Union Bank Ltd., Utraula vs Mst. Ram Rati And Ors. on 19 August, 1953

Equivalent citations: AIR1954ALL595, AIR 1954 ALLAHABAD 595

JUDGMENT

Randhir Singh, J.

1. These two second appeals arise out of a single judgment and decree.

2. Sallar had two sons, Ram Harakh and Raghubar Dayal Ram Harakh died leaving the plaintiff as his widow. Sallar was possessed of some immoveable property and it was alleged on behalf of the plaintiff that this property had been settled by a family settlement or partition in three equal shares in favour of Gangajali wife of Sallar, and the two sons of Sallar, Ram Harakh and Raghubar Dayal. Each of these three persons became owner of a third of the property of Sallar. On the death of Ram Harakh, his widow, the plaintiff, it was so alleged, agreed to marry Raghubar Dayal on the condition that he executed a gift deed of his property in her favour. The gift deed was executed on 20th February 1946 by Raghubar Dayal in favour of Ramrati in respect of his entire interest in the property. This deed was, however, not registered till 28th March 1946. In the meantime, on 26th February 1946, Raghubar Dayal executed a sale deed not only in respect of the one-third share in the property of the entire property of Sallar in favour of the Sallar which belonged to him, but in respect of Union Bank, Utraula.

After this sale deed had been executed the plaintiff Ramrati brought a suit for cancellation of the sale deed executed by Raghubar Dayal in favour of the Union Bank of Utraula against her. This suit was resisted by the Union Bank on various grounds. The contesting defendant denied that the plaintiff was the owner of the property in respect of which she had sued, or that the gift deed relied upon by the plaintiff had been executed on the 20th February 1946, and it was alleged that the gift had been acquired subsequently to defraud the defendant. The lower Court originally framed four issues in this case which are reproduced below:

1. Did defendant No. 2 execute any deed of gift in favour of the plaintiff as alleged?

2. Was there any family settlement according to which the plaintiff and defendant No. 3 are entitled to any and what share?

3. Is the sale deed in favour of defendant No. 1 by defendant No. 2 valid? Is the deed invalid for want of consideration?

4. To what relief, if any, is the plaintiff entitled?

During the course of the evidence, however, the plaintiff's Counsel admitted the execution of the sale deed obtained by the defendant as also that it was for consideration and after this statement had been made issue No. 3 was struck off by the trial Court and the remaining three issues were tried.

The trial Court came to the conclusion that the gift deed dated 20th February 1946, had been executed on that date and although it was registered on 28th March 1946, after the sale deed had been obtained by the defendant the gift deed took priority over the sale deed obtained by the defendant, and that the plaintiff became owner of a one-third share of the property under the gift deed.

3. The finding of the trial Court on issue No. 2 was that there had been a partition between Ram Harakh and Raghubar Dayal and that one-third share in the property of Sallar was given' to each of them and the remaining one-third to their mother Smt. Ganajali defendant No. 3. He also found that as it had not been pleaded on behalf of the defendant that the plaintiff forfeited her right in her husband's property on re-marriage, she continued to hold the property inherited by her from her husband even after the re-marriage. No finding, however, was given by the trial Court with regard to the remaining one-third share of the property which had passed to Smt. Gangajali, mother of Ram Harakh and Raghubar Dayal, under the partition, but a decree was passed in favour of the plaintiff for the cancellation of sale deed dated 26th February 1946.

The defendant went in appeal and it was contended that so far as the share of Gangajali was concerned, the plaintiff could not maintain a suit for the cancellation of the sale deed relating to that part of the property. It was also urged before the lower appellate Court that the plaintiff had lost her rights in the property of her husband on her re-marriage. The lower appellate Court agreed with the view taken by the trial Court in respect of one-third of the property which had been conveyed to the plaintiff under the gift deed but accepted the defendant's contention in respect of the remaining two-thirds of the property. It, therefore, allowed the appeal partly and setting aside the judgment and decree of the trial Court declared that the sale deed executed by Raghubar Dayal, in favour of the Union Bank, Utraula, was invalid and inoperative to the extent of one-third share in the property covered by the saledeed and held the sale deed to be good against the plaintiff in respect of the remaining two-thirds or the property. Dissatisfied by the judgment and decree of the lower appellate Court both the plaintiff and the Union Bank, Utraula, have come up in second appeal.

4. As the points involved in the two cases are more or less common and the appeals arise out of the same suit, it would be convenient to dispose of both the appeals together.

5. The first point which has been pressed in arguments on behalf of the appellant, the Union Bank, Utraula, is that the deed of gift relied upon by the plaintiff should not have been given preference over the sale deed obtained by the Bank. The reasons put forward are that the plaintiff had failed to establish that there was a completed gift in existence before the sale deed was executed by Raghubar Dayal in favour of Union Bank, Utraula. It has been found by the trial Court, and this finding has also been accepted by the lower appellate Court, that the deed of gift was in fact executed on 20th February 1946, and this finding of fact cannot be challenged in' second appeal.

It has, however, been argued that the plaintiff had failed to prove that delivery of possession had also been made to the donee, or that the donee had accepted the gift made by Raghubar Dayal.

Section 122, Transfer of Property Act defines "gift".

> "Gift is the transfer of certain existing moveable or immoveable property made voluntarily and without consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee."

This shows that in order to create a valid gift there should be acceptence on behalf of the donee and this proposition of law has not been disputed by the respondent. It remains, therefore, to be seen if there was evidence to prove that there had been acceptance of the deed of gift by the donee, that is, by Ramrati, before the sale deed had been obtained by the appellant in appeal No. 438. The point raised in appeal by the learned Counsel for the appellant that there had been no acceptance of the gift was not taken up in any of the two Courts below and was raised for the first time in this appeal. It was also not mentioned in the written statement that the gift had not been accepted by the donee.

Apart from this, there is intrinsic evidence in the deed itself which shows that the gift had been accepted by Ramrati. It is clearly mentioned in the gift deed that the gift had been accepted by Ramrati. It has also to be noted that this gift was made to Ramrati as a condition precedent to her remarriage with Raghubar Dayal and the deed of gift shows that Ramrati had agreed to marry Raghubar Dayal only if he agreed to make a gift of the property held by him and that the gift deed was executed under that agreement. It would thus appear that the acceptance of the gift by the donee is proved by the document itself as also by the peculiar circumstances under which the gift was made by Raghubar Dayal to Ramrati. That Ramrati re-married Raghubar Dayal is not now disputed. It is, therefore, abundantly clear that the gift deed dated 20th February 1946, was executed on 20th February 1946, and that the gift had been accepted by the donee.

6. A further point arises whether the gift deed executed and accepted by the donee but not registered would take preference over the later registered document. This point was considered in -- 'Venkat Subba Srinivas v. Subba Rama', AIR 1928 PC 86 (A) and it has been held that a gift would be a valid gift if the gift has been accepted even though the document may not have been registered at the time of the execution of the document, and it cannot be revoked subsequently, if the document has been registered.

7. It was urged on behalf of the appellant that the execution of the sale deed before the registration of the deed of gift was tantamount to a revocation of the gift deed. It has been held in the Privy Council case referred to above that after the gift had been completed it cannot be revoked even though the document may not have been registered. The execution of the subsequent sale deed in favour of the Union Bank, Utraula, would not, therefore, amount to a revocation of the gift made by Raghubar Dayal in favour of Ramrati.

8. As there had been a completed gift in favour of the plaintiff, the gift would take effect from the date of the execution and not from the date of registration. Section 47, Registration Act is clear on

the point and lays down that a registered document shall operate from the time 'from which it would have commenced to operate if no registration thereof had been required or made, and not from the time of its registration. The deed of gift was executed on 20th February 1946, and was registered on 28th March 1946. It, therefore, became operative on 20th February 1946.

9. The last point which has been canvassed on behalf of the appellant is that Section 41, Transfer of Property Act protected the appellant. Section 41, Transfer of Property Act has hardly any application to this case. The appellant claims to be a bona fide transferee for value without notice of the earlier gift deed. It is in evidence that Raghubar Dayal was the owner of a third of the property left by Sallar and the partition of the property was made by a registered document in 1027. In spite of this deed, the Union Bank, Utraula, obtained a transfer in respect of the entire property held by Sallar from Raghubar Dayal.

The defendant appellant examined only one witness Mohammad Jafar who was the general agent of the Bank. He admitted that he knew that the property originally belonged to Sallar and that he had two sons, Ram Harakh and Raghubar Dayal. He also admitted that the plaintiff and her mother Gangajali lived in different houses. Even then no inquiry was made as to how Raghubar Dayal happened to claim his ownership against the whole of the property. No mention was made in the written statement also that any inquiry, such as should have been made by a prudent person, was made in the present case, about the title of Raghubar Dayal to the property in dispute.

It would not, therefore, be open to the appellant to take advantage of the provisions of Section 41, Transfer of Property Act. Moreover the plaintiff did not in any way by any conduct of hers lead the appellant to believe that Raghubar Dayal was the owner of the property. The property which she had obtained by gift was the undivided shares in houses and shops and there could, therefore, be no separate possession over the gifted property. The plaintiff had after the gift become the wife of Raghubar Dayal and even if the property gifted to her had been separate property no severance of possession could be contemplated as both husband and wife would normally continue to live in the house even after the gift deed. The respondent is, therefore, not protected under Section 41, Transfer of Property Act. The sale deed obtained by the appellant, the Union Bank, Utraula would not, therefore, affect the rights of Ramrati in the gifted property and the finding of the lower appellate court on this point cannot be assailed.

10. The other appeal is on behalf of the plaintiff Ramrati whose suit for cancellation of the sale deed against two-third share of the property has been dismissed. Learned counsel for the appellant has conceded that so far as the share of Gangajali goes, she has no title to maintain a suit in the life time of Gangajali. Smt. Gangajali became owner of one-third of the property on a partition between Ram Harakh, Ramrati and herself and the plaintiff could lay no claim to this part of the property. Whether Raghubar Dayal had or had not any right to make a transfer of the share held by Gangajali in favour of the Union Bank, Utraula, does not arise in this case. The plaintiff has not established any right to that property and as such she could not maintain a claim in respect of that property.

11. Turning now to the remaining one-third share of the property comprised in the sale deed & in the suit the plaintiff inherited this property on the death of her husband Ram Harakh who was the

owner of this one-third share under the deed of partition. The plaintiff had mentioned in her plaint that she had married Raghubar Dayal in the 'sagai' form according to the family custom. No issue was framed by the trial Court on this point. After the passing of the Hindu Widows' Remarriage Act, 1856, Hindu widows were entitled to remarry regardless of the. existence or non-existence of a custom sanctioning remarriage. There was, however, a restriction imposed on the rights of widows on such a remarriage.

A widow was to forfeit her rights in her husband's property on remarriage. The question as to whether a widow who was permitted to remarry under custom even prior to the passing of the Widows' Remarriage Act, 1856, would or would not forfeit her rights in the property inherited from her husband, arose for consideration in a number of cases in this Court and it, has been consistently held that if there was a custom in existence permitting remarriage in a particular class of Hindu Society before the passing of the Act, the remarriage would not entail a forfeiture of her husband's property unless the custom itself has, as one of its incidents, a forfeiture of the rights inherited from her husband in the property. In the present case, therefore, if the marriage of the plaintiff with Raghubar Dayal was contracted under a custom which had been in existence prior to 1856, she could not and would not lose her rights in the property inherited by her from her previous husband Ram Harakh, as it was not pleaded, much less proved, on behalf of the contesting defendant that the custom set up on behalf of the plaintiff entailed a forfeiture in the inherited property.

As remarked above, no specific issue was framed on this point; but as Ramrati had come to Court in the capacity of a plaintiff seeking relief in respect of certain property, it was incumbent upon her to establish not only title to the property claimed but also a subsisting title to the property. The plaintiff led no evidence to prove that the custom relied upon by her had been in existence since before 1856. In fact, no evidence of the existence of the custom, has been led by the plaintiff.

There is some conflict of authority on the point as to whether a person can escape the restriction imposed by Section 2, Hindu Widows' Remarriage Act, 1856, merely by pleading a custom under which a remarriage was performed. Reliance has been placed on behalf of the plaintiff on a Division Bench ruling of this Court in -- 'Ganga Saran Singh v. Mt. Sirtaji Kuer', AIR 1935 All 924 (B), in which this point came up for consideration and it was held that it was open to a Hindu widow not to take advantage of the Hindu Widows' Remarriage Act and to contract a remarriage under a custom or under the tenets of a particular class of Hindu society. A perusal of this ruling leads to the conclusion that if a person setting up a custom under which re-marriage was said to have been performed fails to establish the custom, the remarriage may be a nullity and the widow contracting such a remarriage would be deemed to be living as an unchaste woman.

The view taken in two other cases of this Court, both of which are Division Bench cases, is, however, slightly different. In -- 'Bhola Umar v. Mt. Kausilla', AIR 1937 All 230 (C), it was held that while Section 2 would not be applicable to the case of remarriage which is permitted under a custom it would apply to all other cases in which a person fails to establish the custom or any other law or practice under which the remarriage was performed. This view was affirmed in a later case, vide, -- 'Mt. Jileba v. Mt. Parmesra', AIR 1950 All 700 (D). The observation of the learned Judges may be quoted with approval:

> "A widow wishing to escape the operation of Section 2 of the Act must establish the existence of an ancient custom."

It would mean, therefore, that if a widow sets up a custom under which she was remarried, but fails to establish it, she cannot escape the operation of Section 2, Hindu Widows' Remarriage Act. It would, therefore, not be enough for a widow merely to declare that she did not contract her marriage under the provisions of the Hindu Widows' Remarriage Act, but something more will have to be shown. It is no doubt possible that a widow may contract a remarriage under the practice prevailing in some other class of society or faith and may not take advantage of the provisions of the Hindu Widows' Remarriage Act for validating her remarriage. But if she definitely pleads a custom and fails to establish that custom, the operation of Section 2 of the Hindu Widows' Remarriage Act cannot be resisted.

12. The plaintiff in the present case did not lead any evidence to prove that there was a custom prevailing in the class or community to which she belonged under which remarriage was permitted or sanctioned. It has been argued on behalf of the plaintiff appellant that she had mentioned in her plaint that she had contracted the marriage according to the family custom and as no issue was framed on this point the case may be remanded to the trial Court for framing a definite issue on this point and deciding the case afresh. I would have acceded to this request, but it appears to me that a very wide issue was framed in this case under which the plaintiff could have adduced evidence in proof of the allegations made by her.

Some cases have been cited on behalf of the plaintiff appellant, but it is unnecessary to refer to these cases as in all these cases it was the widow who was the defendant and the suit had been brought by a person who claimed the property which was already in the possession of the widow. In the present case, however, it is the widow who has come to Court to seek relief and it was the duty of the plaintiff to establish her own subsisting rights to the property before she can claim a decree in her favour. She should have, therefore, led evidence to establish that she had a right to the property in respect of which she claimed a decree. No evidence having been led by the plaintiff to prove that she had a subsisting title to the property, it would not be proper to remand the case to the trial Court for a rehearing after framing a definite issue.

13. In view of my findings above, the plaintiff appellant has not been able to establish her rights to the two-thirds share of the property in dispute and her claim for cancellation of the sale deed executed by Raghubar Dayal in favour of the Union Bank, Utraula in respect of this two-thirds share in the property has been rightly rejected.

14. It may be rioted that the relief claimed by the plaintiff was not properly worded or expressed. The plaintiff was no party to the sale deed and she was, therefore, entitled only to a declaration that the sale deed executed by Raghubar Dayal in favour of the Union Bank, Utraula was not binding on her in respect of the property owned by her. The prayer in the plaint, however, was that the sale deed executed in favour of the Union Bank by Raghubar Dayal be cancelled. The intention evidently was that the sale deed may toe declared ineffectual and null and void as against the plaintiff.

15. As a result both the appeals are dismissed. I make no order as to costs in this Court.