THE BRAHMA VART SANATAN

v.

KANHYALAL BAGLA AND OTHERS

SEPTEMBER 25, 2001

[M.B. SHAH AND R.P. SETHI, JJ.]

Hindu Law :

Hindu Succession Act, 1956—Section 14—Property of female Hindu to be her absolute property—Will executed by testator in favour of his wife—Intention of testator and specific words used in the Will makes it clear that absolute right of ownership of his properties bequeathed to his wife—Wife executes Will in favour of third person—Adopted son claims possession of properties and declaration that Will executed by his mother is null and void—Trial Court held that the mother had only life estate under the Will and son will have no right to obtain possession of the estate of the mother during her life time—High Court confirmed the order—On appeal, held even presuming that mother had life estate, she becomes absolute owner of the property under Section 14(1).

Wills:

Interpretation of—To be read as whole to gather intention of the testator.

Words and Phrases:

'Puree Malik'—Meaning of.

Testator-husband executed a Will in favour of his wife. After the testator's death his wife adopted respondent No. 1. After few years of adoption R-1 initiated proceedings through his natural father for declaration that he was adopted son and also for possession over the disputed properties. Trial Court decreed the suit. On appeal, High Court upheld the decision of Trial Court to the extent that R-1 was the adopted son but set aside the decision of trial court for handing over the possession of the suit premises. Subsequently, the mother executed a Will and a settlement deed in favour of the appellant. After her death R-1 filed another suit for possession and for declaration that Will and settlement deed executed by the mother are null and void. Trial Court held that the mother had only life estate under

A the Will and it was not enlarged under Section 14(1) of the Hindu Succession Act into an absolute estate. High Court confirmed the same. Hence the present appeal.

Allowing the appeal, the Court

B HELD : 1.1. The intention of the testator and the specific words used in the Will makes it clear that the executant of the Will was to bequeath absolute right of ownership of his properties to his wife. [316-C; D]

1.2. After the death of her husband she would have life interest even without Will being executed in her favour. In view of Section 14(1) of the C Hindu Succession Act, she would be the absolute owner of the said property and in such cases, exception provided under Section 14(2) of the Act would not be applicable and presuming that she was having limited estate, she became absolute owner of the said property under Section 14(1) of the Act. [321-A-B; 322-A-B]

D *Thota Seshaŕathamma and Anr.* v. *Thota Manikyamma (Dead) by Lrs.*, [1991] 4 SCC 312 and *Beni Bai (Smt.)* v. *Raghubir Prasad*, [1999] 3 SCC 234, relied on.

Durgi v. *Kanhaiya Lal*, AIR (1927) Allahabad 387, disapproved.

E 2. In the Will, the expression used is 'puree malik' i.e. absolute owner and the expression 'Malik' has a well-known connotation and has been held as "apt to describe a owner possessed of full proprietary rights, including a full right of alienation, unless there is something in the context or in surrounding circumstances to indicate that such full proprietary F rights were not intended to be conferred". [317-C; D]

Pearey Lal v. *Rameshwar Das*, [1963] Supp. (2) SCR 834, relied on.

3. While interpreting the Wills, it is settled law to get at the intention of the testator by reading the Will as a whole; if possible such construction as would give to every expression some effect rather than that which would G render any of the expression inoperative is to be accepted. Further the words occurring more than once in a Will are to be presumed to be used always in the same sense unless contrary intention appears from the Will. The Court may also consider the circumstances under which the testator makes his Will such as the state of his property, or his family and the like. H Further in the matter of construction of a Will, authorities or precedents

would be of no help as each Will is to be construed in its own terms and in the setting in which the clauses occur. [316-G; H; 317-A; B]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 916 of 1984.

From the Judgment and Order dated 18.11.83 of the Allahabad High Court in F.A. No. 276 of 1967.

V.K.S. Chaudhary, Shibsankar Sarkar, Gopishyam Nigam, Anish Kumar Gupta, Shirish Kumar Mishra, S.S. Khanduja, P.K. Chakravarti, Sallauddin, A.S. Bhasme, Saurabh Mishra, Manoj K. Mishra, Sanjay K. Visen and N.S. Bisht for the appearing parties.

The Judgment of the Court was delivered by

SHAH, J. By judgment and decree dated 18th November, 1983 passed in First Appeal No.276 of 1967, the High Court of Allahabad confirmed the judgment and decree dated 3.7.1967 passed by the IInd Additional Civil Judge, Kanpur in Original Suit No.66 of 1960.

After dismissing the appeal, the High Court vide its order dated 18th November, 1983 granted certificate of leave to appeal to this Court.

The dispute in this appeal is with regard to properties owned by one Durga Prasad Bagla who was owner of considerable property in the City of Kanpur and carried business in the names of M/s Durga Prasad Bagla, Kanpur and M/s Harmukh Rai Munna Lal, Delhi. Durga Prasad had third wife Mst. Durgi and that they were having no child. On 01.11.1917, he executed a Will in favour of Mst. Durgi. He died on 09.9.1918 and thereafter on 21st December 1918, Mst. Durgi adopted deceased Kanhaiya Lal Bagla (plaintiff no.1) and executed an adoption deed also. It appears that there were differences after adoption and deceased Kanhaiya Lal Bagla, minor through guardian, natural father filed Original Suit No.232 of 1924 against Mst. Durgi and another in the Court of Civil Judge, Kanpur for declaration that he was the adopted son and also for possession over the disputed properties. The suit was decreed by the trial court. Against that Mst. Durgi preferred first appeal No.502 of 1925 before the High Court of Allahabad. That appeal was allowed and the Court held as under: -

> "We accordingly allow this appeal and setting aside the decree of the Court below, grant the plaintiff a declaration that he is the validly

A adopted son of Durga Prasad but that the estate created under the Will, dated the 1st of November, 1917, in favour of Mst. Durgi holds good and the plaintiff will have no right to obtain possession of the estate of the deceased during her lifetime."

Thereafter, on 1.11.1956, Durgi executed a Will (Ex.A.13) in favour of B defendant no.1 Brahma Vart Sanatan Dharm Mahamandal, Kanpur in respect of properties Nos.1 and 2 of Schedule 'C' to the plaint. On 31.10.1958 she executed a settlement deed (Ex.A.14) in favour of defendant no.1. On 8.11.1958 she also executed a gift deed Ex.Q.1 in favour of defendant no.3 Murari Lal Dwivedi whom she treated as Dharm Putra. It is stated that Mst. Durgi died on C night between 11/12th February, 1960.

It is alleged that plaintiff no.1 Kanhaiya Lal Bagla sold seven annas share in the disputed property to plaintiff no.2 Man Mohan Shukla vide sale deed Ex.27. Thereafter, on 20.4.1960 plaintiffs (Kanhaiya Lal and Man Mohan) filed the present suit for possession of the properties and for a declaration that the D Will, gift and settlement deeds executed by Mst. Durgi are null and void and that the plaintiffs are owners of the properties of Schedule 'C' of the plaint and for recovery of mesne profits and possession of the properties mentioned in Schedule 'A' & 'B' of the plaint. The suit was resisted by the defendants and it was contended that adoption deed was fraudulently obtained by the natural E father of Kanhaiya Lal Bagla and collaterals of Durga Prasad Bagla. It was also stated that Mst. Durgi became absolute owner of the property in terms of the Will executed by Durga Prasad and the adoption in any case would not divest her of the said property. It was also contended that considering the finding given by the High Court in previous proceedings, there was no question of suit or issue being barred by *res judicata*. In the alternative, it was stated that if it F is held that she was limited owner as alleged, she became absolute owner under Section 14(1) of the Hindu Succession Act, 1956.

The Trial Court upheld the contention raised by the plaintiffs and held that there will be bar of *res judicata* with regard to validity of adoption in view G of the earlier litigation; Mst. Durgi had only life estate under the Will and it was not enlarged under Section 14(1) of the Hindu Succession Act into an absolute estate. The court disbelieved the plaintiffs' version that the Will and the settlement deed were not executed by Mst. Durgi voluntarily or were obtained by fraud, misrepresentation or undue influence. It was also held that gift deed in favour of defendant no.3 Murali Lal Dwivedi was obtained under H undue influence. In appeal, the High Court considered the facts of the previous

litigation between the parties and held that in a previous suit between the parties the issue was — as to whether she had an absolute estate under the Will; that she continued to be the owner of the property in the suit or the plaintiffs became the owner after adoption" and that issue was decided against her. The Court, therefore, held that decision in earlier First Appeal No.502/25 operates as *res-judicata* and it was not open to the Court to adjudge the same again. The Court further held that Mst. Durgi would not get benefit of Section 14(1) of the Hindu Succession Act.

In this appeal, three questions are required to be determined:

(a) Whether under the Will, Mst. Durgi got absolute ownership [पूरी मालिक] of the property bequeathed or whether she got limited estate?

(b) What is the effect of the decision rendered between parties by the Allahabad High Court in First Appeal No. 502 of 1925? and,

(c) What is barred by *res judicata*?

For deciding the first question, that is, whether under the Will Mst. Durgi got absolute ownership of the property or only a limited estate, we would refer to the relevant parts of the Will made by the deceased Durga Prasad Bagla, which are as under: -

> ".....
>
> I bequeath '*absolutely all my estate to my wife*' Mst. Durgi D/o late Lala Harnarayan Das by caste Vaish Agrawal previously r/o Bhivani, District Hissar and at present residing in city of Kanpur and provide as under: -
>
> Thirdly— All my remaining estate after defraying the funeral expenses, '*will vest absolutely in my wife*',
>
> Mst. Durgi, as aforesaid and she will also have the power to continue or to discontinue my business shops and commission agency in consultation with and with the approval of my family in which I have been adopted and she will have the right to close the business, shop and commission agency in the same manner as I am entitled.

A Fourthly—She will have the right in consultation with the member of the family in which I have been adopted, to spend the whole money *and no one will have any right to question the same and 'further she will have the right to sell and bequeath by Will etc.*the whole property' in consultation with the family members in which, I have been adopted and further, I confer on her the right to adopt a son of any person, she likes, in consultation of 'biradari' in which I have been adopted and after the death of the lady aforementioned, the adopted son *may become* the owner (malik ho sakta hai) but during the life time of the lady, *the adopted son will have no rights.*"

C Aforesaid Will makes it abundantly clear that by unambiguous term absolute ownership of the properties was bequeathed to Mst. Durgi by her husband Durga Prasad. Repeatedly in the Will, it has been made clear that the intention of the executant of the Will was to bequeath absolute right of ownership of his properties to his wife.

D However, learned counsel for the respondents submitted that in paragraph (4) of the Will, it has been provided that after the death of the testator, it would be open to his widow to adopt a son and in such eventuality, adopted son may become the owner after the death of the lady. In our view, these words in no way restrict or curtail the absolute ownership rights of Mst. Durgi. They only E provide that after her death, in case of adoption of a son by her, the adopted son may get the said property. But, rights of Mst. Durgi to deal with the property as an absolute owner and to transfer or bequeath the same are not affected or restricted. This has been made clear stating that she will have the right to spend the whole money and no one will have the right to question the F same and further she will have the right to sell and bequeath by way of Will etc. the whole property. Result is, if any property remains after the death of Bai Durgi which she has not transferred or bequeathed, her adopted son would get right over the same.

G Further, in interpreting the Wills, it is settled law to get at the intention of the testator by reading the Will as a whole; if possible such construction as would give to every expression some effect rather than that which would render any of the expression inoperative is to be accepted. Another rule which may be useful in context of the Will is that the words occurring more than once in a Will are to be presumed to be used always in the same sense unless contrary H intention appears from the Will. The Court may also consider the circumstances

under which the testator makes his Will such as the state of his property, or his family and the like. [Re.: *Pearey Lal* v. *Rameshwar Das,* [1963] Supp 2 SCR 834.

Further, in the matter of construction of a Will, authorities or precedents would be of no help as each Will is to be construed in its own terms and in the setting in which the clauses occur. In the present case, the circumstances under which the Will was executed by the testator could be gathered from the Will itself. The testator himself was adopted son. He married thrice and was suffering from some ailment and fever. Third wife was minor and young having no child. To protect her interest from other members of the family, he bequeathed his entire property in her favour. He repeatedly mentioned and made it crystal clear that he was bequeathing absolute ownership of his property to his wife. Only suggestion which was made to his wife was to consult his other family members before disposing of the property. In the Will, the expression used is [पूरी मालिक or 'puree malik'] absolute owner and the expression 'Malik' has a well-known connotation and has been held as "apt to describe a owner possessed of full proprietary rights, including a full right of alienation, unless there is something in the context or in surrounding circumstances to indicate that such full proprietary rights were not intended to be conferred". [Re. Pearey Lal (supra)]. Hence, considering the intention of the testator and the specific words used in the Will, it would be difficult to hold that the Will conferred limited estate on Mst. Durgi.

Learned counsel for the respondents, however, relied upon the judgment rendered by the Allahabad High Court between the same parties in the earlier proceedings. Reported as *Durgi* v. *Kanhaiya Lal,* AIR (1927) Allahabad 387. It is required to be understood that earlier proceedings were initiated by plaintiff Kanhaiya Lal within few years of his adoption through his guardian, natural father. That suit was filed for a declaration that he was validly adopted son and was entitled to possession of the property bequeathed in favour of Mst. Durgi. It was decreed by the trial Court and hence, Mst. Durgi preferred first appeal before the High Court. The High Court confirmed the judgment rendered by the trial court to the extent that Kanhaiya Lal was validly adopted son of Mst. Durgi and set aside the judgment of the trial court for handing over possession of the suit premises. The Court held (at page 389) as under: -

> "The document is called a Will by the testator himself. We have no doubt in our mind that it was not merely an ordinary Hindu widow's estate that was intended to be conferred on Mst. Durgi. On the other

A hand, the testator expressly stated that *she should be absolute owner of the entire estate left by him* and that she should have power to spend the whole of the money, that is to say, the capital, with the consent of his family and also she should have power to make a sale or gift with the consent of his family. Obviously these are not powers which can be ordinarily exercised by a Hindu widow, who has no power to alienate the estate without legal necessity."

Thercafter the Court negatived the contention that the testator had no power to execute the Will or that it is not binding to subsequently adopted son and, therefore, the Court set aside the finding given by the trial court that the C disposition made by Durga Prasad was null and void.

The Court also held that:

"In our opinion the testator had *intended to confer on her an absolute estate*, with this condition: that in case she exercised the D power to adopt a boy her interest would be cut down to a life-interest with remainder over to the adopted son. This undoubtedly was the intention of the testator. Under this will therefore a life-estate at least was intended to be created in favour of the widow."

Thereafter the Court partly allowed the appeal and set aside the decree E of the trial court, granted the plaintiff a declaration that he was a validly adopted son of Durga Prasad, but that the life estate created under the Will dated 1st November 1917 in favour of Mst. Durgi holds good and the plaintiff will have no right to obtain possession of the estate of the deceased during her life time.

F

Learned counsel for the respondents submitted that the aforesaid finding given by the High Court that under the Will, life estate was created in favour of Mst. Durgi is binding between the parties. As against this, learned counsel for the appellant pointed out that the High Court has specifically held that under the Will absolute ownership of the entire estate left by the testator is given to G her and that she was having power to sell or gift away the property. Therefore, the finding which is given in the alternative is not final binding adjudication between the parties.

In view of these submissions, the next question which is required to be H considered is whether the aforesaid finding is binding between the parties and

the issue is barred by *res judicata*. For this purpose, we would refer to the relevant issues raised by the trial Court. They are as under : -

> "3. (B) Is the plea regarding factum and validity of adoption barred by *res judicata* in view of the decision in suit No. 232/1924 and appeal No. 502/1925?
>
> 4. (A) Had Durgawati only a life interest under the Will of Durga Prasad? What is the effect of the above referred judgments on this point?"

With regard to the factum and validity of adoption, the trial Court held that the issue was barred by *res judicata* in view of the decision rendered in First Appeal No. 502 of 1925. It is to be stated that with regard to the contention whether Mst. Durgi was having life interest or absolute ownership, the trial court has not raised issue of *res judicata* and rightly so because that was not the question which was required to be decided in the previous suit. On issue No. 4 (A) raised by it, the court held that the decision in the previous case limiting the interest of the widow to a life estate might not have the force of *res judicata* in the present suit, yet the interpretation put by the High Court on the Will of Durga Prasad could not be ignored and was binding on the Court. However, without considering this aspect, the High Court referred to issue No. 6 quoted below which was raised in the previous proceedings.

> "Is the defendant full owner of the property of her late husband by virtue of his Will dated the 1st November, 1917? If so, can the plaintiff claim the property in question?"

The High Court, therefore, held that in the previous proceedings, the Court was called upon to decide defendant's (Mst. Durgi's) main plea that she had an absolute estate under the Will and also the alternative plea that she had a life estate and she could not be dispossessed. The Court negatived the contention that the plea that suit for possession would have failed on the finding that she had a life estate and it was as such not necessary to go into the question as to whether she had an absolute estate was without any merit because it is the duty of the courts of law to record specific and clear cut finding on all points of law raised before them. The Court, therefore, rejected the plea that the observations of the High Court in earlier proceedings were mere obiter dicta and consequently not binding.

On the question of *res judicata*, we would only refer to the decision

A rendered by this Court in *Sajjadanashin Sayed MD. B.E. EDR. (D) by LRs.* v. *Musa Dadabhai Ummer and Ors.*, [2000] 3 SCC 350. The Court in paragraph 12 observed as under:-

> "It will be noticed that the words used in Section 11 CPC are "directly and substantially in issue". If the matter was in issue directly and substantially in a prior litigation and decided against a party then the decision would be *res judicata* in a subsequent proceeding. Judicial decisions have however held that if a matter was only "collaterally or incidentally" in issue and decided in an earlier proceeding, the finding therein would not ordinarily be *res judicata* in a latter proceeding where the matter is directly and substantially in issue."

In paragraph 18, the Court has further considered in which case, it could be said that the issue was directly and substantially raised and decided and held as under: -

> "In India, Mulla has referred to similar tests (Mulla, 15th Edn., p. 104). The learned author says : a matter in respect of which *relief* is claimed in an earlier suit can be said to be generally a matter "directly and substantially" in issue but it does not mean that if the matter is one in respect of which *no relief* is sought it is not directly or substantially in issue. *It may or may not be.* It is possible that it was "directly and substantially" in issue and it may also be possible that it was only collaterally or incidentally in issue, depending upon *the facts of the case*. The question arises as to what is the test for deciding into which category a case falls? One test is that if the issue was "*necessary*" to be decided for adjudicating on the principal issue and was decided, it would have to be treated as "directly and substantially" in issue and if it is clear that the judgment was in fact based upon that decision, then it would be *res judicata* in a latter case (Mulla p. 104). One has to examine the plaint, the written statement, the issues and the judgment to find out if the matter was directly and substantially in issue (*Ishwer Singh* v. *Sarwan Singh*, AIR (1965) SC 948) and (*Syed Mohd. Salic Labhai* v. *Mohd. Hanifa*, [1976] 4 SCC 780). We are of the view that the above summary in Mulla is a correct statement of the law."

In the present matter, even though the trial court has considered this aspect in detail, the High Court has not dealt with it. However, it would not be necessary to deal with the same in detail in view of Section 14 of the Hindu

Succession Act, 1956. Admittedly, deceased Mst. Durgi was third wife of testator and was young and minor at the relevant time. Testator was not having any other heir except his wife Mst. Durgi. Mst. Durgi was entitled to maintenance from her husband and from his property. So, after the death of her husband she would have life interest even without Will being executed in her favour. In view of Section 14(1) of Hindu Succession Act, she would be absolute owner of the said property. In such cases, exception provided under Section 14(2) of the Act would not be applicable. Law on this question is well settled and we would only refer to the decision in *Thota Sesharathamma and Anr.* v. *Thota Manikyamma (Dead) By LRs.*, [1991] 4 SCC 312, wherein this Court held as under : -

> "Section 14(2) of the Act is in the nature of a proviso or an exception to Section 14 and comes into operation only if acquisition in any of the methods indicated therein is made for the first time without there being any pre-existing right in the female Hindu to the property. *If the case falls under the provisions of Section 14(1) of the Act then the female Hindu shall be held to be full owner of the property* and sub-section (2) of Section 14 will only apply where the property is acquired without there being any pre-existing right of the female Hindu in such property. This view lends support to the object of the section which was to remove the disability on women imposed by law and to achieve a social purpose by bringing about change in the social and economic position of women in Hindu Society.
>
> .....If the finding is positive her limited estate, though created with restrictive covenants in instrument or an omission to expressly so mention in full particulars thereof in the instrument in that regard are of little consequence. *Her limited estate gets blossomed into full ownership under Section 14(1) with a right to bequeath, gift over, alienate or to deal in any manner recognised by law.* If on the other hand the Hindu female acquires for the first time the title therein as a grant with restrictive estate under the instrument with no pre-existing title or right, sub-section (2) of Section 14 gets attracted and the restrictive covenants contained in the instrument would bind her. She remains to be a limited owner in terms thereof. The subsequent alienee or transferee acquires no higher right thereunder than the legatee etc. The reversioner to the last male holder is not bound by such transfer and is entitled to succeed to the estate, on her demise, in terms of the instrument."

A Same view is taken in *Beni Bai (Smt.)* v. *Raghubir Prasad,* [1999] 3 SCC 234. Hence, presuming that Mst. Durgi was having limited estate, she became absolute owner of the said property under Section 14(1) of the Hindu Succession Act, 1956.

B Hence, the appeal is allowed and the impugned judgment and decree passed by the trial court and confirmed by the High Court is quashed and set aside. The suit filed by the respondents is dismissed. There shall be no order as to costs all throughout.

N.J. Appeal allowed.