B. Audhesh Singh vs B. Rajeshwari Singh And Ors. on 23 November, 1950

Equivalent citations: AIR1951ALL630, AIR 1951 ALLAHABAD 630

JUDGMENT

Bind Basni Prasad, J.

1. The following three points arise for determination in this appeal; (1) Whether a child in womb can take advantage of the provisions of Sections 6 & 8, Limitation Act ? (2) Whether the sale in dispute in respect of 3 pies share in Khata khewat No. 8 is invalid, having regard to the provisions of para. 11 of Schedule 3, Civil P. C. ? & (3) Whether the defts. vendees are entitled to any compensation under Section 65, Contract Act, if the sale is held to be void in regard to 3 pies share o£ khata khewat No. 8 ? If so, to what amount ?

2. The material facts are as follows: On 13-10-1922, the pltf.'s father & uncle executed a deed of sale for Rs. 6,926 in favour of the defts. in regard to zamindari property situated in khata khewat Nos. 5, 8, 21, 33 & 35 of village Fatehpur in the district of Deoria. The pltf. was born 19 days later on 2-11-1922. We brought the suit from which this appeal arises on 11-5-1943, for the setting aside of the sale on two grounds: (1) that the sale was of ancestral property & was without consideration & legal necessity; (2) that so far as the zamindari in Khata Khewat No. 8 was concerned the sale was void because it was in contravention of para. 8 of Schedule 3, Civil P. C.

3. Both the Cts. below have held that the sale was for consideration & legal necessity, that the property in khata khewat Nos. 5, 21, 33 & 35 was non-ancestral but that in khata khewat No. 8 was ancestral. They further held that the sale in respect of khata khewat No. 8 was void because of para. 11 of Schedule 3, Civil P. C., but the pltf. could not avoid it because the suit was time barred under Article 126, Limitation Act, The suit was accordingly dismissed by both the Cts. below. The pltf. comes in appeal.

4. It may be stated at the outset that the applt confines his claim in this Ct. as he did in the lower appellate Ct., only to the 3 pies share in khata khewat No. 8.

5. The first point for consideration is as to whether the claim in regard to this portion of the zamindari in suit is time barred. The pltf.'s case was that he was entitled to the benefits of Sections. 6 & 8, Limitation Act. The relevant portion of Section 6 (1) is as follows :

> "Where a person entitled to institute a suit or make an appln. for the execution of a decree is, at the time from which the period of limitation is to be reckoned, a minor... he may institute the suit or make the appln. within the same period after the

> disability has ceased, as would otherwise have been allowed from the time prescribed therefor in the third column of the first Schedule."

The relevant portion of Section 8 provides:

> "nothing in Section 6.....shall be deemed to extend, for more than three years from the cessation of the disability, ...the period within which any suit must be instituted....."

The lower appellate Ct. has relied upon Muhammad Khan v. Ahmad Khan, A. I. R. (l6) 1929 Lah. 254 : (10 Lah. 713) in support of its view that Section 6 is not available to the pltf.-applt. because he was not born on the date on which the disputed sale took place. The learned Judges held in this case that where a cause of action accrues to a person when he is in embryo, be cannot get the advantage of Section 6 as he cannot be deemed to be a minor in existence on the date of the conception. Their Lordships observed:

> "If a son in embryo is deemed to be a minor in existence on the date of the conception, the period of 18 years, which would determine his disability, would run from that date. But it is clear that that date can never be ascertained with any degree of certainty, & the contention urged by the learned counsel would lead to the absurd result that the pltf. would attain the age of majority for the purposes of the law of limitation when he was only 17 years & a few months old, though he Would be a minor at that time for all other purposes."

With greatest respect I may point out that their Lordships did not take into consideration the provisions of Section 4, Majority Act 1875. which provides for the computation of the age of majority in the following words:

> "In computing the age of any person, the day on which he was born is to be included as a whole day, & be shall be deemed to have attained majority, if he falls within the first para, of Section 3, at the beginning of the twenty-first anniversary of that day, & it he falls within the second para, of Section 3, at the beginning of the eighteenth anniversary of that day."

6. The term "minor" has nowhere been defined. The position as I see is that for the computation of age the starting point is the date of birth; but the law nowhere provides that the period spent by a child in the womb is not to be regarded as a period of minority. A child in the mother's womb has been recognisad by law to possess certain right, for instance, in a Hindu family the right to the pint Hindu family property accrues to a son from the date of his conception & he is entitled to challege the alienations made by the Karta during the period that he was in the womb.

7. As against this decision of the Lahore H. C. there is the F. B. case of Madras H. C., Ranganatha Reddi v. Ramaswami Mudali, 58 Mad. 886 : (A. I. R. (22) 1935 Mad. 839 F.B.) & that of the Bombay H. C. Basayya Shivabasayya v. Baslingayya Channayya, A. I. R. (35) 1948 Bom. 150 : (I. L. R. (1947)

Bom. 750) in which a contrary view was expressed.

8. In the Madras case English cases were also referred to. Ramesam J., in his referring judgment observed:

> "But the law does recognize that in certain oases a child in the womb of his mother should be regarded as a person in existence : vide Sabapathi v. Somasundaram, 18 Mad. 76 : (2 M. L. J. 244), where all the authorities are referred to, & Deo Narayan Singh v. Ganga Singh, 37 All. 162 : (A. I. R. (2) 1915 All. 65). It seems to us that this view is not peculiar to the Hindu Law, but for some purposes a similar doctrine seems to prevail in the English Law In Witmer's Trusts, In re; Moore v. Wingfield, (1903) 2 Ch. 411 : (72 L. J. Ch. 670), Williams L. J. points out that, though there cannot be the murder of a foetus, foetus can be a person in existence for other purposes, & he relies on Blackstone's Commentaries where it was observed that a guardian can be appointed of a child in the womb of his mother. In Hale v. Hale, (1692) 24 E. R. 25, mention was made of an earlier case where a bill was filed on behalf of an infant in venire sa mere for the purpose of restraining waste. Similar view was also adverted to in Villar v. Gilbey, (1907) A. C. 139 at p. 144 : (76 L J. Ch. 339) where it was observed that a child in ventre sa mere may be a party to an action. Therefore the net result of these authorities seems to be this : while for certain purposes a child in the womb of his mother cannot be regarded as a person in existence, for certain other purposes he may be regarded as a person in existence."

The F. B. held in this case that a son in womb, born subsequent to the alienation made by his father, can sue for setting it aside before the three years' period of limitation from the date of his attaining majority has expired & that Section 6, Limitation Act, was applicable to him. The F. B. referred to several other English cases in which it was held that a posthumous illegitimate child of a workman was a deft. within the meaning of the Workmen's Compensation Act, 1906.

9. In the Bombay case also which has been referred to above it was held:

> "A son of a Hindu father who was in womb of his mother at the date of the alienation of the joint Hindu family property by the father can sue to set aside the alienation as such a right accrues to him from the date of his conception & he is entitled to the benefit of Sections. 6 & 8, Limitation Act. The period of the minority of such a, son, i.e., 18 years is to be computed from the date of his birth & not from the date of his conception."

10. I respectfully agree with the view taken is Ranganatha Reddi v. Ramaswami Mudali, 58 Mad. 886 : (A. I. R. (22) 1935 Mad. 839 F.B.) & Basayya v. Baslingayya, A. I. R. (35) 1948 Bom. 150 : (I. L. B. (1947) Bom. 750) & with the greatest respect differ from the view taken in Muhammad Khan v. Ahmad Khan, A. I. R. (16) 1929 Lah. 254: (10 Lah. 713).

11. The pltf. is entitled to the benefits of Sections 6 & 8, Limitation Act. The view taken by the Cts. below that the suit was time barred was wrong. The suit is within time.

12. Before I leave this point I may refer to Ranodip Singh v. Parmeshwar Prasad 47 ALL. 165 : (A. I. R. (12) 1925 P. C. 33), relied upon by the learned counsel for the resps. The facts of that case are distinguishable. The sale sought to be set aside in that case was made in 1893. Four sons of the alienor brought the suit for Setting aside the sale. Two of them were already in existence on the date of the sale. The third was born four years later and the fourth seven years later. The last two sons were, therefore, not in womb when the disputed sale was made. The principle laid down in the case is, therefore, not applicable to the present case.

13. Para. 11 (l) of schedule 3, Civil P. C., provides:

> "So long as the Collector can exercise or perform in respect of the J. D.'s immovable property, or any part thereof, any of the powers or duties conferred or imposed on him by paras. 1 to 10, the J. D. or his representative in interest shall be incompetent to mtge. charge, lease or alienate such property or part except with the written permission of the Collector ....." The provision is positive & mandatory. It is undisputed that, so far as the 3 pies share in khata khewat no. 8 is concerned, it was on sale before the Ct. In fact the auction sale had already taken place & an appln. for setting it aside had been made to the Collector when the sale in dispute was effected. It is true that one of the items of the sale consideration was to satisfy the decree in the execution of which the auction sale before the Collector took place; but the essential point remains that the disputed sale did not take place after obtaining "the written permission of the Collector".

Learned counsel for the resps. points out to the circumstance that after the execution of the sale deed the decretal amount was paid to the D. H. & then the Collector set aside the auction sale. He interprets this order of the Collector as an implied permission for making the disputed sale. I am unable to agree with this contention. There is nothing on the record to show that the collector's permission for sale was asked for or that he ever applied his mind to the question whether or not the permission for the sale should be granted. When the D. H. certified satisfaction of the decree, there was no alternative for the Collector but to set the sale aside. A transfer made in these circumstances without the permission of the Collector is void according to the plain language of para. 11. I may refer also in this connection to two cases of their Lordships of the Judicial Committee reported in Gauri Shankar v. Chinnumiya, A. I. R. (5) 1918 P. C. 168 : (46 Cal. 183) and Mohan Manucha v. Manzoor Ahmad Khan, A. I. R. (30) 1943 P. C. 29 : (18 Luck. 130).

14. The transfer of 3 pies share in khata khewat No. 8 being prohibited by law must be held as void. Though the pltf's. claim for the setting aside of the sale on the ground of want of legal necessity failed, it is open to him under the law to assail it on the ground that it was void being in contravention of para, 11 of Schedule 3 to the Civil P. C.

15. The question then remains whether the pltf. should be required to pay any compensation under Section 65, Contract Act. It runs as follows :

> "When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it."

On the plain language of this section, I have no doubt in my mind that the vendees are entitled fro compensation when the contract of sale in respect of the 3 pies share of khata khewat No. 8 falls to the ground. The case is, however, covered by authorities. In Mohan Manucha v. Manzoor Ahmed, A.I.R. (30) 1943 P. C. 29 : (18 Luck 130), their Lordships of the Judicial Committee observed :

> "The principle underlying Section 65 is that a right to restitution may arise out of the failure of a contract though the right be not itself a matter of contractual obligation. If it be settled law that the incapacity imposed on a J. D. by para. 11 of Schedule 3 is an incapacity to affect his property & not a general incapacity to contract, it follows that the covenant to repay is not made void by the mere operation of the para. But the lender who has agreed to make a loan upon security & has paid the money, is not obliged to continue the loan as an unsecured advance. The bottom has fallen out of the contract & he may avoid it. If he does so avoid the contract, he brings himself within the terms of Section 65 & within the principal of restitution of which it is an expression,"

The principle laid down in this case is on all fours with the present case.

16. Learned counsel for the applt. has relied upon Mt. Nathibai v. Wailaji, A. I. R. (24) 1937 Nag. 330 : (I.L.R. (1937) Nag. 111) in which it was held that "a transfer made in contravention of the provisions of para 11 of Schedule 3 is void & of no legal effect whatsoever. A person who is incompetent to transfer property under para. 11 of Schedule 3 stands on the same footing as a minor or lunatic & therefore money paid under such contract cannot be refunded under Section 65, Contract Act." Their Lordships relied upon the decision of the Judicial Committee in Gauri Shankar v. Chinnumiya, A. I. R. (5) 1918 P. C 168 : (46 Cal. 183). That case does not deal with the question of compensation under Section 65, Contract Act. All that it lays down is that so long as a property is under the regime of the Collector the J. D. has no power to transfer it & it was in the discussion of this principle that their Lordships approved of the F. B. decision in Mt. Salu Bai v. Bajat Khan, A. I. R. (4) 1917 Nag. 215 : (13 N. L. R. 130 F. B.). The decision of their Lordships of the P. C. in Mohan Manucha v. Manzoor Ahmad Khan, A.I.R. (30) 1943 P. C. 29 : (18 Luck 130) has the effect of overruling the view taken in Mt. Nathi Bai v. Wailaji, A. I. R. (24) 1937 Nag. 330 : (I. L. R. (1937) Nag. 111). So far as the question of compensation under Section 65, Contract Act, is concerned, I hold that the vendees are entitled to compensation under Section 65, Contract Act.

17. The question then remains as to what amount of compensation should be paid to the vendees. Learned counsel for the resps. contended that the total area sold was 36 acres out of which the claim will be disallowed in respect of 13 acres, will be allowed in regard to 28 acres. So on the basis of the

proportionate area the compensation may be assessed. I am of opinion that it is not possible to assess the compensation in this manner, as lands vary in quality from plot to plot. The compensation should be assessed taking into consideration all the relevant factors such as the quality of the soil, the area & facilities for irrigation, etc. The proper course is to remand the case to the trial Ct. to assess the compensation in regard to the 23 acres in khata khewat No. 8.

18. I would, therefore, allow the appeal & set aside the sale in regard to 3 pies share in khata khewat No. 8 of village Fatehpur on the condition that the pltf. pays to the vendees such compensation, in regard to this zamindari, as may be assessed, within such time as may be fixed by the trial Ct. & would remand the case to the trial Ct. for this purpose. In view of all the circumstances of the case I would let the parties bear their costs throughout.

Sankar Saran J.

19. I agree. The short point that we have to consider is whether an infant in venire sa mere is a person in existence & can take advantage of Section 6, Limitation Act. A large volume of judicial opinion has been expressed on this question & at times reliance has been placed on the principles laid down by English jurists & Judges & at other times upon the Hindu law. The position so far as the English jurists are concerned has been authoritatively laid down by Blackstone in his Commentaries wherein he says :

> "An infant in venire sa mere is supposed to be born for many purposes. It is capable of having a legacy or a surrender of a copy-hold estate made to it. It may have an estate assigned to it, & it is enabled to have an estate limited to its use & to take afterwards by such limitation as if it were then actually born" (1 Comm., 130).

20. Another jurist Domat has expressed himself as follows :

> "The children not yet born when their fathers die are reckoned in the number of children who succeed. Although not born when the succession which they are to inherit falls to them by the death of father or mother or other relations, yet they belong to them upon condition that they shall be born alive, & they are considered as heirs already before their birth" (Civil Law, Part II, Book II, s. i. para. 2797).

21. Subsequently the same principle was referred to with approval in Hale v. Hale, a case decided in the year 1692 & reported in (1692-24 E. R. 25). This was a case where A conveyed certain property to J. S. upon trust to raise £1500 for such child or children of A as should be living at the time of his death. A died leaving no child, his wife ensient with a daughter, which was afterwards born. It was held that this posthumous daughter was a child living at the death of A within the meaning of that trust & that a direction of a trust is not to be strictly construed. Another case was referred to in Hale v. Hale, (1692-24 E. R. 25) where a bill was exhibited on behalf of an infant in venire sa mere to stay waste, & an injunction was granted upon it. In Vitlar v. Gilbey, (1907) A. B. 139: (76 L. J. Ch. 339) it was held :

> A testator by his will devised real estate in strict settlement to his brother's first & second sons (who were alive at the date of the will) successively for life, with remainder to their first & other sons in tail, with remainder to his brother's third, fourth, & other sons successively in tail but declared his intention to be that any third or other son born in the testator's lifetime should not take a larger interest than for life only, with remainder to his issue in tail male. The brother's third son was born three weeks after the testator's death. The first & second sons died without issue :
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> Held, that the third son took an estate tail, not having been born in the testator's lifetime."
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> Lord Loreburn L. C. expressed himself thus :
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> "It is certain that a child in venire sa mere is protected by the law, & may even be party to an action. Again, in computing lives for the purpose of the rule against perpetuities, a child in ventre sa mere is taken as if it were actually living. And under the old law, which treated a will made before marriage as revoked by marriage & the subsequent birth of a child, it made no difference whether the child was actually born before the father's death or was still in ventre sa mere at that time. All this SB quite true ....."
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> His Lordship further expressed himself thus :
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> "I agree with Mr. Warmington that it may be difficult at times to say when a particular construction is for the benefit of a child. But I am not on that account to extend to all cases a construction which has throughout been applied only to a particular class. Authority may compel us to do violence to the English language, & to say that in some cases a child is born weeks or months before it is brought forth. But in my opinion we ought not to say so, knowing that it is not the fact, unless we are constrained by authority. And we are not so constrained, except where it is for the child's benefit."

22. It would thus appear that his Lordship was not giving assent to the general proposition that the law is always in favour of the child in ventre sa mere & it is only where the child's benefit is involved that this principle should be conceded. Lord Atkinson while discussing a case decided by Lord Westbury, Blasson v. Blasson, (1864) 2 De. G. J. & S. 665 : (46 E. R. 534), expressed as follows :

> "In my opinion it Is a direct decision that, for the purpose of ascertaining the period of distribution of a fund, the words 'born & living at the time of my decease' do not include a child in utero, but that for the purpose of ascertaining who is to participate in the gift they do include such a child, since it is for its benefit to be included."

23. The view of the English authorities that I have referred to above is on similar lines as the Hindu law. In Deo Narayan Singh v. Ganga Prasad, A. I. R. (2) 1915 ALL. 65 : (37 ALL. 162), a Bench of this

Ct. held :

> "A Hindu son subsequently born alive is competent to contest an alienation made by the father when the son was in his mother's womb ..... Under the Mitakshara a son acquires an interest in ancestral property by birth, the reason for the rule being, as pointed out by Mr. Gopal Chandra Sarkar in his work on Hindu Law p. 210, Edn. 4, that the father & other ancestors are reproduced in the son. The question is whether birth relates back to the period when the child was in its mother's womb. Under other systems of law, such as the Civil Law & the English Law, a child is deemed for some purposes to be born when it is in its mother's womb. This rule is in several instances recognised by the Hindu law. In the case of succession by a posthumous son, he takes a share in his father's property from the date of his father's death & he is regarded as being in existence, though he is only in his mother's womb & not actually born until afterwards. Again, in the case of partition, a son in utero at the time of partition is deemed to be in existence & the partition may either be postponed or a share should be set apart for him. (See Strange's Hindu Law, p. 182, Jolly's Tagore Law Lectures, p. 132, Kalidas Das v. Krishna Chander Das, 2 Beng. L. R. 103 : (11 W. R. 11 F. B.) It has also been held that the 'rights of a son in the womb could not be defeated by a Will made by the father' ..... So that in the cases of succession, partition & will, a son in the womb has been regarded as one in esse. There is nothing to show that in the case of an alienation by sale a different rule obtains. Our attention has not been called to any text of Hindu law in which an alienation has been excluded from what is deemed to be the general rule ..... Both on authority & on principle we are of opinion that a son subsequently born alive is competent to contest an alienation made by the father when the son was in the womb."

24. The F. B. case of the Madras H. C., Renganatha Reddi v. Ramaswami Mudali, 58 Mad. 886: (A. I. R. (22) 1935 Mad. 839 F.B.) has been dealt with by my brother at lengh & it is hardly necessary for me to add anything to what he has said about that case. My brother has also dealt with the Bombay case, Basayya v. Baslingayya,, A.I.R. (35) 1948 Bom. 150: (I. L. R. (1947) Bom. 750). I am in agreement with the views expressed by him about these cases.

25. The appeal is allowed in part, the decree of the lower appellate Ct. is modified & the pltf.'s suit for the setting aside of the sale in respect of the three pies share in khata-khewat no. 8 in village Fatehpur, Dist. Deoria, is decreed on payment by him of such compensation in respect of that property as may be assessed by the trial Ct. within such time as may be fixed by it. In the event of the failure in payment of the compensation by the pltf.-applt. within the time fixed by the trial Ct. this appeal shall stand dismissed with costs. The case is remanded to the trial Ct. for the determination of the compensation payable to the vendee-defts. by the pltf.-applt. within the time fixed by the trial Ct. the parties will bear their costs throughout.