

Mithibai Vs. Meherbai

Mithibai Vs. Meherbai

SooperKanoon Citation : sooperkanoon.com/333402

Court : Mumbai

Decided On : Feb-18-1921

Reported in : (1921)23BOMLR858

Judge : Kanga, J.

Appeal No. : O.C.J. Suit No. 1962 of 1919

Appellant : Mithibai

Respondent : Meherbai

Disposition : Suit dismissed

Judgement :

Kanga, J.

1. One Jasvir Bhudar died in the month of May 1893, leaving him surviving his widow Bai Divali as his only heir according to Hindu law. He left a will, dated the 2nd day of May 1893, whereof he appointed his widow, the said Bai Diwali, the sole executrix. Bai Divali proved the will and obtained probate thereof on the 11th November 1893, From the schedule to the petition for probate it appears that Jasvir Bhudar owned an immoveable property at Jambli Mohola and another immoveable property at Falkland Road, an outstanding debt of Rs. 36,000, stock-in-trade of the value of Rs. 2,000, and household furniture and apparel of a small

value. After obtaining probate of the will, Bai Divali sold the property at Falkland Road to Ratanbai and conveyed the same to her by a conveyance dated the 2nd day of June 1894. On the 28th November 1898, Ratanbai conveyed to N.C. Shroff the said property. The defendants are the heirs and legal representatives of the said N.C. Shroff. Bai Divali died on the 6th January 1917, and the plaintiff claiming to be the reversionary heir of Jasvir Bhudar has filed this suit, praying that it may be declared that Bai Divali only took a widow's estate under the will of her husband and that on the death of Bai Divali she became entitled to the said Falkland Road property and that the defendants should be ordered to deliver possession of the said property to the plaintiff.

2. On the evidence of the plaintiff I hold that she is the reversionary heir of Jasvir Bhudar.

3. The next question that arises is, what interest did Bai Divali take under the will of her husband? The clause in the will of Jasvir Bhudar whereby the residue is devised to Bai Divali runs as follows :-

As to whatever surplus of my property may remain over after my decease the (malik) owner thereof is (shall be) my wife Divali. She shall during her life-time apply and spend the same in a good way. As to the surplus that may remain over after the performance of her that is to say my wife's Karaj Avasar (funeral and subsequent ceremonies) all that shall be used for good purpose. Except my executrix no one else nor my heirs or representative whatever shall have any right to or interest in my property.

4. It was contended by Mr. Desai that Bai Divali took an absolute estate under the said will, and reliance was placed by him on the Privy Council decisions in *Lalit Mohun Singh Roy v. Ghukhun Lal Boy* and *Surajmani v. Babi Nath Ojha*. The word 'Malik' is used by Jasvir Bhudar in his will in connection with the devise to Divali. The said word, according to the said Privy Council decisions, imports full proprietary rights unless there is something in the context to qualify it. The fact that the donee is a Hindu widow is not sufficient for that purpose. If, therefore, there had been no qualifying words in the will, as the word 'Malik' in connection with the devise of the residue to Divali has been used, there would have been no difficulty in

holding that Bai Divali took an absolute estate. Mr. Mehta cited *Hirabai v. Laksmibabil* L.R (1887) Bom. 573 but the word used in connection with the devise to the Widow in that case was heir and not 'Malik' and that decision has, therefore, no application to this case. The decision in *Harilal v. Bai Rewa* I.L.R (1895) Bom. 376 cited by Mr. Mehta, seems to be in point for, there the Gujarati word in the will is translated 'owner'. But Mr. Mehta has not informed me, and I have not been able to find out, What the Gujarati word used in the Will in that case was. My impression is that the Gujarati word used there Was 'dhani'. I take it that the Gujarati word translated 'owner' would import full proprietary rights and in the will before the Court in the case of *Harilal v. Bai Rewa* there was nothing to qualify the word translated 'owner'. The Court of Appeal in that case thought that the fact that the legatee was a Hindu widow was sufficient to qualify the word translated 'owner', and accordingly held that the legatee in that case took a widow's estate. The authority of *Harilal v. Bai Rewa* is, in my opinion, considerably shaken by the above cited Privy Council decisions. However, the word used in this will, viz., 'Malik', is the same as that used in the Privy Council decisions, and, unless there are some words to qualify it, I must hold that Bai Divali took an absolute estate.

5. The qualifying words in the will which are relied upon by the plaintiffs counsel are-' During her life-time she shall apply and spend the same in a good way'. No doubt, the law requires that if there is an absolute gift in the first instance you must have very clear words to cut down the absolute estate; and it may be said that the words 'during her life-time she shall apply and spend the same in a good way', used by the testator, express the object of his having made an absolute gift: In *re Jones*; *Bidharda v. Jonea* (1898) 1 Ch. 438. But taking into consideration the fact that the aforesaid Words are used in reference to a Hindu widow and the fact that the qualifying words used in the will are very similar to those used in the will in *Mafatlat v. Kanialal* : AIR1915 Bom246 Where the learned Judges of the Court of Appeal held that a life-estate had been created, I come to the conclusion that the words ' during her life-time she shall apply the same and spend . in a good way 'cut down the absolute estate created by the use of the word 'Malik' and hold that Bai Divali took a life-estate and not an absolute estate.

6. The next question for consideration is, what are the and incidents of such life-interest Mr. Mehta has contended that whatever might be Bai Divali's powers during her life-time over moveables, in immoveables she had only a life-estate, and that she could only enjoy the income of the immoveable properties and nothing more. In the will itself there are no words to the effect that she was to use and spend the income only. The will says: 'She shall during her life-time apply and spend, the same', that is to say all the residue of the testator's property. The clause in the will containing the disposition of the residue of the testator's property is very much like the clause in the will in Mafatlal's case, where, on the construction of the will, the Court of Appeal held that the testator's son's widow took a life-estate with full powers of disposition by acta, inter vivos. Mr. Mehta contended that Mafatlal v. Kaniala : AIR1915 Bom246 was the case of a daughter-in-law and was not the case of a widow of the testator. But, in my opinion, that does not make the slightest difference, because a daughter-in-law in the Bombay Presidency inherits only as a widow of a gotraja sapinda, and is entitled, when she succeeds as an heir, to a widow's estate. She is in the same position as a Hindu widow. I, therefore, hold that Bai Divali took a life-estate with uncontrolled, powers of disposition by acts inter vivos : Mafatlal v. Kamalal, and In re Pounder (1886) 56 L.J. Ch. 113

7. Mr. Desai further argued that even if Bai Divali took a 'life-estate with no powers of disposition during, time, she being an executrix the conveyance to Ratanbai should be deemed to have been conveyance by her as executrix. Bai Divali took out probate in 1893 and conveyed the property to Ratanbai in June 1894. The conveyance (Exh. B) does not mention in what particular capacity Bai Divali sold conveyed. All the various capacities are mentioned and then the conveyance says, 'she the said, Bai Divali doth by these presents grant bargain, sell assign, release, convey and assure unto the said Ratanbai' the said property 'and all the estate, right, title, interest, use, trust, inheritance, property, possession, benefit, claim and demand whatsoever of the said Bai Divali in and to the said premises and every part thereof.' Then in the conveyance there is a covenant for title given by Bai Divali. At the date of the conveyance (Exh. B) the Falkland Road property, which is in dispute in this suit, was in the hands of Bai Divali as executrix and she was competent as executrix to sell it to Ratanbai, who was a bona fide

purchaser for valuable consideration. But it is argued as executrix because the deed shows that she intended to convey as beneficial owner being under the impression that she took the property absolutely under the will of her husband. I am of opinion that the deed shows that Bai Divali conveyed the whole property and all the title she possessed in the property, and that would include the right and title possessed by her as executrix: see *Gangabai v. Sonabai* I.L.R (1915) Bom. 69 : 17 Bom. L.R. 303 and *Bijraj Nopani v. Pura Sundary Dasae* (1914) 16 Bom E.R. 796, p. c.

8. Mr. Mehta argued that in the petition for probate the value of the property was given at Rs. 10,800 and that the sale by Bai Divali to Ratanbai was for Rs. 4,000, and, therefore, Ratanbai must have thought that the title was doubtful and paid to Bai Divali a very low price. But as pointed out by Mr, Desai the value in the petition for the purposes of probate was arrived at by taking into consideration the fifteen years' rent of the property. As the lease was thought to be determinable at will no purchaser would pay anything more than the value of the building to Bai Divali.

9. Mr. Metha has further argued that it would be dangerous to hold that if a Hindu widow, who is also an executrix, sold and conveyed, she should be deemed as conveying as an executrix. I do not see any danger in so holding. The Legislature has expressly applied Section 90 of the Probate and Administration Act to all Hindus, including Hindu widows, and under Section 90 of the Probate and Administration Act a Hindu widow, who is appointed an executrix, would be entitled to sell as executrix the property left by her husband, if no restriction was imposed on her powers of disposing of the property by the will which appointed her executrix. There are no words used in this will imposing any restriction on the powers of the executrix. Therefore, there was nothing to prevent Bai Divali from selling and conveying this property as executrix. If she could have sold as executrix under Section 90 by so stating expressly in the conveyance, I do not see any difficulty in holding that she sold in all the capacities she possessed when the deed (Exh. B) does not expressly say in what particular capacity she has sold but merely recites all the capacities. I, therefore, hold that the sale to Ratanbai should be deemed to be a sale by Bai Divali as the executrix of the will of Jasvir Bhudar.

10. Then Mr. Desai has raised some further issues and, relying on Section 51 of the Transfer of Property Act, has contended that the defendants are entitled to the relief claimed in prayer (2) of the counter-claim. Mr. Desai has also contended that in any event the interest of Jasvir Bhudar had been terminated and that no interest of his estate remained in the Falkland Road property. It appears from Exh. No. 3 that one Narsinga Saibu leased to one Bhansalee Bhagvandas, on the 10th November 1869, the property in suit; and it appears that the said lease was a lease at will. Jasvir Bhudar derived his title as lessee from Bhansalee Bhagvandas. On the 10th June 1894, Narsinga Saibu gave another lease of the said property to Ratanbai on her application. Subsequently, Bomanjee Shapurjee Ohothia became the owner of Narsinga Saibu's interest in the property as landlord, and, on the 10th June 1906, he terminated the lease and granted a lease for 99 years to N. O. Shroff, whose representatives the defendants are. It appears from the evidence of the Bhayya that the building in 1907-08 was in a dilapidated condition and that two of the walls were pulled down, and the floors and walls were re-built. No books of account have been produced to show how much was spent in the repairs and rebuilding of the walls that were pulled down. The Bhayya says that about Rs. 5,000 were spent. The evidence on this point is very meagre and it is very difficult to say how much was spent on the improvements. Mr. Desai argues that if under Section 51 of the Transfer of Property Act he is asked to pay for the interest of Jasvir Bhudar in the property, that interest would be at the most of the value of Rs. 500. Mr. Mehta says that the interest would be of the value of Rs. 20,000. I have got no materials before me for determining what the value of that interest would be. I think that it would certainly be more than Rs. 500. If I am wrong on the construction of the will and in holding that Bai Divali should be deemed to have conveyed the property as an executrix to Ratanbai, then the lease granted on the 10th June 1906 to N.G. Shroff should be taken to be a lease for his benefit during the life-time of Bai Divali only and after her death the estate of Jasvir Bhudar would be entitled to the benefit of that lease and the defendants at the most would be entitled to have credit for the improvements.

11. Suit dismissed with costs. No order on the counter-claim.

