

TEJ KAUR AND ANR.
v.
KIRPAL SINGH AND ANR.

MAY 10, 1995

[K. RAMASWAMY AND B.L. HANSARIA, JJ.]

Code of Civil Procedure, 1908 :

S.98—Executive of Will—Proof of—Whether a finding of fact—Difference of opinion among the judges in the Bench—Confirmation of decree in the absence of majority opinion—Validity of—Examination on merits by Supreme Court to find the validity of the will—Whether s.98(2) rendered otiose or ineffective.

The first respondent is a step brother of one K, whose widow succeeded to a limited estate in 1922 on her husband's demise. She executed a will in 1967, to the extent of about 36 acres in favour of the appellant, who is her sister's daughter. On a suit filed by the first respondent, the trial court held that the will was not proved to have been validly executed and in consequence the respondent-plaintiff became entitled to estate. The Sub-Judge confirmed the same. In appeal before the High Court one Judge held that the will was not proved while the other judge held it to have been proved. In the absence of majority opinion on proof of the will, the decree of the lower court was confirmed. Hence this appeal.

It was, *inter alia*, contended that the disputed question should have been referred to a third Judge for his opinion.

Dismissing the appeal, this Court

HELD: 1. The difference of opinion between Judges, who constitute the Bench hearing the appeal, on a point of law alone would be referred to a third or other Judges according to the rules of that High Court. By implication, on question of fact, when there is no majority opinion varying or reversing the decree appealed from, such decree should be confirmed.

[386-H]

2. In the instant case, the Letters Patent power was not available and therefore, by operation of sub-s.(2) of s.98, the decree of the court below

A stands affirmed. [388-C]

Javanti Devi v. Chand Mal, (1984) BBCJ, 561, held inapplicable.

Rajgopala Naidu v. Subbammal, AIR (1928) Madras 180, *Harakh Narain v. Babban*, AIR (1933) Allahabad 473 and *Baboo Ram v. Ishrat Ali*,

B AIR (1975) Allahabad 180, referred to.

Mulla's Code of Civil Procedure, 14 Edn. Vol. I, P.587, referred to.

3.1. It is true that in a case where there is a difference of opinion among the Judges of the High Court, the power of this Court under Article 136 is wide enough to test the correctness of the conclusion reached by the differing Judges. This proposition is unexceptionable but this Court had no occasion in *Dr. Prem Chand Tandon and Ors.*, case to consider the scope of sub-s. (2) of s.98. The language employed in sub-s. (2) is imperative and in mandatory terms. The object appears to be that on a question of fact when there is a difference of opinion, the view expressed by the court below, in the absence of a majority opinion, needs to be given primacy and confirmed. When such is the animation, this Court cannot enlarge the scope of the controversy by itself examining the correctness of the finding of fact and decide which view of the two is correct. This would be in direct negation of the legislative mandate expressed in sub-s. (2) of s.98 of the CPC. [388-D-F]

3.2. While exercising power under Art. 136, this Court not to do anything which would violate legislative mandate, and hence it declined to interfere. [388-G]

F *Dr. Prem Chand Tandon v. Krishna Chand Kapoor*, [1973] 2 SCC 366, referred to.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 88 of 1979.

G From the Judgment and Order dated 16.5.77 of the Punjab and Haryana High Court in R.F. No. 117 of 1971.

A.B. Rohtagi and Har Dev Singh and Ms. Madhu Mool Chandani for the Respondent No. 2.

H The Judgment of the High Court was delivered by

K. RAMASWAMY, J. This appeal by special leave arise from the judgment of the Division Bench dated May 16, 1977 in R.S.A. No.117 of 1971 of Punjab & Haryana High Court. The appellant is the first defendant. Kirpal Singh, first respondent, laid the suit for possession of agriculture lands, buildings and movable properties from the appellant and another with certain declarations. Kirpal Singh is a step brother of one Kartar Singh, husband of Harbant Kaur. She succeeded to a limited widow estate in the year 1922 on her husband's demise and she executed a will Ex-D.1 dated August 12, 1967 in favour of the appellant, daughter of Harbant Kaur's sister to an extent of 36 acres etc. The trial court decreed the suit holding that the will was not proved to have been validly executed and in consequence the respondent/plaintiff became entitled to the estate of Kirpal Singh. On appeal, the Sub-Judge, Ist Class, Rajpura in his decree and judgment dated January 21, 1971 confirmed the same agreeing that the will has not been proved. When the appeal was posted before the Division Bench, one learned Judge held that the will has not been proved while another learned Judge held it to have been proved. Since no majority opinion of division bench on proof of the will emerged decree of the court below was confirmed. Thus this appeal by special leave.

It is vehemently contended for the appellant and the second respondent that the learned Judge who held that the will was not proved had not taken relevant factors into consideration, while the other learned Judge had gone in greater detail of the circumstances in which the will came to be validly executed and proved, the onus of proof of will in that behalf has been discharged. The disputed question should have been referred to a third Judge for his opinion. In any case, the bar engrafted in sub-s. (2) of s.98, CPC applies only to the Division Bench of the High Court who heard the appeal; and its constraint is inapplicable when this Court hears the appeal under Art. 136. This Court should examine in detail whether the finding of non- proof of the will is vitiated by errors of law. The power of this Court is very wide to independently reappraise the evidence and come to its conclusion. In that behalf he placed strong reliance in *Dr. Prem Chand Tandon v. Krishna Chand Kapoor*, [1973] 2 SCC 366.

The question, therefore, is whether the finding of the court below that the will has not been proved is a finding of fact? If so, whether in the absence of majority opinion of the Division Bench, the confirmation of the decree of civil court is valid in law? Thirdly, whether this Court can

- A examine the case on merits to find whether will is validly proved, in which event would sub-s. (2) of s.98 be not rendered otiose or ineffective?

It is fairly agreed across the bar that one learned Judge of the Bench recorded a finding that will has not been proved and another learned Judge recorded contra finding, namely, will has been proved. The ground on which the conclusion is reached are not material for the purpose of deciding the controversy in this appeal. It is not controverted across the bar that the question whether a will is proved or not proved is a question of fact. In the absence of majority opinion in that behalf, sub-s.(2) of s.98 mandates that the decree of the court below should be confirmed. Whether this Court could enlarge this scope and independently examine the merits to come to a conclusion either agreeing or disagreeing with either of the learned Judges who constituted the Division Bench? In that behalf it is necessary to look into the language of s.98 of CPC. Section 98(1) adumbrates that where an appeal is heard by a Bench of two or more Judges, the appeal shall be decided in accordance with the opinion of such judges or of the majority (if any) or such Judges. Sub-s.(2) seems to design a situation where no majority opinion agreeing with the judgment of the trial court emerges. It says that: "Where there is no such majority which concurs in a judgment varying or reversing the decree appealed from, such decree shall be confirmed". Proviso to sub-s.(2) reads:

- E "Where the Bench hearing the appeal is composed of two or other even number of judges including to a Court consisting of more Judges than those constituting the Bench, and the Judges composing the Bench differ in opinion shall than be heard upon that point only by one or more of the other Judges, and such point shall be decided according to the opinion of the majority (if any) of the Judges who have heard the appeal, including those who have first heard it."

- G Sub-s.(3) provide that nothing in this section shall be deemed to alter or otherwise affect any provision of the Letters Patent of any High Court.

In other words, the difference of opinion between Judges, who constitute the Bench hearing the appeal, on a point of a law alone would be referred to a third or other Judges according to the rules of that High Court. By implication, on question of fact, when there is no majority opinion varying or reversing the decree appealed from, such decree should

be confirmed.

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In Mulla's Code of Civil Procedure, 14 Edn., Vol. I at P. 587, it is stated thus: "no reference can be made under this section if the Judges differ on a question of fact. The power to refer can only be exercised if there is a difference of opinion on a point of law". In *Rajagopala Naidu v. Subbammal*, AIR (1928) Madras 180, in a suit for accounts, the Judges partly differed and partly agreed; and question arose as to what extent the decree of the court below stands confirmed or reversed. The Bench held that where an appeal is heard by two Judges and both agreed upon reversing the decree appealed from only as to one portion but differed as to the rest, the decree will be reversed as to the portion with respect to which the Judges have agreed on reversal, and will be confirmed as to the rest, namely with respect to which they have differed. The same view was expressed by a Division Bench of the Allahabad High Court in *Harakh Narain v. Babban*, AIR 1933 Allahabad 473. Therein, in a suit based on mortgage its validity and binding nature was assailed by a member of the coparcenary. A learned Judge held that a large part, namely, that a sum of Rs. 2000 was not supported by valid consideration and the rest was. Another learned judge upheld the decree of the trial court except as regards Rs. 340 of the principal amount. It was held that the decree to the extent of concurrence stands confirmed and the rest is not a decree of the High Court within the meaning of ss.2(2) and 2(9) of of C.P.C. It was held that where the Judges composing a Bench do not agree in confirming the adjudication made by the lower court in respect one item such decree or adjudication relating to that item shall be confirmed. At the same time if they agree in reversing the decree or adjudication by the lower court, as regarding another item in dispute, the decree in respect of such item shall be varied. In *Baboo Ram v. Ishrat Ali*, AIR (1975) Allahabad. 180, the second appeal under s.100 CPC arose from the suit for ejectment and the trial court, accepting the plea of the tenant, dismissed the suit finding that the tenant did not commit default in the payment of rent. On first appeal, it was reversed holding otherwise. In the second appeal, there was difference of opinion between the Judges constituting the Bench. It was held that by operation of sub-s. (2) of s.98, the finding in respect of which there was a difference of opinion, would stand confirmed, and the opinion of the third Judge on the legal point was severable from his opinion on the finding of fact, which become conclusive by the application of s.98(2) irrespective of the opinion recorded by the third Judge.

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A The ratio in *Jayanti Devi v. Chand Mal*, (1984) BBCJ, 561, which has been referred by Shri Bagga, is inapplicable to the point in issue. Therein, because of what has been provided in sub-s.(3) of s.98 CPC, the Letter Patent power was taken aid of and it was held that the Letter Patent Court was not confirmed to the hearing of the appeal by the third Judge on the question of law only, on which the Judges hearing the appeal had differed.

B Such a difference of opinion could be on a question of fact as well. It could, thus, be seen that the reference there was under the Letters Patent which power has been expressly preserved by sub-s.(3) of s.98. But in the case at hand, the Letters Patent power was not available and therefore, by operation of sub-s.(2) of s.98, the decree of the court below stands affirmed.

C The question then is whether this Court could nullify the scheme of s.98(2) by examining the dispute on merits and by implication render sub-s.(2) surplusage or otiose. In our considered view the contention of the appellants cannot be accepted. It is true that in a case where there is difference of opinion among the Judges of the High Court, the power of this Court under Article 136 is wide enough to test the correctness of the conclusion reached by the differing learned Judges as pointed out by this Court in *Dr. Prem Chand Tandon's* (supra). This proposition is unexceptionable but this Court had no occasion in that case to consider the scope of sub-s.(2) of s.98. The language employed in sub-s.(2) is imperative and in mandatory terms. The object appears to be that on a question of fact when there is a difference of opinion, the view expressed by the court below, in the absence of a majority opinion, needs to be given primacy and confirmed. When such is the animation, this Court cannot enlarge the scope of the controversy by itself examining the correctness of the finding of fact and decide which view of the two is correct. This would be in direct negation of the legislative mandate expressed in sub-s.(2) of s.98 of the CPC.

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G When leave was granted, it was to examine the correctness of the legal position; and not to examine the controversy on merits. While exercising power under Art. 136, we may not do anything which would violate legislative mandate. In that view, we decline to interfere.

The appeal is accordingly dismissed but in the circumstances parties are directed to bear their own costs throughout.

G.N.

Appeal dismissed.