Bhagi Ram and others v. Birbal and others

Kapur J.

Bench was of the opinion that the law of inheritance according to the Customary Law of the Kangra District was that the position of the mother was equal to that of the widow.

I am in respectful agreement with the view taken by the Letters Patent Bench that on a correct reading of the various questions, Questions Nos. 44 to 54, of the *Riwaj-i-am* of the Kangra District the widow and the mother are equal heirs to male proprietors who die without leaving male lineal descendants and that the rights of other persons are subordinate to the rights of the widow and the mother and, therefore, the mother would be a preferable heir to the brothers. In that view of the matter the suit which was filed by the pre-emptors without bringing the mother on the record was not properly constituted and must, therefore, be dismissed as all the necessary parties were not brought on the record.

I would therefore, allow this appeal, set aside the judgment and decree of the appellate Court and restore that of the trial Court. The appellants will have their costs in this Court and in the Courts below.

APPELLATE CIVIL

Before Khosla and Harnam Singh, JJ.,

MST. SANTI,—*Appellant*

versus

SUDH RAM AND OTHERS,—*Respondents.*

Regular First Appeal No. 195 of 1951

1954

15th June

Indian Registration Act (XVI of 1908) Section 17(1)(b) —Memorandum declaring further interest in immovable property—Whether requires registration under Section 17 (1) (b)—Transfer of Property Act (IV of 1882)—Section 53 A—Benefit of, to whom and when available—Maintenance—Fixation—Circumstances to be taken into consideration stated.

Held, that a memorandum declaring what the interest of a person in a shop is to be in future requires compulsory registration under section 17 (1) (b).

Held also, that the right conferred by section 53-A of the Transfer of Property Act is only available to a defendant to protect his possession.

Held further, that in determining the amount of maintenance, the following circumstances must be taken into consideration:—

(1) the value of the estate, taking the debts for which it is liable also into consideration;

(2) the position and status of the deceased husband and of the widow;

(3) the reasonable wants of the widow including not only the ordinary expenses of living but what she might reasonably expend for religious and other duties incident to her station in life; and

(4) the past relations between her and her husband.

First Apeal from the decree of the Court of Sodhi Durga Parshad, Sub-Judge, 1st Class, Moga, dated the 10th day of March 1950, ordering that the plaintiff's suit with regard to the possession of the shop in dispute be dismissed and the maintenance of the plaintiff be fixed at Rs 40 p.m. and she is granted a decree for Rs 480 on account of her arrears for maintenance for the period of one year ending with February 1947, against the defendants.

M. L. SETHI and F. C. MITTAL, for Appellants.

H. L. SARIN, D. N. AGGARWAL and I. D, DUA, for Respondents.

JUDGMENT

HARNAM SINGH, J. By this order I dispose of Regular First Appeal No. 195 of 1951, and the cross-objections arising therefrom. Harnam Singh, J.

Shrimati Santi instituted Civil Suit No. 147 of 1948, on the 1st of April 1948. In that suit *Shrimati* Santi claimed possession of Shop No. 148 situate in Bartanganj, Moga Mandi, and for the recovery of Rs. 2,400 on account of arrears of maintenance for the past year. In the alternative Shrimati Santi

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claimed in that suit maintenance at the rate of Rs. 200 per mensem for life and a charge on shop No. 148 for the payment of that maintenance.

In resisting the suit the defendants raised pleas which gave rise to the following issues on merits:—

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1. Was Budh Ram not a member of the joint Hindu family of the defendants at the time of his death?
2. Is the shop in dispute joint family property;
3. Did Ganga Ram create a charge on the shop for the maintenance and residence of the plaintiff?
4. What is the amount of the maintenance due to the plaintiff per mensem?
5. Is the plaintiff entitled to a charge for that maintenance on the shop in suit and is she entitled to residence in the shop?
6. Is the plaintiff entitled to arrears of maintenance and at what rate?
7. Did Ganga Ram execute a will and a mortgage with regard to the shop in dispute?
8. Can the plaintiff challenge the will and the mortgage?
9. If so, were the will and the mortgage valid so as to defeat the right of the plaintiff for maintenance and residence?
10. Are the defendants liable for payment of maintenance to the plaintiff, if issue No. 1 is proved and issue No. 2 not proved?
11. Otherwise are the defendants not liable for the payment of the plaintiff's maintenance.
12. Was the will made when he was of sound disposing mind?

In deciding Civil Suit No. 147 of 1948, the Court of first instance has found—

(a) that Budh Ram was member of the joint Hindu family at the time of his death;

(b) that the shop in dispute was joint family property;

(c) that Ganga Ram had not created any charge for the plaintiff's maintenance on Shop No. 148;

(d) that the maintenance fixed for the plaintiff should be a charge on Shop No. 148;

(e) that the sum of Rs. 480 was payable to the plaintiff on account of arrears of maintenance;

(f) that in view of the admission of the defendants that they were liable to maintain the plaintiff it was not necessary to give a finding whether the will, Exhibit D. 2, was made by Ganga Ram when he was of sound disposing mind;

(g) that the plaintiff has a right to challenge the *factum* and validity of the will and the mortgage;

(h) that the mortgage deed, Exhibit D. 1, was valid and binding, and

(i) that neither the will nor the mortgage were effected with the intention to defeat the plaintiff's right of maintenance or residence.

In dismissing the plaintiff's suit with regard to the possession of the shop the Court of first instance has awarded maintenance to the plaintiff at Rs. 40 per mensem and granted her decree for Rs. 480 on

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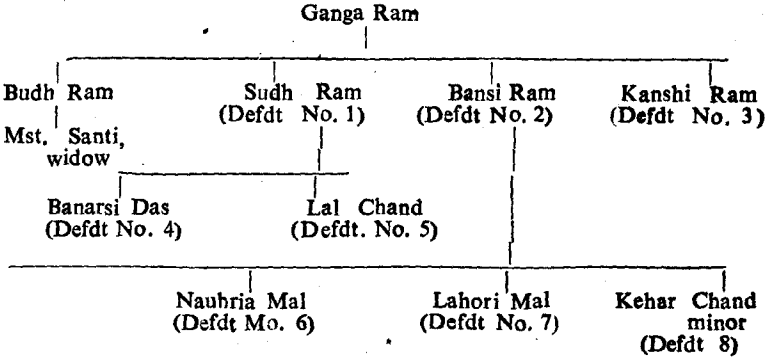
account of arrears of maintenance charging future maintenance on the shop in suit. In the decree it is stated that the charge of *Shrimati* Santi on the shop would be subject to the mortgage, Exhibit D. 1, made by Ganga Ram.

From the decree passed in Civil Suit No. 147 of 1948, *Shrimati* Santi appeals under section 96 of the Code of Civil Procedure while the defendants cross-object.

In order to appreciate the points that arise for decision it is necessary to set out the pedigree-table of the parties. That pedigree-table is as under—



Mr. Madan Lal Sethi appearing for the plaintiff-appellant urges that the Court of first instance was in error in dismissing the suit of the plaintiff for possession of Shop No. 148. In arguments reliance is placed on the memoradum, Exhibit P. 17, made on the 4th of June 1925, by Ganga Ram.

Now, the memorandum, Exhibit P. 17, so far as material to the question that arises for decision in Regular First Appeal No. 195 of 1951, reads :—

> "I and *Mussummat* Santi, widow of Budh Ram, shall remain in possession of Shop No. 148, situate in Moga Mandi, in equal shares. After my and Mst. Santi's death, it shall be jointly owned by the three brothers, namely Sudh Ram, Bansi Ram and Kanshi Ram. When any one of us dies, the other shall receive the rent. The brothers shall not hold any share therein till any one of us remains alive."

In *Sailendra Nath Palit* v. *Syed Hade Kaza* (1), Mukerji, and Guha, JJ., said—

> "Immovable property as defind in the Registration Act, section 2, clause (e), includes 'any other benefit to arise out of land'. The assignment of future rents, that is to say, of rents to arise in future and not of rents which had already accrued due; see *Mangalaswami* v. *Subbia Pillai* (2), and consequently registration of the assignment was compulsory."

In *Bai Parsan* v. *Lallubhai Vandravandas Rani* (3), Beaumont, C. J. (Nanavati, J., concurring) ; said—

> "That a deed purporting to bestow residence in the house and food from the rent of the house is not a declaration of an existing right of a person in respect of that house but declaration of what his interest in that house is to be in future and, therefore, prima facie it requires registration under section 17(1)(b) of the Indian Registration Act".

In plain words, memorandum, Exhibit P. 17, purports to declare what the interest of the plaintiff in the shop is to be in future. If so, registration of the memorandum, Exhibit P. 17, was compulsory.

Mr. Madan Lal Sethi basing himself on the provisions of section 53A of the Transfer of Property Act, then urges that the memorandum, Exhibit P. 17, was admissible in evidence notwithstanding that the document was required to be registered. From a perusal of section 53-A of the Transfer of Property Act, it is plain that the right conferred by that section is only available to a defendant to protect his possession.

(1) A.I.R. 1932 Cal. 356
(2) I.L.R. 34 Bom. 217
(3) A.I.R. 1932 Bom. 217

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Finding as I do, that the memorandum, Exhibit P. 17, was not admissible in evidence for want of registration, I confirm the finding given by the Court of first instance on issue No. 3.

nam Singh, J.

Then it is said that defendants Nos. 1, 2, and 5 being parties to the family partition the right of maintenance of Shrimati Santi was enforceable against them on the principle underlying section 39 of the Transfer of Property Act.

Section 39 of the Transfer of Property Act, provides *inter-alia* that where a third person has a right to receive maintenance from the profits of immovable property, and such property is transferred, the right may be enforced against the transferee, if he has notice thereof or if the transfer is gratuitous; but not against a transferee for consideration and without notice of right, nor against such property in his hands.

In explaining the scope of section 39 of the Transfer of Property Act, Mr. M. R. Jayakar, said in *Mussummat Dan Kuer* v. *Mussummat Sarlo Devi* (1):—

> "The true rule of Hindu Law in such matters would appear to be as follows:—
>
> Two obligations confront a joint Hindu family, (1) the obligation to pay the debts (for instance, of the father) binding on the family; and (2) the moral obligation to provide maintenance to the widows of the family. The latter obligation would, under certain circumstances, ripen into a legal obligation as, for instance, when a charge is created on specific property of the family either by agreement or a decree of the Court; that so long as neither of these two obligations has taken the form of a charge on the family property, the obligation to

(1) A.I.R. 1947 P.C. 8

pay the binding debts will have precedence (as for instance, in the course of the administration of the estate) over mere claims of a female member's maintenance; but, if either of these two obligations assumes the shape of a charge, it would take precedence over the other. This rule of Hindu Law is thus in accord with the principle underlying section 39 of the Transfer of Property Act: (*Somasundaram Chetty* v. *Unnamalai Ammal.*)" (1).

For the reasons given hereinbefore, I have found that the memorandum, Exhibit P. 17, is not admissible in evidence for want of registration. If so, the plaintiff has failed to bring the case within section 39 of the Transfer of Property Act.

Again it is said that the amount of maintenance was much too inadequate.

In determining the amount of maintenance the Court proceeds on the following circumstances:

(1) The value of the estate, taking the debts for which it is liable also into consideration;

(2) the position and status of the deceased husband and of the widow;

(3) the reasonable wants of the widow including not only the ordinary expenses of living but what she might reasonably expend for religious and other duties incident to her station in life; and

(4) the past relations between her and her husband.

In fixing maintenance the Court was of the opinion that in 1926 the total value of the joint family property was not more than Rs. 40,000. That finding is not challenged in appeal.

(1) I.L.R. 34, Mad, 800

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Shri Mohan Lal, D.W. 6, gave evidence that in 1915-16 and 1916-17 Budh Ram, husband of Shrimati Santi, plaintiff, was employed in the District Board Primary School, Singhanwala, on a salary of Rs. 10 per mensem. In this connection copies of the extracts from the school register, Exhibits D.W. 6/1 and D.W. 6/2, may be seen.

In cross-examination Shrimati Santi stated that Budh Ram was a teacher first at Singhanwala for about one year and then at Ratta Khera. Shrimati Santi gave evidence that she did not know what was the pay of Budh Ram when he was posted at Singhanwala.

Shri Kirpal Singh stated that the salary of Budh Ram in the school at village Ratta Khera was Rs. 12 or Rs. 13 per mensem.

Shrimati Santi was maintained by Ganga Ram till the 14th of March 1947, when he died. Ganga Ram had no other source of income except the rent of Shop No. 148. In 1947-48 rent of Shop No. 148 was Rs. 650 per annum. In this connection copy of entry from register 'A' under the Punjab Urban Immovable Property Tax Act, 1940, Exhibit P. 13, may be seen.

Shrimati Santi has two daughters both of whom are married.

On the evidence given in Civil Suit No. 147 of 1948, I find that the maintenance fixed is adequate.

Mr. Madan Lal Sethi urges that the court-fee payable on the plaint cannot be first charge on the amount of future maintenance. In this connection reliance is placed on the provisions of section 60(1)(n) of the Code of Civil Procedure.

Section 60(1)(n) of the Code of Civil Procedure exempts 'right to future maintenance' from attachment and sale in execution of a decree. In the recovery of court-fee from the subject-matter of the suit the judgment-debtors have no interest. Plainly, section 60(1)(n) of the Code of Civil Procedure does not control the provisions of Rule 10 of Order XXXIII of the Code of Civil Procedure.

In closing the arguments Mr. Madan Lal Sethi points out that the court-fee payable on the plaint has not been correctly assessed.

In the plaint maintenance at the rate of Rs. 200 per mensem was claimed in the alternative. If so, court-fee was payable on the relief for the possession of the shop which was valued at Rs. 30,000 and the sum of Rs. 2,400 claimed on account of arrears of maintenance for one year. Indisputably, in a suit where reliefs are claimed in the alternative the court-fee is payable in respect of the relief which carries the higest court-fee. In these proceedings it is common ground that the court-fee payable on the plaint was Rs. 1,680.

For the foregoing reasons, I maintain the judgment and decree under appeal on merits. In the matter of court-fee I find that the court-fee payable on the plaint was Rs. 1,680 and not Rs. 2,972-8-0 as assessed in the decree under appeal.

In the result I allow the appeal by directing the amendment of the decree under appeal so far as the court-fee payable on the plaint is concerned. In all other respects the appeal fails and is dismissed.

Cross-objections preferred by the defendants fail and are dismissed.

Parties are left to bear their own costs in Regular First Appeal No. 195-51 and the cross-objections arising therefrom.

KHOSLA, J.—I agree.

FULL BENCH

Before Falshaw, Kapur and Bishan Narain, JJ.

MRS. INDERJIT KAUR,—*Petitioner.*

versus

MR. ALBERT MICHAEL DAMPIER OVERMAN,—*Respondent*

1954

3rd August

Matrimonial Reference No. 2 of 1954

Divorce—Petition for by a person guilty of adultery—Requisites thereof—Amendment of the petition in such cases, when to be allowed.