DHARWAD BENCH

S.B.SAMPAT KUMAR Vs.. S.B.PARASMAL S/O. LATE BHAKATAVARMAL

CASE NO.RFA 100121/2014

For the Appellant: M.S. Satish, Advocate.
For the Respondent: R1, Satish S Raichur, Advocate, R2 Served.

JUDGES
SREENIVAS HARISH KUMAR
P.N.DESAI

O.S. NO. 404/2007 ON THE FILE OF THE PRL. SENIOR CIVIL JUDGE, BELLARY & ETC.

THIS REGULAR FIRST APPEAL HAVING BEEN HEARD AND RESERVED FOR PRONOUNCEMENT OF JUDGMENT ON 08.01.2021 COMING ON FOR PRONOUNCEMENT OF JUDGMENT THIS DAY, SREENIVAS HARISH KUMAR J., DELIVERED THE FOLLOWING:

JUDGMENT

The Prl. Sr. Civil Judge, Ballari, by her judgment dated 29.04.2014, partly decreed the suit O.S. No. 404/2007, granting 1/3rd share to the plaintiff in A schedule property while dismissing it in respect of B and C schedule properties. The first defendant is in appeal as he is aggrieved by the decree in respect of A schedule property.

2. The material facts are: The plaintiff, the first defendant and one Sukh Raj, the deceased, are all sons of Bhaktawarmal, who executed a Will on 03.04.1982 giving life interest to his wife, Sundar Bai in A schedule property which is a residential building bearing Nos.148(1), (2), (3) and (4) situate in : 3 : Ward No.3, T.S. No. 53, 54, 55 and 56 of block no.1, Tank Bund Road, Ballari. The will directed that after the death of Sundar Bai, Bhaktawarmals three sons should enjoy the property in equal rights till their lifetime and thereafter, the entire property should go to the grandchildren. On 03.04.1982, Bhatawarmal executed another will in favour of defendant no.1 in respect of a property bearing door no. 10/3 in Car Street. Bhaktawarmal died on 13.03.1983. Sundar

Bai enjoyed A schedule property till her death on 09.06.1995. Thereafter the three sons of Bhaktawarmal succeeded to the property as per the recitals of the will. First defendant was collecting rents from some portions of the property that had been let out, and giving 1/3rd share in the rents to the plaintiff until March, 2004. When defendant No.1 stopped paying rents to him, he made an enquiry to ascertain the reason for stoppage of rent and came to know that Sundar Bai had executed a will dated 19.05.1995 in favour of the first defendant in respect of A schedule property. According to the plaintiff, Sundar Bai had no testamentary capacity as she just had life : 4 : interest in the property, the first defendant did not derive any interest or title by virtue of the will made by Sundar Bai. The plaintiff therefore, demanded the first defendant to effect partition; when he did not heed, he got issued a legal notice. Then he brought a suit for partition in respect of A and B schedule properties. B schedule property consists of household articles and jewellery.

3. The first defendant, in his written statement admitted the relationship and life interest being given to his mother Sundar Bai in the will dated 03.04.1982 made by Bhaktawarmal. His main contention is that the life interest given to the mother was in lieu of maintenance and therefore by virtue of Sec.14(1) of the Hindu Succession Act (for short Act), the mother became the absolute owner and thus derived testamentary capacity to make a will in his favour on 19.05.1995. The plaintiff or the second defendant had no right to claim partition. He stated that he was not in possession B schedule property and that the plaintiff cannot claim partition in respect of household items that he purchased from his self earnings. : 5 : He further contended that since the will made by Bhaktawarmal recited that the grandchildren of Bhaktawarmal would ultimately take the property, all the grandchildren should have been made parties to the suit and thereby the suit was bad for non joinder of necessary parties. Another contention of the first defendant is that plaintiff was given another property bearing no.10/1, Car Street, Ballari towards his share and this property should have been included in the suit.

4. The second defendant, admitting the will made by his grandfather, contended that the plaintiff could not claim 1/3rd share in A schedule property as he and other grandchildren of Bhaktawarmal were given absolute estate as per the will 03.04.1982. He also disputed testamentary capacity of his grandmother Sundar Bai to make a will in favour of the first defendant. However, he too claimed 1/3rd share in all the properties.

5. The trial Court struck in all eight issues and one additional issue. The plaintiff, while adducing oral evidence as PW1, produced both the wills, one made by : 6 : Bhaktawarmal as per Ex.P.1 and the other made by Sundar Bai as per Ex.P.2 in addition to other documents marked upto Ex.P.14. Defendant No.2 is DW1. First defendant is DW2. DW3 is the sister of DW2, an attestor to

the will-Ex.D.1. dated 19.05.1995 executed by Sundar Bai. From the defendants side, totally 19 documents as per Ex.D.1 to 19 were marked.

6. We have heard the arguments of learned counsel for the appellant as also respondent No.1.

7. We will delve on the points of arguments in the course of discussion, but the points that emerge for discussion are:

1. Did Sundar Bai become absolute owner of schedule A property by operation of Sec.14(1) of the Hindu Succession Act?

2. Whether the suit was bad for the reason that the plaintiff did not include in the suit the other property in his possession?

3. Was the suit bad for non joinder of necessary parties? : 7 : REASONS

8. Point No.1: The evidence on record shows that execution of will-Ex.P.1 by Bhaktawarmal dated 03.04.1982 is not disputed both by the plaintiff and the defendants, the examination of evidence whether the will as per Ex.D.1 said to have been executed by Sundar Bai arises only if it is held that she became absolute owner by virtue of Section 14(1) of the Act.

9. The trial Court, having referred to the authorities cited by the plaintiffs counsel and assessing the evidence held that the will dated 03.04.1982 only conferred a life interest on Sundar Bai, and that the first defendant failed to prove that she became absolute owner of A schedule property.

10. Sri M.S. Satish, learned counsel for the appellant- defendant No.1 argued vehemently that the properties were the self acquisitions of Bhaktawarmal and his testamentary capacity is not disputable. But, in the will made by him, he created life interest in favour of his : 8 : widow, it was for her maintenance only till her lifetime. The right that she had to claim maintenance is a pre- existing right, and therefore the life interest created in her favour in the will enlarged into her absolute estate by virtue of Sec. 14(1) of the Act. Since she became the absolute owner, she had every right to execute a will in favour of defendant No.1 as per Ex.D.1. Referring to the cross-examination of PW1,he submitted that PW1 has also admitted that his father gave life interest in the property to her mother with an intention to provide maintenance. DW3 has been examined to prove the execution of the will as she was one of the attestors, she was the daughter of Sundar Bai also. In view of this, the trial Court should not have decreed the suit in favour of the plaintiff. In support of his arguments on this point, he referred to a number of authorities which would be referred to later.

11. His next point of argument was that the trial Court ought to have framed an issue with regard to non joinder of necessary parties in view of a specific plea

taken in that regard in the written statement. The sisters of the : 9 : plaintiff and the first defendant should have been impleaded. He also submitted that the property that is in the possession of the plaintiff, should have been included. Therefore, the suit is bad for these reasons.

12. Sri Satish S. Raichur appearing for respondent no.1/ plaintiff argued that the recitals of the will dated 03.04.1982 as per Ex.P.1 are unambiguous indicating very clearly that Sundar Bai was given only a life interest in A schedule property. She did not become absolute owner, Sec. 14(1) of the Act cannot be applied for the reason that it is not the case of the first defendant that Sundar Bai had been neglected to be maintained by her husband Bhaktawarmal and therefore he made a provision for her maintenance in the will that he executed. Interest was created for the first time in the will. The life interest created in faovur of Sundar Bai was though restricted, it did not manifest into absolute estate. In the circumstances, Sec. 14(2) of the Act was applicable and not Sec. 14(1). It was his argument that the trial Court has rightly appreciated the evidence for decreeing the suit. : 10 :

13. The controversy between the parties further confines to examining whether the life interest created in favour of Sundar Bai was in recognition of her pre-existing right or not.

14. One of the authorities cited by Sri M.S. Satish is in the case of V.Tulasamma Vs. Sesha Reddy (LAWS (SC) 1977 3 55) wherein it is held that the intention of the Parliament was to exclude the application of sub Section (2) to cases where the property has been acquired by a Hindu female either at a partition or in lieu of maintenance etc, and the language of sub Section (2) clearly shows that it would apply only to such transactions which are absolutely independent in nature and which are not in recognition of pre-existing rights. We may also state that probably, the legislature thought it to do away with the limited right given to a woman under Hindu Womens Right to Property Act, 1937, and for this reason it was provided in S. 14(1) that a female Hindu would take the property as full owner. : 11 :

15. Sri M.S. Satish has placed reliance on Raghubarsingh Vs. Gulab Singh [LAWS (SC) 1998 7 53]. In this decision, the Supreme Court, having discussed the aspect of obligation of a Hindu husband, has held that right to maintenance of a Hindu female flows from the social and temporal relationship between the husband and wife and that the right in the case of a widow is a pre-existing right.

16. What is the meaning of pre-existing right? What is required is its legal meaning rather than dictionary meaning. In the context of S. 14(1) of the Act, legally speaking, pre-existing right can be said to be a right possessed by a woman to lay claim on the entire or part of the property, it may include right to

inherit the property by birth as in the case of Hindu coparceners, a right to succeed to self acquisition properties of a male Hindu and right to claim maintenance also. In case, a husband deserts his wife and neglects to provide maintenance to her, she can certainly claim maintenance as a legal right, and this right extends over the husbands : 12 : self acquired property although she has no right to claim partition in the self acquired property of her husband till his lifetime. Looked in this view, right to maintenance is a pre-existing right. But, if a husband executes a will in respect of his self acquired property or in respect of his interest in coparcenary property as contemplated in Sec.

30 of the Act, creating only a life interest in favour of his wife, can it be said that such a bequest is in recognition of pre-existing right of a wife to maintenance. This requires little more elucidation with an illustration.

17. A wife cannot claim partition in the ancestral property of her husband. During the lifetime of a male Hindu, neither his wife nor children can claim partition in his self acquired property. Right to seek partition arises after the death of a male Hindu. If a male Hindu possessed of self acquired property dies intestate leaving behind a wife and two sons, his heirs including the wife take 1/3rd share each. Suppose the property is ancestral, the wife does not take 1/3rd share, rather her share gets reduced to 1/9 th by applying the doctrine of notional : 13 : partition. The pre-existing right of a wife therefore, is limited to 1/3rd share in the self acquired property of her husband and 1/9 th, in case of ancestral property. If a male Hindu executes a will or makes an arrangement during his lifetime with regard to devolvement of his property after his demise by providing life interest to his wife to the extent of the share that she is actually entitled to, it can be construed as what is provided to the wife is for her maintenance till her lifetime even though the will or the other instrument does not expressly indicate that kind of an intention. This kind of a bequest or arrangement can definitely be made in recognition of the pre-existing right of a wife and in that event the limited interest will enlarge into absolute interest in accordance with Sec. 14(1) of the Act. But, if the bequest extends beyond the actual share of the wife, it is nothing but interest that comes into existence in favour of the wife for the first time according to volition of the husband and such a bequest, though restricted, falls within the sphere of Sec.14(2) of the Act. It is pertinent to mention here that in the case of Tulasamma, it has been held in : 14 : paragraph no. 39 that the claim or the right to maintenance possessed by a Hindu female is really a substitute for a share which she would have got in the property of her husband.

18. Sri M.S.Satish has relied upon certain other authorities which may now be referred to. In Smt. Palchuri Henumayamma Vs. Tadikamalla Kotlingam (AIR 2001 SC 3062), the facts are that Subbaiah, the grandfather of the appellant, i.e., Palchuri Henumayamma, made a Will on 19.03.1929 and a codicil on

09.04.1929 and provided for maintenance of his wife Ramamma till her lifetime and directed the property to be divided in three shares among his three daughters who were minors at that time. Appellant was the daughter of the first daughter of Subbaiah and Ramamma. Appellants mother died when she was still a minor. Ramamma colluded with her two other daughters and settled the properties in their favour by retaining the property of her first daughter probably with an intention to give it to the appellant when she attained majority. However, : 15 : Ramammas third daughter instigated her mother to make a gift in her favour of the property retained by mother and thus the appellant was deprived of the share of her mother. In this context, the Honble Supreme Court mainly noticed that in the Will Subbaiah had clearly directed that the property should be held by his wife for her maintenance and in this view Sec.14(1) of the Act would come into picture. The facts are distinguishable to some extent in the sense that in the case on hand, there is no such a recital in Ex.P1 that property was given to Sundar Bai for her maintenance.

19. B.Y.Narasimha Prasad Vs. H.S.Saraswati, (LAWS (KAR) 2020 6 32) is the judgment of the Division Bench of this Court. Smt. H.S. Saraswati was the wife of S.R.Shankarnarayan Rao and they had no issues. The plaintiff Narasimha Prasad claimed to be their adopted son and brought a suit for declaration that the registered will dated 05.04.1991 executed by Shankarnarayan Rao conferred only a life interest in favour of the defendant and for permanent injunction to restrain the defendant : 16 : from alienating the property. The trial Court negatived the adoption of the plaintiff and dismissed the suit. The Division bench of this court dismissed the appeal and while doing so came to conclusion that in the facts and circumstances, the restricted bequest in favour of defendant enlarged into her absolute estate, even the will is held to be not proved. Therefore, we do not think that this decision is of any help to the appellant.

20. Sri Satish S. Raichur, counsel for respondent has also placed reliance on a few authorities in which the principles laid down are akin to the facts and circumstances in the case on hand. In Sharad Subramanyan Vs. Soumi Majumdar and others (2006)

8 SCC 91, it is held as below:

13. Finally, this Court said: Where any of these documents are executed but no restricted estate is prescribed, sub-section (2) will have no application. Similarly where these instruments do not confer any new title for the first time on the female Hindu, Section 14(2) would have no application. It seems to me that Section 14(2) is a salutary provision which has been incorporated by Parliament for historical : 17 : reasons in order to maintain the link between the Shastric Hindu law and the Hindu law which was sought to be changed by recent legislation, so that where a female Hindu became possessed of property not in

virtue of any pre-existing right but otherwise, and the grantor chose to impose certain conditions on the grantee, the legislature did not want to interfere with such a transaction by obliterating or setting at naught the conditions imposed.

20. Thus, in view of the fact that there were no indications, either in the will or externally, to indicate that the property had been given to the female Hindu in recognition of or in lieu of her right to maintenance, it was held that the situation fell within the ambit of sub- section (2) of Section 14 of the Act and that the restricted life estate granted to the female Hindu could not be enlarged into an absolute estate. Learned counsel for the respondents relied strongly on this judgment and contended that there was no proposition of law that all dispositions of property made to a female Hindu were necessarily in recognition of her right to maintenance whether under the Shastric Hindu law or under the statutory law. Unless the said fact was independently established to the satisfaction of the Court, the grant of the property would be subject to the restrictions contained therein, either by way of a transfer, gift or testamentary disposition. Learned counsel also distinguished the three cases cited by the learned counsel for the appellant that in each, the circumstances clearly indicated that the testamentary disposition was in : 18 : l ieu of the right of maintenance of the female Hindu. We think that this contention is well merited and needs to be upheld. (emphasis supplied)

21. The case of Sadhu Singh Vs. Gurdwara Sahib Narike and others (2006) 8 SCC 75 also deals with a situation where the testator created a life interest in favour of his wife in respect of his self acquired property and gave absolute estate to his nephews. Dealing with a situation like this the Supreme Court held:

13. An owner of property has normally the right to deal with that property including the right to devise or bequeath the property. He could thus dispose it of by a testament. Section 30 of the Act, not only does not curtail or affect this right, it actually reaffirms that right. Thus, a Hindu male could testamentarily dispose of his property. When he does that, a succession under the Act stands excluded and the property passes to the testamentary heirs. Hence, when a male Hindu executes a will bequeathing the properties, the legatees take it subject to the terms of the will unless of course, any stipulation therein is found invalid. Therefore, there is nothing in the Act which affects the right of a male Hindu to dispose of his property by providing only a l ife estate or limited estate for his widow. The Act does not stand in the way of his separate properties being dealt with by : 19 : him as he deems fit. His will hence could not be challenged as being hit by the Act.

14. When he thus validly disposes of his property by providing for a l imited estate to his heir, the wife, the wife or widow has to take it as the estate falls. This restriction on her right so provided, is really respected by the Act. It provides in Section 14(2) of the Act, that in such a case, the widow is bound by

the limitation on her right and she cannot claim any higher right by invoking Section 14(1) of the Act. In other words, conferment of a l imited estate which is otherwise valid in law is reinforced by this Act by the introduction of Section 14(2) of the Act and excluding the operation of Section 14(1) of the Act, even if that provision is held to be attracted in the case of a succession under the Act. Invocation of Section 14(1) of the Act in the case of a testamentary disposition taking effect after the Act, would make Sections 30 and 14(2) redundant or otiose. It wil l also make redundant, the expression property possessed by a female Hindu occurring in Section 14(1) of the Act. An interpretation that leads to such a result cannot certainly be accepted. Surely, there is nothing in the Act compelling such an interpretation. Sections 14 and 30 both have play. Section 14(1) applies in a case where the female had received the property prior to the act being entitled to it as a matter of right, even if the right be to a l imited estate under the Mitakshara law or the right to maintenance. : 20 :

22. In the case of Shivadev Kaur (dead) by LRs and others Vs. R.S. Grewal (2013) 4 SCC 636 what is held

14. Thus, in view of the above, the law on the issue can be summarized to the effect that if a Hindu female has been given only a life interest, through will or gift or any other document referred to in Section 14 of the 1956 Act, the said rights would not stand crystall ized into absolute ownership as interpreting the provisions to the effect that she would acquire absolute ownership/title into the property by virtue of the provisions of Section 14(1) of the1956 Act, the provisions of Sections 14(2) and 30 of the 1956 Act would become otiose. Section 14(2) carves out an exception to the rule provided in sub-section (1) thereof, which clearlyprovides that if a property has been acquired by a Hindu female by a will or gift, giving her only a life interest, it would remain the same even after commencement of the 1956 Act, and such a Hindu female cannot acquire absolute title.

23. Therefore, in the light of the principles enunciated in the above decisions referred to by the learned counsel Sri Satish S. Raichur and also in view of our discussion in paragraph Nos.16 and 17, we are of the opinion that the bequest in favour of Sundar Bai, as it extended beyond the actual share she would have got had a partition taken : 21 : place in case Bhaktawarmal had died intestate, was an interest created for the first time in her favour. Though it was restricted one, it did not come within the realm of Sec.14(1) of the Act, Sec. 14(2) of the Act comes into picture. Therefore, Sundar Bai had no right to execute a will subsequently as per Ex.D.1 and thus the appellant cannot claim to have become absolute owner of A schedule property. The will also does not indicate that Bhaktawarmal created a life interest in favour of his wife only for the purpose of her maintenance in recognition of her pre-existing right. PW1 might have

stated in the cross-examination that the property was given to his mother in lieu of maintenance; but at a later stage of the cross-examination, when a suggestion to that effect was again given, he denied it. Therefore, it cannot be said that PW1 has admitted that the property given to his mother was for the purpose of her maintenance. The argument of Sri M.S. Satish in this regard is not acceptable. Point No.1 is therefore answered in negative. : 22 :

24. Point No.2: Though Sri M.S. Satish argued that the plaintiff omitted to include the other property which he has in possession, the finding of the trial Court is that the first defendant failed to provide evidence in this regard. Sri Satish, while arguing submitted that property bearing No.10/1, Car Street, Ballari, is the property which should have been included. As has been rightly held by the trial Court, there is no evidence that this property belonged to Bhaktawarmal and therefore it should have been included in the suit. We do not find any infirmity in the finding of the trial Court.

25. Point No.3: Sri M.S. Satish argued that the first defendant has contended very specifically in his written statement that the suit is bad for non-joinder of necessary parties; the trial court ought to have framed an issue in this regard and this aspect can be raised in the appeal as it is a question of law.

26. In the written statement of defendant No.1 what is stated is that the sisters of the plaintiff, and the : 23 : grandchildren of Bhaktawarmal who will take absolute bequest should have been made parties. As an answer to this contention, it is to be stated that while discussing point No.1 we have held that Sundar Bai did not derive absolute interest. Ex.P.1 clearly recites that after the demise of Sundar Bai, her three sons should enjoy the property in equal shares, of course without any right to alienate and deal with the property in any manner they like. The ultimate legatees are the grandchildren of Bhaktawarmal. One of the sons of Bhaktawarmal, i.e., Sukh Raj is dead and his son i.e., second defendant was made a party to the suit. So long as the other two sons are alive, their children do not get any interest in A schedule property. For this reason the children of the plaintiff and the first defendant do not become necessary parties; and for the same reason, the sisters also.

27. Before concluding, we want to express an opinion, of course, keeping in mind Order 41 Rule 25 of CPC, that Order XIV Rule 5 of Civil Procedure Code provides for amending the issues already framed or framing additional : 24 : issues as are necessary for determining the matters in controversy. Though it is the duty of the trial Court Judge to frame the issues properly, if for any reason an issue is not raised, nothing prevents the parties or their counsel from applying to the Court for raising an additional issue. It is of no use if any amount of argument is advanced in appeal if a party has failed to avail this opportunity when the trial is in progress. The appellate Court can raise a new issue only if it notices that a new or additional issue will help decide the appeal

effectively and non framing of an issue by the trial Court has resulted in miscarriage of justice.

28. Since the will clearly recites that the three brothers can equally enjoy the property till their lifetime, for convenience purpose, A schedule property can be divided into three shares for the enjoyment of the plaintiff and the first defendant till their lifetime, and absolutely by the third defendant. Therefore, we come to conclusion that the division of A schedule property into three shares as held by the trial Court is justifiable. We do not find any : 25 : infirmity in the judgment. Hence, appeal is dismissed with costs.