
(1920) 04 AHC CK 0029
In the Allahabad High Court

Lalta Prasad

APPELLANT

Vs

Sri Mahadeoji Birajman Temple and Others

RESPONDENT

Date of Decision : 07-04-1920

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 32 Rule 12

Citation : AIR 1920 All 116 : 58 Ind. Cas. 667

Hon'ble Judges : Grimwood Mears, C.J;Piggott, J;P.C. Banerji, J

Bench : Full Bench

Judgement

Grimwood Mears, C.J.—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 lifetime and, in the year 1914, the appellant was about 17 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 November the 25th, 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 the Counsel that, in our view, the appellant's contention in that respect was wrong and, thereupon, we came at once to what are the substantial points in dispute. One of

the provisions of the Will of November the 22nd, 1914, was in these terms: "As all the expenses of the temples at Manzas Bangawan and Ramaipur, 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 executants, to set apart (a portion of) the property for their expenses and management so that the such of my ancestors and the members of the family may be benefited thereby in the next world, and my religious duties may be performed. With this view I dedicate the property entered in list B, which is a portion of the entire property owned by me, the executants, to Sri Mabadeoji installed in the temples aforesaid. The said Sri Mahadeoji shall be the owner thereof, neither Lalta 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, Musammam Sheo Rani Kunwari, 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 5th 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 Dhundiraj* 37 Ind. Cas. 321 : 43 C. 1031 : 4 L.W. 114 : 20 C.W.N. 1085 : 14 A.L.J. 822 : 18 Bom. L.R. 621 : 20 M.L.T. 78 : 12 N.L.R. 113 : (1916) 2 M.W.N. 65 : 24 C.L.J. 207 : 31 M.L.J. 455 : 43 I.A. 151 (P.C.). 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 juris. 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 17 years of age, the law requires that the minor shall be represented in the suit by a next friend and it has been argued before us that a minor, 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 grave danger". 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. Subbanna 42 Ind. Cas. 860 : 41 M. 442 : (1917) M.W.N. 792 : 22 M.L.T. 432 : 34 M.L.J. 213. 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 XXX II, 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 Act ion, 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 to 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 grandfather, 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 1/30th 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 the VIIth Volume of the Madras High Court Reports at page 6 Vitla Batten v. Yamenamma 8 M.H.C.R. 6. In that case an adopted son sought to set aside a Will made by his adoptive father, who had purported to dispose of Immoveable ancestral property Therefore, leaving out the immaterial fact that it was a suit as 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 to day. The Court in that case say: " we are of opinion that the Will in the case referred to cannot take effete. 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 Bunti Koer v. Sheo Persad Singh* 5 C. 148 : 6 I.A. 88 : 4 P.C.J. 1 : 3 P.C.J. 589 : 4 C.L.R. 226 : 2 S.L.R. 242 : 2 Ind. Dec.705; *Rathnam v. Sivasubramania* 16 M. 363 : 3 M.L.J. 139 : 5 Ind. Dec.953 and *Lakshman Dada Naik v. Ramchandra Dada Naik* 5 B. 48 : 7 I.A. 181 : 4 P.C.J. 173 : 3 P.C.J. 778 : 3 L.R. 217 : 4 Ind. Jur. 472 : 7 C.L.R. 320 : 3 Ind. Dec.34. In the last mentioned case their Lordships of the Privy Council approved of the practice of the High Court of Madras, who have by their decision admitted that a coparcener 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 coparcener'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 Bunti Koer v. Sheo Persad Singh* 5 C. 148 : 6 I.A. 88 : 4 P.C.J. 1 : 3 P.C.J. 589 : 4 C.L.R. 226 : 2 L.R. 242 : 2 Ind. Dec.705 and was fully recognised 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 lifetime of the mortgagee as to give, notwithstanding 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 coparcener 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 including fees in this Court on the higher scale. As regards costs of the other defendants we do not interfere with the order of the Court below.

Banerji, J.

8. I am of the same opinion and entirely agree with the judgment of the learned Chief justice on both the questions discussed in this appeal. The rule laid down by their Lordships in the Privy Council in *Girja Bai v. Sadashiv Dhundiraj* 37 Ind. Cas. 321 : 43 C. 1031 : 4 L.W. 114 : 20 C.W.N. 1085 : 14 A.L.J. 822 : 18 Bom. L.R. 621 : 20 M.L.T. 78 : 12 N.L.R. 113 : (1916) 2 M.W.N. 65 : 24 C.L.J. 207 : 31 M.L.J. 455 : 43 I.A. 151 (P.C.) to the effect that the institution of a suit for partition of joint family property 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* 42 Ind. Cas. 860 : 41 M. 442 : (1917) M.W.N. 792 : 22 M.L.T. 432 : 34 M.L.J. 213, 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 ceased to be the manager of the family and had no estate left in him which could 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.

Piggott, J.

9. I concur.