Privy Council Appeal No. 57 of 1934

Hari Sadashiv Khare - - - - - - - *Appellant*

v.

Sitabai Kom Ramchandra Sadashiv Khare, since deceased (now represented by Govind Ramkrishna Gadre and another) - - - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT BOMBAY

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 19TH MARCH, 1937

Present at the Hearing :
LORD MAUGHAM.
SIR SHADI LAL.
SIR GEORGE RANKIN.
[*Delivered by* LORD MAUGHAM.]

This is an appeal from a decree dated the 29th February, 1932, of the High Court of Judicature at Bombay, affirming, with the exception of certain costs of defendant No. 2, who is not a party to this appeal, the decree dated the 23rd October, 1929, of the Court of the First Class Subordinate Judge of Ratnagiri. The suit in which the said decrees were passed was brought by the respondent, Sitabai, against the appellant, Hari Sadashiv Khare (defendant No. 1), for partition of immoveable properties consisting of agricultural land and two houses of which the plaintiff and defendant No. 1 were in joint possession and for separate possession of her (plaintiff's) own share therein. Both Courts in India have given judgment in favour of Sitabai, who however has since died.

The parties are Hindus of the Brahmin caste subject to the Mitakshara law as interpreted in Bombay. One Sadashivrao Khare, a retired Subordinate Judge, died on the 4th May, 1915, leaving him surviving his widow Yamunabai and the respondent (Sitabai) the widow of his only son Ramchandra who had predeceased him. Sadashivrao left a will dated the 2nd February, 1914, and a codicil thereto dated the 5th January, 1915. The testator by his will after stating that all his properties were acquired by himself proceeded to devise his entire immoveable property consisting of two houses and certain agricultural

land to the two widows in equal shares. He gave the bulk of his moveables, consisting of promissory notes, debts due to him and gold and silver ornaments, to his own widow (Yamunabai) but gave a part thereof of the value of Rs.14,200 in addition to a large proportion of gold and silver ornaments to his son's widow (Sitabai). In the codicil the testator stated that the promissory notes of the amounts mentioned in his will to be given to the widows had already been transferred to them respectively. He also stated that the ornaments bequeathed to them were in fact ornaments which belonged to them as their stridhan.

On the 6th April, 1916, the testator's widow, Yamunabai, obtained probate of both the testamentary documents. The two widows lived together in the dwelling-house left to them jointly on very amicable terms until the death of the elder widow on the 9th July, 1927.

On the 13th June, 1916, Yamunabai adopted or purported to adopt the appellant as the son of her late husband. The appellant was a son of Yamunabai's sister and was at the time a married man of 30 years of age and a practising pleader. The appellant's name in his natural family was Maheshwar Dhondeo Sathe and on adoption he was renamed Hari Sadashiv Khare though he continued to use the name of Maheshwar. Three documents were executed on the date above mentioned. The first was a deed of adoption executed by Yamunabai in favour of the appellant. It was afterwards registered. The second was a document executed by the appellant in favour of the adoptive mother to the effect that by his adoption he did not get any right to the moveable and immoveable property given to her as stridhan under the will of her late husband " excepting to the estate that you may of your own accord give me out of the same." The third document was executed by the adoptive mother. It is called " vyawasthapatra " which is a will. By it Yamunabai devised the whole of the immoveable property which she had got under her husband's will to the appellant and bequeathed to him a large portion of the moveable property.

On the 20th July, 1916, the younger widow, Sitabai, executed a deed of sale in favour of the elder widow Yamunabai in respect of the immoveable property which she had received under the will of her father-in-law for the consideration, as stated, of Rs.2,000. It seems to be agreed that the sale deed was executed for a specific purpose though there is no agreement as to the nature of the purpose. In spite of this document both widows remained in joint possession and enjoyment of the immoveable property which they had respectively received under the will of Sadashivrao. The parties are agreed that the price of Rs.2,000 was not adequate. Both Courts have found that Yamunabhai had no necessity to purchase the property and that Sitabai had no need to sell it.

On the 17th August, 1921, Yamunabai made another will revoking the will of the 13th June, 1916. It was in

several respects in an unusual form and was apparently made without legal assistance. She began by referring to the will of her late husband and the property she acquired under it and then proceeded to give "the particulars of what I myself have up till now spent out of the said property as well as out of my own estate." These particulars are lengthy and comprised many gifts she had made to a number of institutions and persons amounting to over Rs.50,000. These were to belong absolutely to the persons to whom they were given. She then recited that she had been obliged to obtain a probate of her husband's will; and she proceeded as follows:—

> "3. After having obtained the probate as stated above, I, with a view that the name of my husband the late Mr. Sadashiv Hari Khare should continue and the annual religious and charitable acts should be properly performed, took on the date 13th June, 1916, in adoption Chi(ranjiv) Maheshwar the son of my sister Chi(ranjiv) Sau. Bhimabai Bhratar (husband) Dhondo Sakharam Sathe residing at Shiral and changed his name Maheshwar and named him as Hari. However, by reason of the adoption the said adopted son has neither got nor acquired any right over the property which is the self acquired immoveable property of my husband Sadashiv Hari Khare and which he has given me absolutely under the will and the codicil. I have preserved my right of ownership with respect to the same.
>
> "4. Some days after the aforesaid adoption, I, in the year 1916, made and left a deed of disposition at the instance of the said adopted son. There in it was stated that the said adopted son and my brothers and others should get something by way of gift after my death. About five years have elapsed since then. In the meanwhile the said adopted son and some of those persons who were to get legacies after my death, did not behave towards me as before but they, on the contrary, gave me wrong advice and moreover they refused to return to me the deposit which I had kept with them and my adopted son Hari neglected to do the annual religious acts and rites in the memory of my husband, in my presence, and adopted an indifferent attitude towards me and they did not render me any help in the management of the estate. On this account I felt sorry and I again asked him to see me personally, but it was of no avail. However, as I have taken him in adoption I am firm in my intention to give him the estate that I have to give him out of my estate.
>
> "5. Recently for about a year I have grown weak and I fall ill now and then and consequently I do not feel confident about the duration of my life. During that illness my daughter-in-law Chi(ranjiv) Gangabhagirthi Sitabai and nephew Chi(ranjiv) Janardan Ramchandra Damle have been waiting upon and serving me and I am quite sure that they will serve me in future."

She then stated (para. 6) that she had cancelled the will or deed of disposition of 1916 which she had mentioned in para. 4 and said, "I state below . . . how the estate got by me under the will and codicil" (meaning clearly the will and codicil of her husband) "as well as the remaining estate of my ownership shall be dealt with." She then made certain gifts and bequests. As regards her adopted son (the appellant) she said he was to get, amongst other things, "the immoveable property consisting of paddy fields, etc. The value thereof is about 6,000 rupees." These "paddy

fields, etc.," were part of the immoveables which Sadashiv had devised to the testatrix and Sitabai in equal shares. There is no evidence as to their value. It may, however, be remarked that by the revoked will of the 13th June, 1916, the testatrix had given to the appellant the immoveable property which she got under the will of her husband "including the house, wadi, fields, etc.," without any reference to the circumstance that she had only got a moiety of that property under his will.

After some other gifts, Yamunabai continued as follows:—

> "(*d*) My dwelling house at Kasbe Guhagar including the house and the wadi and the outer portion together with the garden plantation."

So far there is no person to whom this property is given. She proceeds, however, with this clause:—

> "From the talk that I had with my adopted son I do not think he will come and stay in this house after my death, but it is my ardent desire that the vahiwat of the said Agar, etc., should be carried on by the male member in our family and that a lamp should be lighted in the house at his hands and if the adopted son is resolute in his determination I shall be obliged to make a permanent arrangement to get the lamp lighted at the hands of a male member in our family."

There is a forgetfulness here of the fact that the will cannot operate till after her death. Then comes the important clause No. 7:—

> "7. As regards the estate which my husband has given to my daughter-in-law Chi(ranjiv) Gangabhagirthi Sitabai and which he has directed in his will to be given to her, I have given the same to her. She should maintain herself by making proper expenses from the entire estate got by her and if she desires she may, for the purpose of perpetuating the name of my son the late Ramchandra Sadashiv Khare, adopt a boy according to her own will and choice and she is fully competent to give her whole estate to him (i.e.) the boy adopted by her."

In the last clause in her will she said:—

> "I have myself with my own hands dealt with some estate as stated above and some estate is to be dealt with after my death according to what is stated above."

The will of 1921 was registered and on the 18th August, 1922, Yamunabai sent a true copy of it with a covering letter to the appellant. She died on the 9th July, 1927, and in her place the appellant entered into joint possession of the immoveable property devised to him by her with the respondent Sitabai. On the 4th February, 1928, the respondent gave the appellant a notice asking for partition of the property in their joint possession, being the immoveable property devised by the will of Sadashiv to Yamunabai and the respondent in equal shares (called below "the said properties"). She also claimed the Rs.2,500 bequeathed to her by the will of Sadashiv which she alleged had not been paid to her. It is not in dispute that the appellant had received sums exceeding Rs.2,500 from the estate of Yamunabai.

On the 9th July, 1928, Sitabai brought the present suit against the appellant claiming a half share of the said properties and the legacy of Rs.2,500, due to her under Sadashiv's will. She alleged that the sale deed executed by her in favour of Yamunabai was a nominal transaction intended to facilitate the management of the whole estate by Yamunabai. She contended that, in any case, she got back the immoveable property under Yamunabai's will. She also stated that Yamunabai had collected the outstandings of Sadashiv and she would therefore be entitled to get Rs.2,500 from the appellant.

The Trial Judge on the 23rd October, 1929, delivered judgment in favour of Sitabai. He treated the deed of sale as valid, but after a very elaborate consideration of the will of Yamunabai he held that the half share in the said properties was restored to Sitabai by the will. He also held that the Rs.2,500 had not been paid to Sitabai, and that Sitabai in the circumstances of the case was entitled to recover that sum from the appellant in the first instance and, if she failed to recover it from him, she was to recover it from the estate of Yamunabai to be found in the hands of the appellant and defendant No. 2 who is not a party to this appeal. There was an appeal to the High Court at Bombay. On the 29th February, 1932, Patkar and Murphy JJ. delivered judgment confirming the decree (with a trifling variation as to costs) on substantially the same grounds as the learned Trial Judge.

The question as to the validity of the deed of sale depends to a considerable extent on the correct view of the facts. The Trial Judge was unable to accept the evidence of Sitabai as to the circumstances under which the deed of sale was executed, and he was unable to come to a positive finding which would result in the deed being treated as invalid. Their Lordships are not disposed to differ from him on this matter, depending as it does so largely on the facts.

In the above circumstances their Lordships have to deal with two questions. The first is whether, assuming the deed of sale to be valid, the one half of the said properties passed to Sitabai by the will of Yamunabai. The second is whether the judgment for the Rs.2,500 is correct.

The first question undoubtedly presents elements of difficulty having regard to the great lack of precision in the language of the will; but their Lordships are quite unable to accept the view that clause 7 is nothing but a recital framed in most misleading terms. The language of the second sentence, "she should maintain herself by making proper expenses from the entire estate got by her," inaccurate as it is, seems to be amply sufficient to negative the theory of a mere recital. The words "the entire estate" must have their due meaning, and one cannot imagine that Yamunabai thought that Sitabai could maintain herself out of the property of another, nor that if she adopted a boy

she could give to him " her whole estate " unless Yumunabai had given back to her that which she had transferred by the deed of sale. If then the clause is not a mere recital, it seems to their Lordships impossible to come to any conclusion other than that the testatrix intended to revest the said properties in Sitabai. It may well be that her motive was partly due to the peculiar circumstances surrounding the deed of sale referred to and discussed by Patkar J. and to a feeling that a transaction not at all fair to Sitabai ought not to be carried into effect now that the appellant had proved himself unsatisfactory, to say the least, as an adopted son. However that may be, their Lordships have come to the conclusion that the words in clause 7 are intended to operate as words of gift. No useful purpose will be served by elaborating the reasons for this conclusion, which is derived from the whole tenour of the will, especially as they are to be found in the judgments under appeal. There are, no doubt, certain difficulties pointed out in those judgments, but these difficulties may well be regarded as some of the inaccuracies with which the will is overflowing.

As regards the much less important question of the judgment for Rs.2,500 there are concurrent findings of fact that Sitabai was not paid that sum by Yamunabai. It follows, having regard to the large sums collected by the latter before or after having obtained probate of the will of Sadashiv, that she was at the date of her death *primâ facie* personally liable to pay the Rs.2,500 to Sitabai. Upon the death of Yamunabai there was an obligation on any person taking her estate to pay her debts, at any rate to the extent of the estate taken. This is based on the equitable principle that he who takes the benefit must also take the burden. (Mayne's Hindu Law, 9th Edn., 442.) The appellant accordingly set up the contention that all the beneficiaries were necessary parties to the suit so far as the Rs.2,500 were concerned; and on account of this contention defendant No. 2 was made a party. The learned Trial Judge took the view that the estate of Yamunabai had gone only to the two defendants and he held that they were jointly liable to pay the amount to Sitabai, but he also held that the appellant was primarily liable on the ground that he had received during the lifetime of Yamunabai the greater part of the fund (" of outstandings ") out of which the Rs.2,500 were payable according to the will of Sadashiv. In the High Court the same view was apparently taken. It would seem that the legal question as to the liability of the appellant as having received the fund (or part of it) out of which the Rs.2,500 were payable during the life of Yamunabai, was not discussed, and that the only point really urged by the appellant, and that without success, was that Sitabai had received the sum in question. The appellant, after the decree of the Trial Judge, paid the sum to Sitabai. The defendant No. 2 had filed cross-objections with regard to the Rs.2,500; but as the sum had been paid by the appellant

the cross-objections were not pressed as to that sum; but the High Court held that he ought not to have been ordered to pay one-fourth of the plaintiff's costs. The learned Judges also held that he was not a necessary or proper party to the appeal, and ought to have filed a separate appeal. They, however, varied the order of the lower Court by omitting the direction that defendant No. 2 should pay one-quarter of the plaintiff's costs, but they left him to pay his own costs of the appeal.

In view of the above facts defendant No. 2 has not been made a party to the present appeal, and on the other hand the appellant in his case has merely contended as regards the Rs.2,500 that "Yamunabai had fully carried out the directions of Sadashiv in regard to the respondent and the respondent is not entitled to claim Rs.2,500 from the appellant." It is not clear to their Lordships that the appellant might not have been entitled, on raising the point at the appropriate time, to some small rebate or deduction from the decree for Rs.2,500; but in the circumstances of the case it is impossible for their Lordships to allow a new contention to be raised on this matter and the decree as regards the Rs.2,500 cannot therefore be disturbed.

For the above reasons their Lordships will humbly advise His Majesty that the appeal should be dismissed with costs.

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In the Privy Council

HARI SADASHIV KHARE

v.

SITABAI KOM RAMCHANDRA SADASHIV KHARE, SINCE DECEASED (NOW REPRESENTED BY GOVIND RAMKRISHNA GADRE AND ANOTHER)

DELIVERED BY LORD MAUGHAM

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