

(1966) 04 SC CK 0006
In the Supreme Court Of India
Case No : C.A. No. 402 of 1964

Lilabai (dead) by legal representative Gomatibai
Vs
Jai Prakash and Another

APPELLANT
RESPONDENT

Date of Decision : 12-04-1966

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 5
Land Revenue Code — Section 135(J)
Supreme Court Rules, 1950 — Order 16, Order 16 Rule 13

Citation : (1966) MhLj 893 : (1966) MPLJ 925

Hon'ble Judges : S.M. Sikri, J; J.C. Shah, J

Bench : Division Bench

Advocate : S.T. Desai, B. Sen, C.B. Agarwala, S.K. Sastri and I.N. Shroff, for the Appellant; S.N. Andley, Rameshwar Nath, P.L. Vohra and Mahinder Narain of M/s. Rajinder Narain and Co., for the Respondent

Final Decision : Allowed

Judgement

S.M. Sikri, J.—This appeal by certificate granted by the High Court of Judicature at Bombay, Nagpur Bench, is against its judgment and decree in Appeal No. 163 of 1956 allowing the appeal and setting aside the decree in Shrimati Lilabai v. Mangilal C. S. No. 9-A of 1946, D/- 12-4-1947.

2. This appeal arises under the following circumstances. One Sitaram Agarwal died in 1914 leaving behind considerable property. During his life-time he had adopted one Kisanlal, and Mangilal was born to him subsequent to the adoption of Kisanlal. Mangilal had two wives, Saraswatibai and Triveni-bai. In 1938 there was a partition between Kisanlal and Mangilal, Kisanlal getting one-fourth of the property and Mangilal the remaining three-fourth. Saraswatibai had a daughter named Durgabai. Saraswatibai died on June 11, 1943. On April 15, 1944, Mangilal executed the document, Exh. D-17. This document was in the form of a receipt in favour of Lilabai and it purported to acknowledge the receipt of Rs. 8,700. It provided that in case this money was not paid by June 1, 1944, Lilabai

would become the owner of the land mentioned therein from June 1, 1944. Mangilal was not able to pay the money and Lilabai brought a suit, No. 9-A of 1946, against Mangilal and Mst. Durga-bai claiming specific performance of the alleged contract contained in Exh. D-17. It appears that in 1944 Mst. Durgabai had brought a suit against Mangilal and Mst. Trivenibai and some others, claiming possession of the property, rendition of accounts and mesne profits on the ground that the property in suit belonged to her mother, Mst. Saraswatibai, as her stridhan, and that she was the heir. This suit was dismissed by the Additional District Judge, Wardha, on January 27, 1947.

3. During the pendency of suit No. 9-A of 1946, the plaintiff was born on November 1, 1946, but he was not impleaded in the suit and the suit proceeded against Mangilal and Durgabai. In this suit details of Rs. 8,700 was given as follows:

(i) Rs. 2000 in the form of two hundis of Rs. 1,000 each dated 6-4-1944. The hundis were drawn by Ramji Vrijpal, the son of Lilabai, on Jayantilal Hemichand of Bombay.

(ii) Rs. 200 paid in cash on 11-4-1944.

(iii) Rs. 6,500 paid in cash on 16-4-1944.

4. Mangilal admitted the receipt of Rs. 2,000 but stated that the money belonged to Ramji Vrijpal and not to his mother. He denied having received the other two items, namely, Rs. 200 in cash and Rs. 6,500 in cash. He further took the plea that Exh. D-17 was a bogus, sham and collusive document not meant to be acted upon. The Additional District Judge, Wardha, on August 12, 1947, decreed the suit for specific performance. He held inter alia that the hundis for Rs. 2,000 were drawn at the instance of Lilabai by her son and that Lilabai did pay Rs. 200 on April 11, 1944 and Rs. 6,500 on April 15, 1944, in cash to Mangilal and that the agreement was not bogus, sham or collusive document but was intended to be acted upon. Mangilal appealed to the High Court but the High Court by its judgment dated October 30, 1953, dismissed the appeal. It appears that Mangilal died during the pendency of the appeal and by order dated March 27, 1952, Trivenibai and Jai Prakash were substituted as appellants in place of Mangilal. The High Court agreed with the finding of the trial Court that the document, exhibited as D-17 in this case, had been duly executed by Mangilal for the consideration of Ra. 8,700.

5. Trivenibai and Jai Prakash filed an appeal before this Court. The only question raised before this Court was whether the document, exhibited as D-17 in the present appeal, required registration under the Indian Registration Act. In order to decide this question this Court had to interpret this document. This Court after considering the terms of the document, held that (1) no present or immediate demise of the occupancy rights had been made in favour of Lilabai; (2) the document did not refer to the payment of rent and did not contemplate delivery of possession until June 1, 1944 and (3) Lilabai was not intended to be treated

as an occupancy tenant between the date of the document and June 1, 1944. This Court further held that "during that period the agreement did not come into operation at all. In other words, it is on the contingency of defendant's failure to repay the amount on June 1, 1944, that the agreement was to take effect". This Court accordingly dismissed the appeal. The judgment is reported as Tiruvenibai and Another Vs. Lilabai,

6. In the meantime Jai Prakash, son of Mangilal, brought Civil Suit No. 6-A of 1954, for a declaration that the decree obtained by Lilabai in Civil Suit No. 9-A of 1946, decided on August 12, 1947, and confirmed in First Appeal on October 30, 1953, was not binding upon him. The plaint was later amended and Jai Prakash prayed for a decree of possession of the land, as Lilabai had managed to obtain possession of the property in dispute in execution. The Additional District Judge, Wardha, the trial Court, dismissed the suit. The High Court allowed the appeal and set aside the decree for specific performance passed in Civil Suit No. 9-A of 1946. Lilabai having obtained certificate from the Bombay High Court, Nagpur Bench, the appeal is now before us for disposal.

7. Before we deal with the merits of the appeal, it is necessary to dispose of the preliminary objection raised by Mr. Andley, learned counsel for the respondent Jai Prakash that the appeal had abated. It appears that on July 10, 1962, the High Court granted the certificate of fitness; on March 25, 1964, the printed record was despatched by the High Court; and on March 29, 1964, notice was served on the appellant, Lilabai. May 13, 1964, was the last date for filing the petition of appeal in this Court, but this Court was then closed for the long vacation. On June 2, 1964, Lilabai died. On November 11, 1964, the High Court, on the application of Smt. Gomitibai, dated July 6, 1964, granted a certificate under Order XVI, rule 13 of the Supreme Court Rules, 1950, that the said Smt. Gomitibai was the proper person to be substituted and entered on the record in place of the deceased appellant. In her application Gomitibai had alleged that the deceased Lilabai had executed and registered a will dated September 6, 1962, whereby the property in dispute had been bequeathed by the deceased Lilabai in favour of the applicant Gomitibai is the daughter-in-law of Lilabai, being the wife of the pre-deceased son of the deceased Lilabai. In the application the names of other heirs and legal representatives were given but the High Court finding that the other heirs were not interested in challenging the will took the view that Jai Prakash was not entitled to object to the will and did not, according to Mr. Andley, allow him to lead evidence to establish that Smt. Gomatibai was not the proper legal representative. We are not impressed by the arguments addressed to us by Mr. Andley in this behalf. We do not see how Jai Prakash is interested in the genuineness of the will if all the other heirs accept its genuineness. Mr. Andley complains that in terms of Order XXII, rule 5, Civil Procedure Code, the High Court was bound to decide this question and should have allowed Jai Prakash to lead evidence on the point. In our view, the High Court was quite right in the circumstances of the case in determining the question as to who is the proper legal representative on the admissions of the other heirs and it was

not necessary for the High Court to hear evidence as to the genuineness of the will.

8. Coming to the merits of the appeal, Mr. S.T. Desai, the learned counsel for the appellant, raised a number of points in the beginning but later pressed only the following points:

(1) That the property which is the subject-matter of the dispute is not ancestral property;

(2) That there was consideration for the agreement, Exh. D-17, and the earlier decision regarding the question of consideration would be *res judicata*;

(3) That there was an antecedent debt amounting to Rs. 8,700; and

(4) That Mangilal being the sole surviving co-parcener on April 15, 1944, when Exh. D-17 was executed, his power of entering into the transaction of sale was absolute and that the plaintiff Jai Prakash being born more than a year after the execution of D-17 had no right to challenge the decree for specific performance passed in Suit No. 9-A of 1946. Mr. Andley in reply controverted the points raised by Mr. Desai. The first point was covered by issue No. 1, which reads as follows:-

Whether the deceased Mangilal owned the suit-fields No. 1, 2, 4 and 18 of village Mohammadpur as part of his share of the ancestral property, allotted to him in the partition between his brother and himself, on 5-2-1939 ?

9. The trial Court held that the plaintiff had failed to discharge the burden of proof which lay on him to establish that the suit fields were ancestral property of Mangilal at the time of plaintiff's birth. After going through the evidence, both documentary and oral, it came to the conclusion that the evidence only proved that it was the self-acquired property of Mangilal as on November 1, 1946. The High Court differed from that conclusion. The High Court was of the view that it was never suggested that the suit property was self-acquired property of Mangilal, and the only burden that lay upon the plaintiff was to prove that the suit property formed part of the property held by his grand-father, Sitaramji. The High Court relied on Exh. P-3 which is a certified copy of the Bandobast Khasra for the years 1910-11. In it the name of the owner in column No. 5 is shown as Sitaram Ramratan Marwari. Further it relied on the evidence of Kisanlal, the adopted son of Sitaramji, who had stated that in the partition between him and Mangilal in the year 1938, he (Kisanlal) got one-third share in the joint family property and Mangilal got the remaining share. In the partition between Kisanlal and Mangilal, Mangilal got in all 13 villages and about 1,600 acres of land. The High Court was of the view that in the circumstances statutory presumption arose u/s 80, sub-section (3) of the C.P. Land Revenue Act, corresponding to the provisions of section 135-J of the Bombay Land Revenue Code, and no evidence had been adduced to rebut the statutory presumption. The High Court further observed that it was nobody's case that the property went out of the family during the period from 1910-11 and 1940-41. The High Court also repelled the

alternative case set up by defendant No. 1, namely that the property belonged to Saraswatibai, and Mangilal got it by inheritance from his wife Saraswatibai. The High Court was of the view that such a case was never set up by defendant No. 1 before. Further after examining the relevant documents it came to the conclusion that Saraswatibai was a benamidar. Mr. Desai has not been able to convince us that the finding of the High Court on Issue No. 1 is wrong. Therefore we affirm the judgment of the High Court on this point.

10. We may now take up the question whether there was consideration for the agreement, Exh. D-17. We assume, without deciding, that Jai Prakash is entitled to show that there was no consideration and no debt existed, and onus rests on him to prove this. The trial Court held that the consideration had been proved. In this connection the trial Court observed as follows:-

It is clear that plaintiff is not personally aware of this agreement in question. He has also not examined Trivenibai (defendant No. 2) about it. Exh. 1-D-17 mentions that the consideration of the same has been fully paid. It was, therefore, for the plaintiff to prove that the said agreement (Exh. 1-D-17) was without consideration. Ramji-bhai (1-D.W. 1) has deposed that Exh. 1-D-17 was executed by Mangilal after receipt of full consideration advanced by his mother. He and Umraosingh (1-D.W. 2) have deposed that Mangilal admitted before Umraosingh that he had received full consideration and then executed the agreement of lease and that he was unable to repay the same and, therefore, requested Umraosingh to bring about a settlement on that point. Then, they went to the suit-fields, and Umraosingh suggested that Mangilal should give possession of only 50 acres of land out of the suit-fields and should execute a lease about it.

Namdeo (1 D.W. 3) had deposed that Mangilal admitted to him the receipt of consideration of Rs. 8,700. Plaintiff did not lead evidence of any eye-witness in respect of this transaction. He examined the P. Ws. to prove that defendant No. 1 Lilabai was unable to advance the said consideration and that the said agreement was a sham and a nominal transaction meant to save his property from the likely demands of Mangilal's mother and daughter. It would however be seen from the deposition of Sobhagmal (P.W. 1), Fattelal (P.W. 3), Fazalhussain (P.W. 4) and Badridaa (P.W. 5) that they are only making vague allegations on these points and do not personally know anything about it.

Pandurang Bhand (P.W. 8) an ex-servant of Mangilal, was not examined in the previous suit about the alleged talk between Mangilal and Ramjibhai about executing a Bham agreement by Mangilal in favour of defendant No. 1. I, therefore, hold that his evidence is unreliable. All the P. Ws. are interested in Mangilal, plaintiff and defendant No. 2. I, therefore, hold that plaintiff has failed to prove that Exh. 1-D-17 was without consideration. It is well proved that it was for consideration of Rs. 8,700 advanced by Lilabai to Mangilal. I further hold that though the said transaction was a loan transaction coupled with an agreement of lease if Mangilal failed to return Rs. 8,700 to defendant No. 1 by a fixed period

(as held in the High Court's judgment Exh. 1-D-1) it was not a sham transaction. I also hold that the parties intended to act upon it, and that it was an agreement enforceable at law.

11. The High Court differed from this finding. After setting out a part of the statement of Ramjibhai, it observed as follows:

Two things are, therefore, clear from the answers given by Ramjibhai in his examination-in-chief cited above. The financial condition of the family of Ramjibhai himself was not very satisfactory. Secondly, the advances made to Mangilal have not been mentioned in the bahikhatas maintained by Ramjibhai. Ramjibhai's explanation is that these amounts were not mentioned in the account books because they belonged to his mother, defendant No. 1.

12. Mr. Desai complains that we are not concerned with the financial condition of Ramjibhai or his uncles but with the financial condition of Lilabai and that Ramjibhai's explanation that these amounts were not mentioned in the account books because they belonged to his mother, defendant No. 1, is plausible and should have been accepted. We see force in this contention. The High Court further came to the conclusion that no separate share had been allotted to Lilabai in the partition that took place between Ramjibhai and his uncles. Further the High Court was impressed that no explanation had been given as to where Rs. 25,000 alleged to be with Lilabai was kept, whether at home or in a bank. One other point which seems to have impressed the High Court was the fact that the hundis which were given to Mangilal on April 6, 1944, were drawn by Ramjibhai and not by Lilabai, and Jayantilal Nemichand upon whom these hundis were drawn had not been examined. Further no mention of these hundis was found in the khata of the mother in the account books. Then the High Court observed:

It is true that Mangilal himself admitted in the previous suit that he had received the hundis and cashed them and got the amount thereunder. That admission, however, cannot be construed to mean that the advances came from Lilabai much less that these advances were intended as a loan. It is also significant that the details of the payment have not been mentioned in the receipt and it is only after the particulars were asked for by Mangilal in the previous suit that the details were supplied by defendant No. 1. As stated above, Mangilal had denied having received the payment of Rs. 200 and Rs. 6,500. Beyond the bare word of Ramjibhai, no evidence has been led to prove that these sums were really advanced on 11-4-1944 and 16-4-1944 as explained by defendant No. 1 in the statement of better particulars in the earlier suit.

The High Court finally concluded as follows:

In view of the financial conditions of Ramjibhai and in view of the fact there is little likelihood of Lilabai of having any separate fund of her own and further in view of the scanty materials placed before us, it is not possible to hold that the loans were advanced to Mangilal by defendant No. 1 as has been sought to be made out in the present case and as was sought to be made out in the earlier

case.

13. We have gone through the evidence and, with respect to the High Court we are inclined to agree with the conclusion arrived at by the trial Court. It appears that in the earlier litigation Mangilal did not raise the point that Lilabai did not have any funds of her own from which to advance money. If there was any substance in this point, the plea would have been raised. Further we are unable to appreciate why Mangilal should execute a receipt for Rs. 8,700 in favour of Lilabai if he had not received any money at all from Lilabai. He admits to having received two hundis for Rs. 2,000 from Ramjibhai, which he encashed. If it was part of Rs. 8,700 we are unable to see why he should mix up a fictitious sum with real payment. If it was not a part of Rs. 8,700 we cannot understand why Ramjibhai would not want security for the loan of Rs. 2,000 made by means of hundis. At any rate, in our opinion, the oral evidence relied on by the trial Court, namely, that of Ramjibhai, Umraosingh and Namdeo lends support to the case of Lilabai. This evidence was relied on in the earlier litigation and there is no reason why the evidence should not be believed in this suit too. Accordingly we hold that it has been established that there was consideration for the agreement, Exh. D-17. In this view of the matter it is not necessary to consider the question of *res judicata*.

14. Taking the next point, namely, whether Rs. 8,700 constituted an antecedent debt, the High Court held that Defendant Lilabai had failed to prove that the agreement of sale was executed for an antecedent debt in the strict sense of that expression as used in Hindu Law. The High Court was of the opinion that the bulk of the consideration of Rs. 6,500 was paid on the date of the agreement itself and that there was no clear evidence in regard to the dates of the other two items, namely Rs. 2,000 and Rs. 200. The High Court further observed:

These debts were made repayable on a subsequent date, that is 1-6-1944, and it was on this date that the document would operate as an agreement of Bale in case the debts were not repaid before that date. In these circumstances, it is impossible to hold that the transaction which was of a loan was dissociated from the transaction of an agreement of lease. In fact, the two formed part of the same transaction and the transaction of the agreement was to come into operation only in the event of the loans not having been repaid. The two, therefore, must be deemed to be parts of one whole. There is no dissociation in fact between the two and the agreement is intended as mode of satisfaction of the loan.

15. It was not disputed before us that an antecedent debt in this context means a debt antecedent in fact as well as in time, i. e. the debt must be truly independent and not part of the mortgage (or sale) which is impeached. In other words, the prior debt must be independent of the debt for which the mortgage is created (or a conveyance is executed) and the two transactions must be dissociated in fact so that they cannot be regarded as parts of the same transaction. [See *Virdhachalam Pillai v. Chaldian Syrina Bank Ltd.* AIR 1964 SC

1426 at p. 1430].

16. With great respect to the High Court, the antecedency of the loan has to be considered not with respect to the agreement itself but with respect to the execution of the conveyance either by Mangilal or ultimately by the Court after a decree for specific performance had been passed. If Mangilal had executed the conveyance in pursuance of the agreement, Exh, D-17, it would have been difficult to resist the argument that the loan of Rs. 8,700 would be an antecedent debt. The fact that Lilabai had to compel him to do so through Court would not change the antecedency of the debt. If we consider the time factor, there is no doubt that the loan and the transaction, i. e. conveyance, are dissociated from each other. If we consider the 'factual' factor the debt is also antecedent in fact, i. e. the debt is truly independent and not part of the conveyance which is impeached.

17. In view of our finding that there was consideration and that the sum of Rs. 8,700 was an antecedent debt, the question regarding the nature of the power of a sole surviving co-parcener to enter into an agreement to sell or lease property which may be enforced after the birth of a co-parcener becomes academic because if it is assumed that the power is restricted and an after-born son is entitled to impeach an alienation in pursuance of such an agreement entered into well before his birth, even then the decree passed by the trial Court must be restored. Although the question is very interesting and there is some difference of opinion, we do not think it necessary to give our own views on this point.

18. In the result the appeal is allowed, judgment and decree of the High Court set aside and that the trial Court restored. The appellant will hare her costs here and in the High Court.