

Sarubai Balakdas Bairagi Vs. Narayandas Devdas Bairagi

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Court : Mumbai

Decided On : Oct-02-1942

Reported in : AIR1943Bom224; (1943)45BOMLR473

Judge : John Beaumont, Kt., C.J.

Appeal No. : Second Appeal No. 385 of 1941

Appellant : Sarubai Balakdas Bairagi

Respondent : Narayandas Devdas Bairagi

Disposition : Appeal dismissed

Judgement :

John Beaumont, Kt., C.J.

1. This is a second appeal from a decision of the Assistant Judge of Poona, and it raises a question of Hindu law.

2. One Parvatibai, who was the wife of the respondent, died on August 16, 1936, having made a will four days before her death, whereby she left her property to the appellant, who is her niece. The will is not before the Court, but it is not disputed that under the will the appellant is given Parvatibai's property. The property in question consisted of cooking utensils, articles of clothing, money in currency notes and ornaments, and it is admitted that it comes within the description of stridhana other than saudayika. The rule with regard to the powers of a woman over property of that nature is stated in Mulla's Hindu Law, 9th Edition, paragraph 143, in these terms :

As regards stridhana other than saudayika, e.g., gifts from strangers, property acquired by mechanical arts, etc., the rule is that she has no power to dispose of it during coverture without the consent of her husband. It is subject to her husband's dominion, and he is entitled to use it at his pleasure even if there be no distress.

Then lower down it is stated :

When it is said that stridhana other than saudayika (gifts from relations) cannot be disposed of by a woman without her husband's consent, it is meant that in her lifetime she cannot sell it, or make a gift of it, or bequeath it by her will, or otherwise deal with it without her husband's consent.

The rule was discussed by this Court in Bhau v. Raghunath I.L.R. (1905) 30 Bom. 229 where the texts are discussed. The rule is expressed to apply to a woman under coverture, which is the expression used in the translations of the texts, and I must assume that the translations are accurate. The word 'coverture' under English law is synonymous with marriage, and a woman under coverture is simply a married woman. The learned trial Judge says : 'A state of coverture is understood to mean a state during which the wife is under the power of her husband.' But in English law a woman does not cease to be under coverture because she

ceases to live with her husband.

3. The learned trial Judge held that Parvatibai had not lived with her husband for some twenty or twenty-five years, but, as the learned appellate-Judge points out, though that may be so, she was not living very far away from him. He lived in a temple, which belonged to him, and Parvatibai: lived in a room in the temple, and the property in question was found in another room of which both the appellant and the respondent had keys, the appellant having received one key from Parvatibai. The respondent had married again, and I will accept the finding of the learned trial Judge, with which the lower appellate Court did not disagree, that Parvatibai had not lived with her husband as a wife for twenty or twenty-five years. The learned trial Judge held that under these circumstances she could not be said to be a woman under coverture within the meaning of the rule, and for that proposition he relied on a decision of this Court in *Bhagvanlal v. Bai Divali* : AIR1925 Bom445. It was there held that a Hindu wife, who had lived separately from her husband for thirty or forty years, was competent to dispose by will of property which she had inherited from her father, even without the consent of her husband. The facts there were that the wife had left her husband on his marrying another wife thirty or forty years before her death, and she had thereafter lived at a distance from her husband with her father. Whether the Court was justified in the circumstances of that case in departing from the general rule, I am not called upon to consider, because, no doubt, the decision binds me. But it goes no further than to show that the Court, in applying the rule as to the power of a married woman over her stridhana which is not *saudayika*, will take into consideration something in the nature of a *de facto* divorce. Of course, in Hindu law divorce is not permitted, and: it may be reasonable for the Court in certain circumstances to say that a marriage must be treated as having come to an end, though, I can see dangers underlying the doctrine. For however long a period a wife has lived separately from her husband, she is still a married woman, and may at any moment go back to live with her husband. However, the facts in that case were very much stronger than the facts in this case, and the lower appellate Court held that it could not apply the principle of *Bhagvanlal v. Bai Divali* (*supra*) to the facts of this case. I think that view is right.

4. Mr. Samarth on behalf of the appellant has pressed upon me the view that a liberal interpretation of the modification of the rule established in *Bhagvanlal v. Bai Divali* should be adopted, because in these days women are more emancipated than they were when the rule was established, and it is unreasonable to hold that a woman, who is not in fact living with her husband, is still incapable of disposing of her property without his consent. But if the rule is to be altered, it must be by the Legislature, and not by the Courts. It may be true that the emancipation of Hindu women has proceeded some way, but it is still a long way short of the point reached by women in England at the time when the Married Women's Property Act was passed sixty years ago. The bulk of Hindu women are still illiterate, and one cannot shut one's eyes to the fact that a rule limiting their power of disposing of property operates largely for their own benefit by protecting them against unscrupulous persons who might take the property from them, if the law allowed it. If I were to extend the principle of *Bhagvanlal v. Bai Divali* (*supra*) to the facts of this case, I should really be holding that the rule laid down in the texts, that a woman cannot during marriage dispose of stridhan which is not *saudayika* without her husband's consent, only applies if and whilst she is living with her husband as his wife. If I were to do that, I should be usurping the functions of the Legislature.

5. Though, therefore, my sympathies are entirely with the appellant, I am afraid I must dismiss the appeal.

6. No order as to costs of the appeal.