
(1987) 11 MP CK 0052
In the Madhya Pradesh High Court
Case No : C.S.A. No. 260 of 1975 (G)

Mt. Kesharbai and Another	Vs	APPELLANT
Moti and Another		RESPONDENT

Date of Decision : 25-11-1987

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 3B

Citation : (1988) MPJR 16

Hon'ble Judges : K.K. Varma, J

Bench : Single Bench

Advocate : D.K. Katare, for the Appellant; N.K. Jain and Mr. U.K. Jain, for the Respondent

Final Decision : Allowed

Judgement

K.K. Varma, J.

Respondent No. 1 Moti filed a suit (C.S. No. 124-A of 68) in the Court of the Civil Judge Class II, Mungaoli for a declaration of his title to survey No. 15 (2 Bighas 17 Biswas) and survey No. 40 (8 Bighas 10 Biswas), situ-ate at the village of Ghanshyampur, Tahsil Mungaoli District Guna, and for restraining appellant No. 1 Mt. Kesharbai and appellant No. 2 Mt. Tulsabai and their mother Smt Parmobai from interfering with his possession over the suit lands.

The defendants filed a joint written-statement. Later on 9-9-1970, which was not the date of hearing in the suit, plaintiff Moti and defendant No. 2 Mt. Tulsabai (present appellant No. 2) filed a compromise petition, slating therein that Smt. Tulsabai's one-third share in the suit lands may be declared as the plaintiff's in "Bhumiswami" right, and that he was to con-tinue to be in possession there of a "Bhumiswami". The trial Judge recorded their statements on oath and endorsed "Verified and Accepted". Afterwards, the plaintiffs and the defendants 1 and 3 gave evidence on the merits of the case. The claim was decreed in full on 1-2-1972.

Smt. Parmobai and Mt. Kesharbai filed an appeal (C.A. No. 116-A; 73) in the Court of the Additional District Judge Guna, who dismissed the appeal. The two losing defendants filed this second appeal on 22-8-1975.

Smt. Parmobai died on 4-11-1975. On 2-2-1976 surviving appellant Mt. Kesharbai and proforma respondent No. 2 Mt. Tulsabai filed an application for being brought on record as the legal representatives of deceased Smt. Parmobai. The application was allowed. On amendment of the memorandum of appeal Mt. Kesharbai became appellant No. 1 and Smt. Tulsabai became appellant No. 2. After the latter's name was struck off from the array of respondents. Later the State of Madhya Pradesh was impleaded as respondent No. 2 to comply with the provisions of Order 1, Rule 3-B Code of Civil Procedure.

One Jagannath was plaintiff Moti's father Govindi's elder brother. The Courts below have held that Smt. Parmobai was Jagannath's wife. Admittedly, Jagannath had begotten appellants Kesharbai and Tulsabai on Parmobai. Admittedly the suit lands were recorded in Jagannath's name. The Courts below have found that though the local Jamindar had granted a "patla" dated 15-1-1951 (Ex.D-1) in respect of the suit lands in the name of Jagannath only, the lands constituted joint family property of Jagannath and his younger brother Govindi. Govindi pre-deceased Jagannath, who died in the month of "Magh" of Samvat 2022 (1966 A.D.). Plaintiff Moti and Smt. Parmobai filed separate applications before the Tahsildar Mungaoli for mutation of their names vice Jagannath's. On 28-10-1966 the Tahsildar granted Smt. Parmobai's application, but, rejected plaintiff Moti's. Moti's appeal was dismissed by the Sub-Divisional Officer Mungaoli on 21-10-1967.

The plaintiffs case is that apart from the fact that the suit lands constituted joint family property, Jagannath executed a will dated 12-12-1965 (certified copy, Ex. P-9-A) in the plaintiff's favour. The plaintiff's contention was that Smt. Parmobai was a concubine of Jagannath and, as such, appellants Mt. Kesharbai and Mt. Tulsabai were his illegitimate daughters. He claimed a declaration and a permanent injunction to protect his possession.

To repeat, the two Courts have held that the suit lands had constituted a joint family property of Jagannath and the plaintiff's father Govindi, and that Smt. Parmobai was Jagannath's wife, under their caste custom. The Courts below have held that the plaintiff has become full fledged owner of the suit lands on Jagannath's death under his will dated 12-12-1965 and, as such, his title was declared over the suit lands and a permanent injunction was issued against the defendants.

Incidentally, the Courts below have not ordered incorporation in their decrees of the compromise dated 9-9-1970 between plaintiff Moti and appellant No. 2 Mt. Tulsabai.

The first point for determination is Whether this Court can interfere with the first appellate Court's finding affirming the trial Court's finding that the suit lands

constituted the joint family property of Jagannath and Govindi (father of plaintiff Moti).

There is sufficient evidence on record on which the aforementioned finding could be based. To mention one : deceased Jagannath stated in the panchnama dated 12-12-1965 (Ex. P-9-A) as follows: --

.....MERE BHAII GOVINDI KI AUR MERI AK HI JAIDAD SHAMIL HAI JO ABHI BATI NAHI HAI.....

I am, therefore, of the view that the finding of the first appellate Court is not open to correction in second appeal. See, Raruhasingh v. Achalsingh AIR 1961 S.C. 1097 (Para 8), R. Ramachandran Ayyar Vs. Ramalingam Chettiar, , and E. Mahboob v. Sabbarayai AIR 1982 S.C. 1679 (Para 13). I, therefore, affirm the first appellate Court's finding (referred to at paragraph 9 (supra).

The next point for determination is Whether deceased Jagannath had bequeathed his interest in the suit lands under an unregistered will (styled as a panchnama) dated 12-12-65 (Ex. P-9-A).

Section 63(a) requires a will to be attested at least by two witnesses. Section 68 of the Evidence Act says that if a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence.

Now, what the attesting witnesses are to prove. Sec. 63(c) says a will be regarded as duly attested when two or more witnesses have Seen some testator, or some other person--in the presence and by the direction of the testator--sign or affix his mark to the will, or have received from the testator a personal acknowledgement of his or that other person's signature or mark. Then the attesting witness must sign the will in the presence of the testator.

P.W. 1 Motilal deposed only that Jagannath put his thumb impression on the document.

P.W. 3 Vitthal Pd, had deposed that he wrote out the original of Ex. P-9-A only on Jagannath's statement and read it out to him and then Jagannath put his thumb impression on it. P.W. 4 Munshilal corroborates the aforesaid version in his examination-in-chief. In cross-examination he deposed :

JAGANNATH ANGUTHA KIYA SUNKAR MAINE DAST-KHAT KIYE MAI CHALA GAYA PANCHO NE BHI MERE SAMNE DASKHAT KIYA

P.W. 4 Munshilal's first sentence (reproduced above) nullifies the effect of his statement in examination-in-chief implying that Jagannath had put his thumb-impression of the document in his (Munshilal's) presence. What is more, it does not say that who had told the witness that Jagannath had affixed his thumb-mark. The witness does not say that he and any of the panchas had signed the will in the presence of the testator. The result is that there is no evidence of due

attestation of the will. This results in the plaintiff's failure to adduce evidence to establish due execution of the panchnama (Ex. P-9-A), which, as alleged by him is the will of Jagannath.

It is, therefore, evident that the Courts below misapprehended the real point for determination in the matter of proof of the alleged will, and misread the evidence on record to hold due execution thereof as proved in the absence of evidence of due attestation thereof, as required by Section 63(c) of the Succession Act. Their finding that the document was a valid will one is contrary to law and is liable to be set-aside in second appeal and is hereby set-aside. See, *Kakumanu Peda Subbayya and Another Vs. Kakumanu Akkamma and Another*, and *R. Ramachandran Ayyar Vs. Ramalingam Chettiar*, , *Jagannath*, therefore, died intestate.

The legal effect of the findings of the Courts below that the suit lands constituted the joint family property of Jagannath and plaintiff Moti read in the light of my finding in the previous paragraph is set-out below.

Section 164 of the M.P. Land Revenue Code, 1959 states that subject to his personal law the interest of a Bhumiswami shall, on his death, pass by inheritance, survivorship or bequest as the case may be. Now, the factor of bequest is eliminated by the finding recorded above (at para 17). The proviso to Section 6 of the Hindu Succession Act, 1956, intestate read with Section 8(a) of the Act read with the entry of heirs in Class I in the Schedule to the section, and Sections 9 and 10 of the Act resulted in devolution of deceased Jagannath's interest in the suit lands upon his wife Smt. Parmobai and his daughters Smt. Tulsabai and Smt. Kesharbai because a widow and a daughter are Class 1 heirs and excluded plaintiff Moti who as brother's son is a Class IV heir under the Act. Thus, on Jagannath's death, plaintiff Moti continued to have 1/2 undivided interest in the suit lands while Smt. Parmobai, Smt. Tulsabai and Smt. Kesharbai became entitled to the equal shares in the remaining 1/2 undivided interest therein which devolved on them.

The result is that the plaintiff was entitled to a declaration in aforementioned terms at the date of the filing of the suit.

We come to the legal effect of the compromise petition dated 9-9 1970 as between the plaintiff Moti and Smt. Tulsabai. As pointed out at paragraphs 2 and 8 (supra), the learned trial Judge recorded their statements on oath and then endorsed "Verified and accepted" on the petition but did not pass any consent decree in terms of the compromise petition. Two questions of law arise. First, whether what was done by the trial Court amounted to a valid recording of the compromise under Order 23, Rule 3 C.P. Code. Second, if so, what is the effect of the trial Court's failure to pass a consent decree in terms thereof.

Now, a valid recording of a compromise envisages a decision-process comprised of two distinct decisions. The first finding should be : whether there was-in fact-a compromise between the parties. If the finding is in affirmative, the Court, has to

consider whether the compromise is lawful and if it finds so, it has to say so. In the case, before us, the learned trial Judge's endorsement on the compromise petition may be taken to be his finding that there was in fact a compromise, but the endorsement cannot be considered to cover a finding that the compromise was found to be lawful. Thus, there was no valid recording of the compromise as required by Order 23, Rule 3 C.P. Code.

Besides, the learned trial Judge did not incorporate the compromise in a consent decree which is required to be passed under Order 21, Rule 3 C.P. Code. The result is that the compromise contained in the petition have become unenforceable and, therefore, cannot be given effect to. (See : Gurucharan Singh, minor son and representative of Harnam Prasad through Mongol Singh v. Shibdev Singh & Others AIR 1922 Lah. 309 (311), Hemraj and Another v. Dost Mohammad AIR 1921 Lah. 248 (249) and Mt. Mulia v. Partab AIR 1924 Nag. 325(326).

Now, to the effect of the subsequent event of Smt. Parmobai's death during second appeal. Her undivided interest in the suit lands devolved on her daughters, appellants Kesharbai and Tulsabai u/s 164 M.P. Land Revenue Code, 1959 read with Section 14(1), Section 15(1)(a) of the Hindu Succession Act, 1956.

The result is that plaintiff is entitled to only 1/2 undivided interest in the suit lands and the remaining 1/2 undivided interest therein is to be shared equally by appellants Kesharbai and Tulsabai, daughters of deceased Jagannath Smt. Parmobai.

Since Smt. Kesharbai and Smt. Tulsabai have inherited their respective undivided interest in the suit lands as tenants in-common vis-a-vis plaintiff Moti, they cannot be subjected to a permanent injunction at the instance of plaintiff Moti because, that would impinge upon their right of exercising joint possession over the suit lands (See : Gendhiram & Others v. Phoolwati & Others.1977 (Vol. I) M.P.W.N Note 289.

In the result, the appeal is allowed in part as indicated below. Plaintiff-respondent No. 1 Moti is hereby declared to be the owner of the undivided one-half undivided interest in survey No. 15 (2 bighas 17 biswas) and survey No. 40 (8 bighas 10 biswas), situate at mouza Ghanshyampur, Tahsil Mungaoli, district Guna, while appellant Smt. Kesharbai and Smt. Tulsabai are declared to be the owners of the remaining undivided one-half interest in the aforementioned lands--the two sisters to share equally as between themselves. The decrees of the Courts below are modified to the extent mentioned above so far as the relief of declaration claimed by plaintiff Moti.

The said decrees to the extent they gave relief of permanent injunction to the plaintiff-respondent No. 1 Moti are set-aside.

In the particular circumstances of the case the parties shall bear their own costs

throughout, that is, in all the three Courts. Counsel's fees Rs 100/- if certified.
A decree be drawn up as indicated above.