APPELLATE CIVIL.

Before Mr. Justice Batchelor and Mr. Justice Chaubal.

1908
July 6.

KALLIANJI RANCHHOD (ORIGINAL DEFENDANT No. 2), APPELLANT, v. BEZANJI NASARWANJI AND ANOTHER (ORIGINAL PLAINTIFF AND DEFENDANT No. 1), RESPONDENTS.*

Hindu law Joint family—Presumption as to the character of the property held by the father—Self-acquisition.

A Hindu, who had a son and that son's son living with him, made a deed of gift of his property in favour of his grandson. In that deed the property was described as his self-acquired property; and the deed was attested by his son. It was shown that the son had knowledge of the contents of the deed.

Held, that the above facts led to the inference that the property was self-acquired.

SECOND appeal from the decision of D. G. Gharpure, Additional First Class Subordinate Judge, A. P., at Surat, confirming the decree passed by G. L. Chandorkar, Subordinate Judge of Bulsar.

Suit to recover a sum of money by sale of property mortgaged.

The property in dispute belonged to one Bhagwan. Bhagwan had a son Purshottam; and the latter had a son Dullabh by name (defendant No. 1). They lived together as a joint family.

Purshottam had many money decrees passed against him and was otherwise leading an irregular life. Bhagwan, therefore, gifted away the whole of his property to his grandson Dullabh, by a deed of gift dated the 17th July 1885. In this document the property was recited as Bhagwan's self-acquisition: and it was attested by Purshottam.

On the 17th September 1901, Dullabh mortgaged the property to the plaintiff with possession. Kalyanji Ranchhodji (defendant No. 2) was a mortgagee of the same property from Purshottam.

The present suit was instituted by the plaintiff on the 21st September 1905 to recover Rs. 380 by sale of the mortgaged property and the dificit from defendant No. 1 personally. Kallianji Ranchhod was added as a party defendant.

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The defendant No. 2 contended that the property was ancestral property in the hands of Bhagwan who had no right to gift it away to defendant No. 1.

The Subordinate Judge acceded to this contention and dismissed the suit. The reasons were as follows:—

"I find from the evidence that plaintiff has failed to prove the property in dispute to have been the self-acquired property of Bhagwan . . . as there is no independent evidence in the case that the property was self-acquired property of Bhagwan. I attach no value to Bhagwan's own statement in the deed itself that the property was self-acquired property.

On appeal, however, this decree was reversed and the plaintiff's claim awarded. The following were the reasons:—

"The lower Court presumed union and laid the burden on plaintiff to prove that the house was the self-acquired property of Bhagwan. Here, I think, it is in error. In the case of a Hindu family consisting of father sons and grandsons, the presumtpion that any property in the hands of the father is joint does not arise. The presumption of joint estate, applies only in the case of brothers and co-parceners. So that if a son wishes to claim partition from his father, he must prove that the property of which partition is claimed is joint. In short, in such a family it lies upon the party alleging property to be joint to prove that it is joint. (*Toolseydas v. Premji.* I. L. R. 13 Bom. 61.) It is, of course otherwise in the case of a family consisting of brothers and others. This is the more so when a party alleges that certiain property is joint because it is ancestral. In such a case, the burden of proving the ancestral nature of the property lies upon the person who asserts it.

The defendant No. 2 appealed to the High Court.

The Court (Chandavarkar and Batchelor, JJ.) sent down an issue for determination by the lower Court, and recorded the following interlocutory judgment.

CHANDAVARKAR, J.:—It is conceded before us by the learned pleader for the respondent that the learned Judge in the Court of appeal has appreciated the evidence in this case wrongly by throwing the onus on the appellant and declining to presume union. The view of the learned Judge that the presumption in favour of a joint estate applies only in the case of brothers and other co-parceners and not in the case of a father and son living together is erroneous according to Hindu law. There is no rule of Hindu law to that effect. On the other hand where a father

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and his son live together and there is property whether held by the father or the sons, the law presumes union, and that the estate is joint. We cannot accept the finding of the lower appellate Court on the first issue raised by it. We must ask the lower appellate Court to re-hear the appeal and record a fresh finding with reference to the observations in this interlocutory judgment. The issue to be determined will be as follows:—

Whether the property in dispute was the self-acquired property of Bhagwan?

The burden of proof will be at the outset upon the plaintiff.

As regards the point which is raised before us as to the probative effect of the attestation on the deed of gift, it will be for the lower appellate Court to determine, having regard to the surrounding circumstances, whether any and what weight should be attached to that attestation.

Finding to be returned within two months.

On the remanded issue the finding of the lower appellate Court was that the property was the self-acquired property of Bhagwan.

L. A. Shah for the appellant:—The lower Court has after remand again relied upon the mere attestation of the son There is no other evidence. The case of *Raj Lukhee Dabea* v. *Gokool Chunder Chowdhry*[1] ought to be followed.

K. N. Koyajee for the respondent:—The lower Court has found as a fact that the property was self-acquired: this finding was arrived at on a consideration of all the circumstances of the case. There is further oral evidence to justify the finding. I do not dispute the authority of *Raj Dukhee Dobea* v. *Gokool*[1], but there is more than attestation here.

BATCHELOR, J.:—The question before us is whether the property in dispute was self-acquired property of Bhagwan. Ordinarily, no doubt the presumption is that the property would be joint, but the learned Judge below has found that this presumption is displaced by the evidence in this particular case. The item of evidence upon which he mainly relies in support of his finding it

(1) (1869) 13 Moo. I. A. 209.

Purshottam's attestation of the deed of gift of 1885 executed by his father Bhagwan in favour of Purshottam's son Dullabh. In that deed, which is not a lengthy instrument, the property is more than once and emphatically described as the self-acquisition of Bhagwan. It is no doubt unquestionable law that a mere attestation by a relative does not necessarily import consent to the terms of the document attested: see *Raj Lukhee Dabea* v. *Gokool Chunder Chowdhry*[1]. But no one here seeks to contest this proposition of law; and what the learned Judge has done is that he has found that over and above the mere attestation there are circumstances in this case which call for the inference that Purshottam had knowledge of the contents of the sale deed. We agree with the Judge in this view. And having regard to the custom and usages of society in this country, we may safely say that it is extremely improbable that Purshottam would have attested this particular deed without knowledge of, and assent to, its contents. Oral evidence was not necessary to re-inforce this conclusion, but we notice that there was some oral evidence in support of it on the record.

The result is that the decree under appeal is confirmed and this appeal is dismissed with costs.

Decree confirmed.

R. R.

(1) (1869) 13 Moo. I. A. 209 at p. 229.