
(1910) 07 BOM CK 0009
In the Bombay High Court
Case No : O.C.J. Appeal No. 17 of 1909

Ramdas Chabildas

APPELLANT

Vs

Chabildas Lalloobhoy

RESPONDENT

Date of Decision : 08-07-1910

Acts Referred:

Evidence Act, 1872 — Section 92

Citation : (1910) 12 BOMLR 621

Hon'ble Judges : N.G. Chandavarkar, J; Macleod, J

Bench : Division Bench

Judgement

N.G. Chandavarkar, Kt., J.—The learned Judge, from whose decree in favour of the 1st respondent, Chabildas Lalloobhoy, this appeal is preferred, has held that the sum of Rs. 15,000, which the said respondent received from his undivided brothers under an agreement (Ex. R.) in the year 1866, was, on the analogy of a gift by a Hindu father to his son, a gift by the joint family consisting of the respondent and his brothers, in consideration of the services he had rendered to the family. Apart from the question whether any such analogy applies to a transaction such as this between brothers, and whatever its legal character and effect as between the parties to the agreement the sum received by the respondent from the joint family would retain its character as ancestral, as between him and his sons if the source whence it came was an ancestral fund of the family.

2. The question whether Rs. 15,000 received by the respondent under the agreement came from such source will, however, arise only if the release (Ex. S.), on which the respondent substantially founds his claim, is binding on his sons and grandsons, against whom, among others, the declaration sought has been allowed by the decree under appeal.

3. That was a release executed by the 1st respondent's two sons Ramdas and Cursonadas, on the 5th of April, 1889. The learned Judge, who tried the suit, has held, the release to be binding upon them and their sons. That finding is assailed

in this appeal by the appellants, Ramdas and his two sons, Suryakant and Jaysang. Cursondas, the other son of the 1st respondent Chabildas Laloobhoy, having died, was represented in the suit by his widow, Bai Hirabai, and son, Mansen, both of whom were also impleaded as defendants in their personal capacities. They are not appealed against the decree; but the appellants have joined Mansen to this appeal as the 2nd respondent. He, appearing by counsel, has taken up a non-contentious attitude as to this appeal, as he did with reference to the suit.

4. The circumstances under which the release was executed in 1889 by Ramdas and Cursondas are shortly these. Both of them had been kept by their father for some years in England for education. Ramdas returned from there to Bombay in 1888, after having obtained the degree of M. A. and LL. M. from the University of Cambridge, and after having been called to the Bar. Cursondas too returned in the same year, after having been called to the Bar. On their return they lived with their father and commenced practice as advocates of this Court. The father allowed each an allowance of Rs. 100 a month as pocket money. For some time it was paid regularly. But after their mother's death in December 1888, the payments became irregular. Naturally, the sons wished to come to some definite arrangement with the father, which would enable them to maintain an independent position. They were both married and had grown-up wives. The father also was anxious to be rid of the trouble of having to pay to each of the sons a monthly allowance. A proposal for an arrangement such as was finally embodied in the release, Ex. S., came from the father. At the time of his agreement of 1866 with his brothers, he had been joint with them in respect of some Immovable properties, consisting of houses, which yielded rents. From the time of the agreement he had been receiving his share of those rents. That share at the time of the release amounted to a moiety of the said Immovable properties and was undoubtedly ancestral property in Chabildas's hands. But after his agreement of 1866 with his brothers, he made a large income from his business as a freight broker and purchased several Immovable properties. He regarded these as his self-acquisition. He proposed to his sons that he would give up in their favour the whole of his moiety of the houses which were ancestral, provided they released all claim to the properties and income which he claimed as his self-acquired property. We have it from the evidence of one of the sons, Ramdas (the first appellant), that when the proposal for a release was made to him and his brother Cursondas by their father, the father alleged all the property in his hands to be self-acquired except that which he admitted to be ancestral, that he (Ramdas) believed some portion of the properties to be his father's self-acquisition; that both the brothers were doubtful whether the whole was ancestral or not, and that they discussed the matter between themselves on receiving from their father a draft of the release.

5. So far then there can be no question that the sons wanted to be in some way independent of the father. There was a doubt in their minds as to the nature of the properties which he claimed as self-acquired; and the sons gave up by the

release all claim to these in consideration of the father allotting to them not only their shares but also his portion in the properties admitted by him to be ancestral, rather than sue for partition - and embark themselves in a costly litigation, as to the result of which they had serious doubts.

6. The transaction had all the essential elements of a family arrangement. There was sufficient motive for it; and " where there is sufficient motive, the Court will not consider the question of consideration ", (*Lakshmibai v. Ganpat Moroba* (1868) 5 Bom. H.C. 128, and disturb the transaction " on the ground of the inequality of the benefit," (*Rajunder Narain Rae v. Bijai Govind Sing* (1839) 2 I.A. 181, unless there was fraud or some other ground which in law vitiates it.

7. In the present case fraud was never alleged. The first appellant, Ramdas, in his deposition admitted that he did " not plead fraud against the release " and charge his father " with any fraud or dishonesty." The plea of undue influence was set up in the Court below and has been revived in argument on appeal. But both the sons were highly educated and were lawyers. It is true the father showed them no accounts of the properties and volunteered no information. But that was because they asked for no accounts and called for no information. They were living with the father. As Ramdas states they knew what Immovable properties he possessed and that he was making a large income from his brokerage business. Even if they were ignorant of all the facts, which is very doubtful, they had the means of ascertaining them within their reach. Where that is the case, the Court will not set aside a family arrangement (*Rajunder Narain Rae. v. Bijai Govind Sing.* (1839) 2 I.A. 181.

8. Substantially, Ramdas's case in the Court below was that he and his brother had assented to the release, because of a promise by their father that he would leave all his self-acquired property to them by a will. In his deposition Ramdas admitted that he claimed nothing from his father in the lifetime of the latter, because by the release he had deprived himself of that right. But he stated that his father's oral promise to bequeath to him and his brother all the properties claimed by him to be his self-acquisitions formed the real consideration for the release and that they resisted the present suit of the father on the strength of that promise. That alleged oral agreement has been relied upon by the appellant Ramdas in his argument on this appeal. The written release (Ex. S.) is silent as to it. The first respondent Chabildas having waived all objection to the admissibility of evidence in support of the oral promise u/s 92 of the Indian Evidence Act, evidence was let in the Court below. But that evidence hardly bears examination. Ramdas alone speaks to the oral promise of his father; the latter denies it; and Ramdas's conduct and correspondence, no less than those of his brother, Cursonadas, subsequent to the release, plainly contradict the appellant's case on this question. A few months after the release had been executed, the father expressed his desire to marry a second time and leave the bulk of his self-acquired property by a will to charity. If the alleged oral promise were true, Ramdas, on hearing of this, would have reminded his father of that

promise and its binding effect. He not only did nothing of the kind, but in a letter written to the father (Ex. A 4) he warned him that if he married and had sons by the marriage, he would not be competent under the Hindu Law to leave any property by a will to charity, because those sons would be in that event entitled to it. Whether that was good law or not, Ramdas put forward then the right of the sons by a second marriage and not his own right or that of his brother in virtue of the oral promise now alleged. Other letters of Ramdas (Exs. A6, An, A13 and A14) acknowledge the right of the father to make a will as he likes. As a matter of fact he did make a will and show it to his sons. By that he did not leave the whole property to them. As to Cursondas, his letter Ex. A8, is destructive of the case in support of the oral agreement.

9. It may be, and indeed it seems probable, that at the time of the release, both the sons Relieved that on the father's death the properties, over which they were relinquishing all claim on the ground of their being the father's self-acquisition, would descend to them as his heirs or that they would be bequeathed to them. They had then no reason to suspect that he was going to remarry. He had but a short time ago lost his wife, their mother, and deeply mourned the loss. But these were all mere expectations or intentions, which never entered into the terms of the. release as part of the contract.

10. After the release, a moiety of the rents of the properties covered by it were received exclusively by Ramdas and Cursondas: Cursondas with his wife continued to live with his father; and the father sent the 2nd appellant, Suryakant, for education to England and bore the expense of it. That was not because of any right which either Cursondas or Suryakant had as against the respondent Chabildas but was due to his affection for them. At one time Ramdas proposed to bear the expenses of his son's education in England. The evidence also proves that on one occasion Chabildas borrowed money from his sons at interest and repaid it. The release was not only never repudiated by the sons but was acted upon. That is admitted.

11. The release must, therefore, be held binding on the appellant Ramdas. Then comes the question whether his two sons (the 2nd and the 3rd appellant) and the son of his deceased brother, Cursondas, are also equally bound by it.

12. It is argued that they are not, on the authority of the judgment of this Court in Wasantrao v. Anandrao (1904) 6 Bom. L.R. 925 , confirmed by the judgment of the Judicial Committee of the Privy Council in Anandrao Ganpatrao Vs. Vasantrao Madhavrao, . These judgments do not lay down the broad proposition that in no case in a joint Hindu family, consisting of a grand-father, son, and grandson, the last can be bound by a release of his right to a share in the ancestral estate executed by the son. No doubt in the concluding part of their judgment the Privy Council point, as the ground of their decision, to the rule of Hindu law that the grandson has a right to the estate independent of the father; but they go on also to remark that the late Chief Justice of this Court, who delivered its judgment, has rightly applied the principles of Hindu law to the facts

of the case. We must, therefore, turn to the latter judgment to see how the rule of Hindu law in question was applied by this Court to the facts before it in *Wasantrao v. Anandrao* (1904) 6 Bom. L.R. 925. The Chief Justice holds the grandson not bound by his father's release because of the circumstances of the transaction. In each case, where the question arises, it must be decided on its own facts. It is true that a son takes a vested interest by birth in ancestral estate; but it is not true that because he has that independent existence, he is absolutely independent of his father, where the two are joint and where the son is a minor. The father has the right in certain cases and under certain conditions to alienate the estate and bind his son by the alienation; in a partition among the members of the joint family, of which the father and the son are co-parceners, the father represents both himself and his sons; and in all transactions the father has power to act on behalf of the son as well as on his own, especially where the son is a minor. It would be contrary to the letter and the spirit of the Hindu law to hold that a father has no power to bind his son by any transaction regarding family rights. In *Anandrao Vinayah v. Administrator General of Bombay* ILR (1895) 20 Bom. 450, it has been held that, where it is doubtful whether the property, with which the will of a deceased Hindu purports to deal, is ancestral or self-acquired, the assent of his only son to the provisions of the will, some of which are favourable and some unfavourable to his interest and that of his sons, will bind the latter as well as himself, upon the ground that "it was in the nature of an assent to a family arrangement intended for the welfare of the whole family." In such arrangements the father represents and has power to bind his minor sons, in the absence of fraud or other circumstances sufficient in law to vitiate the transaction. This follows from the text of Vyasa, which is quoted and explained by the Mitakshara as authorising even a single co-parcener in a family to bind such of its members as are minors by certain transactions which are entered into "for the sake of the family." [The Mitakshara, Stokes, Section I, pi: 28 and 29 : page 376]. The kind of transactions given there is merely illustrative.

13. In all such cases, what has to be looked to is, whether having regard to the circumstances surrounding the transaction and its object, the father acted so as to bind both himself and his minor sons.

14. In the present case, the 2nd appellant was a minor when his father Ramdas, the 1st appellant, executed the release; the third appellant was utero matris at the time, and was, therefore, in the eye of Hindu law, a born son. It is urged by the 2nd appellant that his father's release is not binding upon him, because upon the admission of his grandfather, the 1st respondent, Chabildas, made in answer to a question in cross-examination, the grandfather did not consider his grandsons as members of his family and took no notice of them in the matter of the release. That answer is perfectly consistent with the fact that the grandsons were included, for the purposes of the transaction, in their father. Its object was to settle once for all dispute and doubt among the members of the family as to the question whether any and what portion of the properties held by Chabildas was self-acquired, and to give him absolute dominion over it. Ramdas and

Cursondas obtained in the properties admitted to be ancestral their respective shares, according to Hindu law, which included those of their sons, and also the share of their father. The effect of the transaction was to separate them in estate from their father and settle finally the character of the property excluded from the release as his self-acquisition so as to give him absolute control over it; and that separation and settlement by the very nature and plain intention of it effected the grandsons also. There was no necessity, therefore, of taking any special notice of these sons or considering separately their interests, which were involved in those of their respective fathers. That is the presumption warranted by Hindu law and there is nothing in the circumstances of the case to rebut it.

15. The next question is as to the right of the 1st respondent Chabildas to a declaration as to certain ornaments of the value of Rs. 40,000 or thereabouts. These, he alleges, he had made for the use of his first wife, Vijkorebai, who died in 1888, and that they belong to him as his self-acquired property. His son by that wife, the 1st appellant Ramdas, claims them with his brother Cursondas, as the stridhan of their mother, the said Vijkorebai. The learned Judge in his judgment under appeal has found the ornaments to be Vijkorebai's stridhan but he has disallowed Ramdas's claim on the ground that on her death her daughter, Bhanumati, sister of the appellant Ramdas, became heir to the ornaments under the Hindu law. The 1st appellant, Ramdas, in appeal, contends that the ornaments formed the anvadheya stridhan of his mother, because they were gifts to her from her husband (his father Chabildas) made subsequent to their marriage through affection, and that, as such, her sons and daughter became on her death in equal shares entitled to them by right of heirship. It is unnecessary to decide this point, because clearly the claim of the sons to the ornaments is time-barred. Vijkorebai having died in 1888, the right to claim the ornaments and their possession accrued then to Ramdas and Cursondas. Ramdas admits in his deposition that he knew his mother had ornaments and that his father, had possession of them since her death. No suit was brought for the recovery of the ornaments from the father within three years from the time the sons and daughter became entitled to them. So the claim of the sons must be held to have become barred in 1892, unless it was kept alive by an acknowledgment of their right by the father or in some other way recognised by law. No plea that the claim was kept alive was set up in the Court below, All that appears in the evidence is that the father, long after the right of the sons had become barred by limitation expressed his willingness to divide the ornaments among his sons and daughter, if they came to an agreement among themselves. But that was no acknowledgment of liability, because it was after the sons had lost their right. Ramdas admits that even then his father made conflicting statements. Under these circumstances, u/s 28 of the Limitation Act, the right of the sons to the ornaments became extinguished at the determination of the period within which they ought to have sued but did not sue to recover the ornaments. The declaration given in the decree to the 1st respondent in respect of them must be upheld.

16. Objection was raised by the appellants during the hearing of this appeal to the maintenance of this suit as one for declaration in the absence of any prayer for consequential relief. There was no need for that prayer, because there was no consequential relief to seek. The object of the suit was to get rid of the blot or cloud on the 1st respondent's title occasioned by the claim of his sons and grandsons in repudiation of the release; and in such a case, a suit for bare declaration lies, u/s 42 of the Specific Relief Act. (*Hem Chunder Sanyal v. Sarnamoyi Debit* ILR (1894) Cal. 354; *Raja Rampal Singh v. Balbhaddar Singh* (1902) I.A. 203, 4 Bom. L.R. 832.

17. It was also urged that the suit for declaration was time-barred, because the right now claimed by the respondent Chabildas had been first denied in 1896 and more than six years had elapsed since then before this suit was filed to take it out of the period prescribed in Article 120 of Schedule II to the Limitation Act. 11 appears that in 1896, the 1st respondent contemplated filing a suit like the present and had a plaint drafted with that object. But he deposes that he did not file the suit, because, when he showed counsel's opinion to his sons, they said nothing against that opinion. The first appellant says in his evidence that the suit contemplated was intended to be a friendly suit. There is practically no evidence to show that the 1st respondent's right under the release was definitely denied or at least disputed in such a way as to give him a cause of action. This plea of limitation does not appear to have been argued in the Court below, judging from the fact that nothing is said about it in the judgment under appeal.

18. Lastly, the appellants complain that they have been unfairly saddled with the costs of defendants Nos. 10, 11 and 9 by the decree under appeal. The question of costs in a suit is, generally speaking, in the discretion of the Judge trying it. "A Court of appeal is averse to interfere with the discretion of a Judge of 1st instance in awarding costs and rarely, if ever, exercises its power except in cases in which some question of principle is involved and the principle is violated." *Khushal v. Punamchand* ILR (1897) 22 Bom. 164. In the present case the learned Judge has thrown the costs of defendants 10, 11 and 9 on the present appellants, who were co-defendants with those defendants, without assigning any reason. There may be cases in which a defendant may fairly be made to pay the costs of a co-defendant but there must be materials before the Court for the exercise of discretion in that manner. Here there were no materials; and there is no principle or authority for ordering a defendant to bear the costs of an unsuccessful co-defendant.

19. The decree appealed from must be amended in respect of the costs of defendants 9, 10, and 11 in the Court below. Those costs must be borne by the said defendants and not by the present appellants. In other respects the decree is confirmed. The 1st respondent must have his costs of the appeal from the appellants; and the appellants must have their costs of the appeal from the respondents who were defendants 10, 11 and 9. These latter costs to be calculated on the footing that the appeal as to the said respondents was in

respect of costs only.

Macleod, J.

20. I have had an opportunity of reading the judgment just delivered by my brother Chandavarkar and I concur with him in the conclusion he has arrived at as to the results of the appeal.

21. On the question whether the suit lay as framed against the 1st appellant, I am of opinion that, if he and his deceased brother had adopted the right line of defence they would have succeeded on the issue. The plaint discloses the most extraordinary mis-joinder of parties and causes of action. The plaintiff has made defendants his separated sons, their wives and children, his children by his second wife, the wife herself, his brother who is joint with the plaintiff as regards certain ancestral immovable property but otherwise separate, and his married daughter. It is alleged in para 20 of the plaint that all the defendants are interested to deny the plaintiff's absolute power of disposal over the property then in his possession but the only cause of action he could have had against his separated sons was a denial by them that the release of 1889 was binding on them. They could not be said to be interested in denying the plaintiff's absolute power of the property in his possession unless it could be said that any party who executes a legal document is interested to deny that he is bound by his own signature. The plaint, therefore, disclosed no cause of action against the sons, Ramdas and Cursonadas, except possibly as regards the ornaments. If, therefore, they had contented themselves with raising this defence the suit as against them must have been dismissed. Their written statement however may be taken as having remedied this defect in the plaint since they therein denied that they were bound by the release of 1889. If they were bound by the release the lengthy inquiry into the earnings of the plaintiff since 1886 was quite unnecessary. Then, again, they mixed themselves up with the plaintiff's claim in respect of the ornaments by contending in para 16 of their written statement that they had become entitled to these ornaments.

22. I agree that the decree of the lower Court should be varied so far as it directs the appellants to pay the costs of respondents 2,3 and 4. These respondents, original defendants 9, 10 and 11, were brought on to the record by the plaintiff for his own purpose and as they have raised no objection to the declaration he asked for, their costs etc. have been paid by him. From one of the exhibits on the record it appears that in 1896 counsel advised the plaintiff he would have to pay such costs. I know of no authority under which the present appellants would be directed to pay the costs of their co-defendants in a case of this nature. It is not a question of direction, it is question of principle. If co-defendants are ordered to pay a plaintiff's costs, there may be circumstances under which the Court may allow one of them if he has paid the plaintiff's costs to recover them from the other, or where a plaintiff is directed to pay the costs of defendant A and have them over from defendant B, the Court may direct A to pay B, but the position of the parties is totally different in this case. The appellants are only responsible for

the costs of the plaintiff caused by their unsuccessfully contesting his right to the relief claimed. They cannot be responsible for the costs of other defendants to the suit with whom they had no concern. It was suggested that the costs of these defendants were increased owing to the contentious attitude of the appellants, but there was no necessity for these defendants to incur any costs if they did not dispute the plaintiff's claim. As between the plaintiff and defendants 10 and n the suit was clearly a friendly one. I should like to add a word on the portentous size of the paper book in the appeal. I think with a little discretion and management it might have been considerably reduced. A large number of Exhibits have been printed quite unnecessarily, and, I think, might have been omitted by arrangement between the parties. Rule 735 of the Bombay High Court Rules certainly prescribes that in an appeal from a decree the paper book shall contain inter alia documentary evidence put in on behalf of the plaintiff and defendant and if this is to be considered as rendering it necessary to print all documentary evidence put in at the hearing, either the Rules should be amended or more care should be exercised at the hearing when putting in documents which have merely been referred to by witnesses as having been executed, but the contents of which have little or no bearing on the case. I refer particularly to documents like Exhibits V to A 3 which take up 35 pages of the printed book.