
(1962) 01 MP CK 0032
In the Madhya Pradesh High Court
Case No : S.A. No. 24 of 1961

Gopal Rao

APPELLANT

Vs

Sampatrao

RESPONDENT

Date of Decision : 10-01-1962

Acts Referred:

Evidence Act, 1872 — Section 32, 50

Citation : (1963) JLJ 994

Hon'ble Judges : P.R. Sharma, J

Bench : Single Bench

Advocate : S.T. Mungree, for the Appellant; M.L. Gupta and B.G. Ap(sic)e, for the Respondent

Final Decision : Allowed

Judgement

P.R. Sharma, J.—This Second Appeal has been preferred by the Plaintiff whose suit for declaration has been dismissed by both lower Courts.

2. The facts admitted in the suit are that Mst. Kaushalyabai was the daughter of one Parasram, who died some 40 years back. Parasram left behind him a widow, named Jamnabai and three daughters, Bithabai, Hoshyabai and Kaushalyabai. Parasram admittedly owned the house in suit. On Parasram's death his widow, Jamnabai "became a limited owner thereof. By a registered deed of gift dated 14-2-1935. Jamnabai transferred the suit house to her daughter Kaushalyabai. The Plaintiff contended that this gift was invalid or at the most could be valid only during the life time of Jamnabai. The Plaintiff also contended that Kaushalyabai died during the life time of Jamnabai and for this reason also the deed of gift became inoperative. The Defendants contended that they were governed by the Bombay or the Mayukh school of Hindu Law and that the deed of gift in favour of Kaushalyabai operated as surrender to the nearest heir, namely Kaushalyabai. The daughter being a full heir under the Bombay or the Mayukh law the Plaintiff's claim as a reversioner could not succeed.

3. The genealogical tree set out in para 1 of the plaint makes it clear that the Plaintiff could have no claim to the property in suit except on proof of the fact that Drupadabai was the sister of Bhausahab, the grandfather of the Plaintiff. This fact was, in my opinion, sought to be proved without due regard to the question of relevancy of the evidence which was tendered in support of it.

4. It was argued before the lower appellate Court that Section 32 and Section 50 of the Evidence Act did not exhaust all the ways of proving relationship. No statements of dead persons were sought to be proved u/s 32 of the Evidence Act in proof of the relationship of brother and sister between Drupadabai and Bhausahab. Shri Mungre admitted before the lower appellate Court that the evidence led by the Plaintiff to prove his relationship with Parasram was not such as would be covered by the provisions of S. 50 of the Evidence Act. Reliance was, however, placed on the evidence of P. W. 1 Dinkarrao, who stated that he knew Parasram intimately, whose mother Drupadabai was the sister of Bhausahab. P. W. 4 Gangajirao merely proved that the Plaintiff's father Shankarrao and Bhausahab were "shagirds" in the palace. Exhibit P/4 shows the names of the incumbents and the salaries received by them. All that his document can prove is that Pandoba had a son named Bhausahab and that Bhausahab had a son named Shankarrao. Gangajirao's evidence can be of no avail in order to prove that Bhausahab was the brother of Drupadabai. P. W. 2 Shankarrao merely stated that Drupadabai was Bhausahab's sister, both of whom had died before the witness attained maturity of understanding. Gopalrao, the Plaintiff, is aged only 44 years and he could not, therefore, prove relationship between Drupadabai and Bhausahab. This is all the evidence on the question of relationship between Drupadabai and Bhausahab. It is obvious that the Plaintiff cannot succeed except on proving this essential link between him and Parasram. Neither the parties to the action nor the Courts concerned have, in my opinion, kept in view the provisions of S. 32 and S. 50 of the Evidence Act in order to determine that kind of evidence could be admitted in proof of the existence of a disputed relationship.

5. It was held by the Privy Council in AIR 1937 201 (Privy Council) , that the Evidence Act does not contain any express provision making evidence of general reputation relevant. Evidence of general reputation which is a cumulation of perception, testimonies heard and gathered and reduced to an assertion in Court is not admissible. (See Chandu Lal Agarwalla, Karta of joint family and of firm named Hanutram Lekram Agarwalla and Another Vs. Bibi Khatemonnessa and Others, , relied on in Ramadhar Chaudhary and Others Vs. Janki Chaudhary, . The decision in Chandulal's case (supra) was approved of by their Lordships of the Supreme Court in Dolgobinda Paricha Vs. Nimai Charan Misra and Others, .

6. It would follow from the above discussion that the only evidence to prove relationship which is receivable under the law is of the kind described in Clauses (5), (6) & (7) of S. 32 and S. 50 of the Evidence Act. This position was not seriously challenged before me by Mr. Mungre and he, therefore, prayed that inasmuch as neither the parties nor the Court had kept in view the aforesaid

provisions, while the evidence on the question of relationship between Drupadabai and Bhausahab was tendered, it would be in the interests of justice to remand this case for being tried specifically on the issue whether Drupadabai is by evidence, which is relevant under any of the provisions referred to above, proved to be the real sister of Bhausahab. The findings of the lower appellate Court that the Plaintiff is the grandson of Bhausahab and that Parasram was Drupadabai's son being pure findings of fact are hereby maintained; and the suit is remanded only for proof, in accordance with law, of the relationship, if any, between Drupadabai and Bhausahab.

7. Another matter to which my attention was drawn by the counsel for the parties to this appeal is that although the Defendants came forward with the definite case that they were governed by the Mayukh or the Bombay school of Hindu Law, under which the daughter is a full heir, and surrender in favour of Kaushalyabai of her widow's estate by Jamnabai would confer an absolute title to the house in suit on Kaushalyabai, the facts necessary under the law to establish a case of surrender were neither pleaded nor put into issue. Where the essential points for determination were not kept in view by the Courts below, the finding arrived at by them is liable to challenge in Second Appeal. It is necessary under the law, for the Defendants in the present case in order to establish a case of surrender, to prove, (1) that the entire estate in the hands of the widow was surrendered and (2) that it was surrendered either to a sole heir or to the entire body of heirs. The Defendants must, in my opinion, be called upon to prove that the suit house was the only property of deceased Parasram in the hands of his widow Jamnabai on the date of the gift and that Kaushalyabai was the only issue of Parasram surviving on that date. Unless these two facts were put into issue between the parties and they had an opportunity to lead evidence on the same, no proper decision on the question of surrender could, in my opinion, be arrived at.

8. I would, therefore, set aside the finding of the Courts below on the question of surrender also and remand the suit for trial on the points noted by me above in this connection. The finding of the lower appellate Court that Kaushalyabai died after her mother Jamnabai, being a finding of fact is hereby upheld. The question as to whether the parties to the action are governed by the Bombay or the Mayukh school of Hindu Law was argued before me at some length. Reliance was placed on certain observations at page 213 of Rajwade's Hindu Law, wherein reference is made to certain orders of the Gwalior Darbar. None of these orders were placed on the record of this case and it was, therefore, not possible for the Courts below to decide whether they were actually passed and if so they have the force of law even today. There is no evidence on record to show that the members of the entire "Maratha" community residing at Gwalior have migrated to this place from Maharashtra. Although it is open to the Courts under certain circumstances to presume the fact of migration from the mere fact that the community to which the parties belong is commonly known to have originated from a certain territory, it is not clear whether the Courts below have based their

decision on the question of the applicability of the Bombay or the Mayukh school of Hindu Law to the parties to the present case on a general presumption or on any law in force in the former Gwalior State, such as could be evidenced by the orders of the Gwalior Darbar referred to in Rajwade's book on Hindu Law. I am, therefore, of the opinion that this question also calls for further investigation. The Court shall allow an opportunity to the parties to tender such evidence as they wish to adduce in support of their plea on this point. The findings on the remaining points arrived at by the lower appellate Court are hereby affirmed.

9. The result is that this appeal is allowed and the case is remanded to the Court of first instance with a direction that it shall re-try the issue regarding applicability of the Bombay or the Mayukh school to the parties to the present case. It shall further frame issues on the points noted by me above and record the evidence of the parties thereon. The trial Court shall then decide the question as to whether (1) the parties are governed by the Bombay or the Mayukh school of Hindu Law. (2) Drupadabai is proved to be the sister of Bhausahab in accordance with law and, (3) whether the requirements of a valid surrender under the law found to be applicable to the parties are fulfilled in the present case. The trial Court shall, keeping in view the fact that the other findings of the lower appellate Court have been affirmed by me, dispose of the case in accordance with law. Costs of this appeal shall be costs in the suit.