

(1944) 12 AHC CK 0024
In the Allahabad High Court

Jawahar Lal

APPELLANT

Vs

Sri Thakur Radha Gopaljee Maharaj

RESPONDENT

Date of Decision : 04-12-1944

Acts Referred:

Citation : AIR 1945 All 169 : (1945) 15 AWR 138

Hon'ble Judges : Sinha, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Sinha, J.—This is a defendant's appeal and arises out of a suit for recovery of Rs. 900, Rs. 720 principal and Rs. 180 interest. One Janki Prasad had four sons, Radha Ballabh, Kanahaiya Lal, Keshab Deo and Jagan Prasad, and a daughter Mt. Bibi Sukkho. Radha Ballabh's son is the appellant before us. The plaintiff, Sri Thakur Radha Gopalji Maharaj, brought the above suit through the manager, Madan Lal. The story with which the plaintiff came to Court was briefly this: Janki Prasad had, on 18th March 1893, executed a will whereby he dedicated permanently a sum of Rs. 12 per month for the expenses of an idol. He had himself purchased the property yielding the above amount. He died and so did his son Radha Ballabh soon after. The story further goes on to say that Radha Ballabh, before his death, directed his son, Jawahar Lal, to continue making payments in accordance with the terms of the will. This Jawahar Lal did for sometime, but later on he stopped the payments. The suit was brought on 13th September 1933. It might be mentioned that the sum claimed was for a period of five years. The defence, in the main, was that the family was a joint Hindu family, the property was ancestral property, the transaction in question amounted to a testamentary disposition beyond the powers of Janki Prasad and the suit was, therefore, not maintainable. It was also pleaded that it was beyond the competence of Janki Prasad to make any provision for the payment of Rs. 12 per month for all time in future without creating a charge upon the property. It was lastly pleaded that the suit was at any rate not maintainable for a period of

more than three years.

2. The learned Munsif found that the family was a joint Hindu family, the property was ancestral property and the will was in consequence invalid. He arrived at some other findings, with which it is not necessary to deal at this stage, and finally dismissed the suit. On appeal, the lower appellate Court dismissed the suit on a technical plea that it had not been framed in accordance with the will. This decree was challenged in second appeal in this Court. A learned Judge of this Court held that the plaintiff should not have been nonsuited on such a technical point, when all the incidents of the case were present before the Court. The learned Judge, therefore, by his order, dated 27th April 1937 remanded the case for trial according to law. The learned Additional Civil Judge of Muttra has on remand passed a modified decree in favour of the plaintiff. He has held that on a true interpretation of the document the transfer amounted not merely to a transfer in future but a transfer in present. He held further that the claim for more than three years was barred by limitation. He, therefore, in this view of the case, passed a decree for Rs. 457-14-0 with pendente lite and future interest at Rs. 3 per cent, per annum. Both parties are dissatisfied with this decree. The defendant has preferred the above second appeal whereas the plaintiff has filed a cross-objection. There were a number of issues framed in the case; the principal were:

- (1) Whether the plaintiff is not entitled to sue through Madan Lal?
- (2) Whether Janki Prasad was competent, to make a valid wakf of the property in the plaintiff's favour?
- (3) Whether the agreement relied upon by the plaintiff is void for want of consideration?

3. For the purposes of this second appeal these are the only material issues. The plea with regard to the maintainability of the suit through Madan Lal must fail. It is true that there were a number of trustees but they appointed Madan Lal a manager through whom this suit has been instituted. It was held in AIR 1933 75 (Privy Council) that a person in actual possession of the Math is entitled to maintain a suit to recover property appertaining to it, not for his own benefit, but for the benefit of the Math. This case was followed in the later case in AIR 1935 44 (Privy Council) . Both these cases were considered in a judgment of this Court reported in Gopal Datt and Another Vs. Babu Ram and Another, . Their Lordships have made the following observation:

A suit can be brought in the name of the idol by a person who is a de facto manager of the temple.

4. On the finding that Madan Lal is in charge of the idol the suit was rightly brought through him. The learned Civil Judge has found that the property in dispute belonged to the coparcenary. He has further found that the family was a joint family. The transfer in favour of Sri Thakurji Maharaj will, therefore, stand

only if it amounts to a gift in praesenti. If, on the other hand, it amounts to a mere testamentary disposition, the legal consequences will be different. We now come to the most important question in this case whether the clause in favour of the Thakurji in the deed of 18th March 1893 amounts to a gift in praesenti or a mere testamentary disposition. The learned Munsif held that it amounted to a will. The learned Civil Judge has on appeal, come to a different conclusion although the judgment itself makes it clear that he was not absolutely free from doubt. Paragraph 12 deals with the relevant portion. The learned Counsel for the appellant has furnished us with an official translation of the will. The paragraph in question reads thus:

I have fixed Rs. 12 a month permanently for the expenses of Raj Bhog of Shri Thakur Radha Gopalji installed in the temple at Qasba Raya. I have already arranged for Rs. 5 a month out of this amount, by purchasing property in Mauza Raja Garhi, a hamlet of Mauza Khanwal, pargana Mat, and getting mutation of names with respect to the same effected in favour of Shri Thakurji Maharaj aforesaid. As regards the remaining Rs. 7 a month, it is necessary to make some arrangement. I have made this arrangement that out of the zamindari property in Mauza Raja Garhi, a hamlet of Khanwal, pargana Mat, which I have purchased, a portion yielding an income of Rs. 7 a month will be set apart for Shri Thakurji Maharaj and mutation of names with respect to the same will be effected in His favour. In case of mutation of names not being effected, my first son, Radha Ballabh, whom the said property has been allotted, shall get it recorded in the name of Shri Thakurji Maharaj and shall get mutation of names effected in His favour.

The difference between the two portions, the one dealing with Rs. 5 a month and the other with Rs. 7 a month is marked. When dealing with the former, the expression used is

I have already arranged for Rs. 5 a month...by purchasing property in mauza.... and getting mutation of names with respect to the same effected in favour of Shri Thakurji Maharaj aforesaid.

These indicate a completed transfer in the sense that the delivery of possession was made in favour of Sri Thakurji. Coming now to the portion respecting Rs. 7 a month, the language does not indicate a transfer in praesenti. It merely says,

I have made this arrangement that out of the zamindari property.... I have purchased...a portion.... will be set apart for Shri Thakurji Maharaj and mutation of names with respect to the same will be effected in His favour. In case of mutation not being effected my first son.... shall get it recorded in the name of Shri Thakurji and shall get mutation of names effected in His favour.

5. The concluding portion of the quotation makes it abundantly clear that with regard to Rs. 7 the testator himself, although he was clear and definite in his mind about the arrangement, never took the necessary steps of mutation or delivery of possession. He, in the event of himself not taking the necessary

steps, left the matter in the hands of his son, Radha Ballabh. There can be no manner of doubt that the testator's treatment of the two portions was different. With regard to Rs. 5 he had already done something; with regard to Rs. 7 he contemplated doing something. The transfer with regard to the former amounted to a transfer in prassenti; with regard to the latter it amounted to a testamentary disposition. It is settled law that a person with restricted rights in a joint Hindu family can make a gift for charitable purposes, if the portion gifted bears a very small proportion to the entire estate: vide *Sardar Singh v. Kunj Bihari Lal* ('22) 9 AIR 1922 P.C. 261 This was the case of a Hindu widow but the principle will apply also to the manager or the father. A will stands on a different footing. It was held by their Lordships of the Judicial Committee so far back as the year *Lakshman Dada Naik v. Ram Chandra Dada Naik* ('80) 5 Bom. 48 at p. 62 that it is not permissible to the father or manager of a joint Hindu family to make a testamentary disposition with respect to the joint family property. In the words of their Lordships:

Its reasons for making this distinction between a gift and a devise are, that the coparcener's power of alienation is founded on his right to a partition; that that right dies with him; and, that, the title of his cosharers by survivorship vesting in them at the moment of his death, there remains nothing upon which the will can operate.

6. This case was followed in AIR 1927 80 (Privy Council) . In his 9th Edn. of the Hindu law, Mulla at p. 245 has summed up the position thus:

A Hindu father or other managing member has power to make a gift within reasonable limits of ancestral immovable property for "pious purposes." But the alienation must be by an act inter vivos, and not by will.

Mr. Chatterji, the learned Counsel for the respondent has, however, tried to support the transaction on the ground of consent. The finding of the learned Judge on this question is in these terms : " These facts clearly show subsequent, if not previous consent." He has taken his stand principally on the case in *Brijraj Singh v. Sheodan Singh* ('13) 35 All. 337 at p. 709, but that was a case where their Lordships made it abundantly clear that the arrangement which had been entered into between the father and the sons was to take effect immediately, that is on the date that it was arrived at. The arrangement there was, therefore, to operate in prassenti and its operation was not postponed to any future date. It has, in the alternative, been contended by the learned Counsel that even a post facto consent is enough to validate the transaction. If it is true, as was held by their Lordships of the Privy Council in *Lakshman Dada Naik v. Ram Chandra Dada Naik* ('80) 5 Bom. 48, that " there remains nothing upon which the will can operate," there remained nothing which could be validated by consent, and the consent, either of Radha Ballabh or of Jawahar Lal was of no avail. The dispute has been set at rest by a Full Bench decision of this Court reported in *Lalta Prasad Vs. Sri Mahadeoji Birajman Temple and Others*, The Privy Council case on which the learned Counsel took his stand, itself makes this point clear. The

passage in the will made by the father on which reliance was placed ran in these terms : " If I, at any time come back from pilgrimages and find mismanagement or character of any one bad, then I shall have power to cancel this will, which shall be enforced from the date of its execution." Their Lordships were of the opinion:

That the highest effect that can be given to such words is that this evidences a contractual condition which the sons accepted in order to obtain the partition which gave them immediate possession of the property, and viewed thus, the contractual acceptance of a power of forfeiture in case of bad behaviour would not, in their Lordships' opinion, be sufficient to prevent the partition operating in prsenti.

7. The true test is from what date does the document speak? The deed in question speaks with regard to Rs. 5 from the date of its execution but it speaks from some date in future with regard to Rs. 7. We are, therefore, of opinion that the subsequent consent of the son of Radha Ballabh would not validate the transaction. The claim therefore with regard to Rs. 7 must fail. The learned Counsel for the respondent has sought to press his cross-objection. He claims that he is entitled to a decree for the entire period of five years. Before the learned Civil Judge the plaintiff's counsel relied upon Article 116, Limitation Act. That article speaks of a compensation for the breach of a contract in writing registered. The present is not a case of that character. Nothing has been shown to us to induce us to disagree with the learned Civil Judge on this question. No further point was raised before us. We, therefore, allow the appeal, modify the decree of the Court below by decreeing the plaintiff's claim for three years on the basis of Rs. 5 a month.

8. The learned Counsel for the parties are agreed that the plaintiff is entitled to a decree for Rs. 200. We, therefore, decree the claim for a sum of Rs. 200 with pendente lite and future interest at three per cent, per annum. The parties will pay and receive costs in proportion to failure and success. The cross-objection is dismissed with costs.