 189, s.c. Bom. L.R. 628, p.c.(Supra) There Sir John Beaumont giving the judgment on behalf of the Board has observed (p. 192)-Where it is established that the family possessed some joint property which from its nature and relative value may have formed the nucleus from which the property in question may have been acquired, the burden shifts to the party alleging self-acquisition to establish affirmatively that the property was acquired without the aid of the joint family property.And he has relied upon the cases Babubhai Girdharlal v. Ujamlal Hargovandas [1937] Bom. 708, s.c. 39 Bom. L.R. 846(Supra) and *Vythianatha v. Varadaraja*[9] In the last-mentioned case it is laid down :A party alleging that property held by an individual member of a joint Hindu family is joint family property must show that the family was possessed of some nucleus with the aid of which the property in question could have been acquired. Mere existence of a nucleus, however small or insignificant, is not enough. It should be shown that the nucleus was of such value as could have reasonably formed the basis of the acquisition of the property in question. If

this i" shown, and only then, the onus shifts to the party alleging self-acquisition to affirmatively make out that the property was acquired without any aid from the family estate.

19. These two cases have been quoted with approval in Appalaswami v. Suryanara-yanamurti. We have, therefore, to see whether in this case the nucleus was such as would have enabled the defendants to acquire property out of the income thereof. It has been found that the annual income of the nucleus was only Rs. 100 or Rs. 125. This could have been hardly sufficient for the maintenance of the family and it is clear that out of the income of this property the defendants could not have acquired the property in dispute. We, therefore, hold that the petitioner has failed to show that the appeal involves any substantial question of law.

20. The rule is, therefore, discharged with costs.

Cases Referred.

1(1902) L.R. 30 I.A. 35, s.c. 5 Bom. L.R. 100
2(1941) I.L.R. 20 Pat. 459, F.B
3(1924) L.R. 51 I.A. 319
4(1920) I.L.R. 43 All 220
5[1937] Bom. 708, s.c. 39 Bom. L.R. 846
6[1947] A.I.R.P.C. 189, s.c. 50 Bom. L.R. 628, p.c
7[1944] Mad. 890
8(1945) I.L.R. 26 Lah. 242
9[1938] Mad. 696