

(1912) 03 BOM CK 0021
In the Bombay High Court
Case No : Second Appeal No. 228 of 1910

Mahadev Laxman Wagle

APPELLANT

Vs

Govind Parashram Wagle

RESPONDENT

Date of Decision : 15-03-1912

Acts Referred:

Citation : (1912) 14 BOMLR 733

Hon'ble Judges : Balchelor, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Batchelor, J.—The relation of the parties concerned in this appeal is shown in the following genealogical tree:-

Farasbram. ----- | | | Govind Vinayak Laxman (Plff.)
(Deft. No. 1). | | | ----- | | | | |
Sakubai Shantabai Deft. 2. Deft-3. Deft. 4. Deft. 5.

2. Plaintiff sued for partition alleging that he was entitled to a one-third share, and that the plaintiff and defendant No. 1 and Laxman were in union. Various defences were raised, including the defence that the property in suit was not joint property but had been separately acquired.

3. The Subordinate Judge in the Court of trial gave the plaintiff a one-third share in a certain portion of the properties. On appeal the District Court has allowed the plaintiff partition in all the Immovable properties, awarding him the third share which was claimed.

4. The present appeal is brought by the defendants, and the first point taken on their behalf by their learned pleader arises in consequence of the accident that between the decision of the trial Court and the decision of the District Court the original plaintiff Govind died. He left, as has been said, no male issue, but only two daughters Sakubai and Shantabai.

5. Mr. Patkar contends that so long as the trial Court's decree was under appeal before the District Court, that decree could not effect a severance between the plaintiff and his relatives. In support of that proposition he relies upon the decision in *Sakharam Mahadev Dange v. Hari Krishna Dange* ILR (1881) 6 Bom. 113. It follows, says the learned pleader, that upon the death of Govind, the defendants became entitled to the property by right of survivorship, and that the daughters of Govind never became entitled to take by inheritance. It appears to me that this argument ought not to succeed. I think it is based upon a misapprehension of certain passages occurring in Sir Michael Westropp's judgment, the misapprehension arising from the reading of particular passages in an isolated manner and without reference to the whole case which was then before the Court.

6. That was a case instituted for a partition of certain family property in the possession of the defendants, and the plaintiff claimed one-eighth share in that property. The Subordinate Judge allowed the plaintiff's claim to the one-eighth share, and that decree was affirmed by the District Judge on appeal. When the case came before the High Court in the second appeal Mr. Shamrao Vithal, who appeared for the plaintiff-respondent, read an affidavit to the effect that one of the defendants had died subsequent to the filing of the second appeal. He submitted that in consequence of this defendant's death, the plaintiff's share in the family property must be increased from one-eighth to one-six. Mr. Kirloskar, who was for the defendants, admitted the fact of the death of one of the defendants, but he urged that in conformity with the decision in *Joy Narain Giri v. Girish Chunder Myti* ILR (1878) Cal. 434 the plaintiff's claim for a larger share than, that allowed by the District Court could not be entertained.

7. It is clear, therefore, what was the question which Sir Michael Westropp and Mr. Justice Pinhey had before them for decision. The question was simply whether owing to the death of one of the defendants, subsequent to the District Court's decree, the increase in the plaintiff's share, which in Hindu Law must necessarily have followed upon the defendant's death, ought to be allowed in second appeal. The Bench answered that question in the affirmative. And if the judgment be read as a whole, it seems to me manifest that that question and that alone was prominently before the minds of the Judges. It is quite true that in one part of the judgment Sir Michael Westropp says :- "We cannot hold that the Subordinate Judge's decree operated as a severance so long as it remained under appeal." And if this passage could be detached from its context, I agree that it would furnish plausibility to Mr. Patkar's argument. When, however, it is read in its context, and with reference to the particular question which alone occupied the minds of the Judges, I do not think that the sentence affords any assistance to the appellants' argument. All that was decided there was that where a plaintiff's share in family property has under Hindu Law been increased owing to the death of a defendant after the District Court's decree it is open to the High Court to take notice of that death, and the consequent devolution of the larger share. That is what was decided in *Sakharam Mahadev Dange v. Hari*

Krishna Dange ILR(1881) 6 Bom. 113. What is it that I am asked to decide in this case, it is that owing to the death of Govind, after the decision of the District Court, that decision must be set aside. In my opinion, however, the mere pendency of an undecided appeal does not detract anything from the vitality or the force of an existing decree. And although the decree now in question was under appeal, I am of opinion, that it was not the less a final decree of a competent Court. The decree once made did, I think, there and then determine the legal status or relation of the parties, and the severance of interests so effected by the decree at the moment it was pronounced could be displaced, it seems to me, only by a legal decision in appeal.

8. Mr. Patkar has urged that if a share in joint family property can be increased or decreased according to the happening of events after the District Court's decree, such share can for like reasons be extinguished. But I cannot concede that. To increase or decrease a plaintiff's share in consequence of events subsequent to the District Court's decree may be regarded merely as a means of bringing that decree into conformity with existing facts, in other words as a means of affirming that decree. It would be a totally different thing to upset that decree, not for any legal reason, but on account of a supervening fact which so long as the decree stands is of no consequence.

9. For these reasons I am of opinion that there is nothing in this appeal which justifies the present argument on behalf of the appellants.

10. The only other point taken by Mr. Patkar was with reference to the property falling in the sub-division marked (c) in the lower appellate Court's judgment, that is to say, the lands purchased in the name of Vinayak in the year 1888. Mr. Patkar complains that the learned Judge was wrong in throwing the burden of proof upon his clients. And he quotes in support of his argument the decision in Vinayak Narsingh v. Datto Govind ILR (1900) 25 Bom. 367. That case, however, was decided on very different facts from those which are now before us. What we have here is that the learned Judge below, having regard to all the evidence including the fact that there was a substantial nucleus of joint family property, found that this particular property had been purchased for the co-parcenary. That, I think, is not a finding which can be successfully challenged now in second appeal.

11. No other point was taken, and for these reasons I dismiss the appeal with costs.