Supreme Court of India
Chaya vs Bapushaheb on 27 January, 1993
Equivalent citations: 1993 SCR (1) 286, 1994 SCC (2) 41
Author: P Sawant
Bench: Sawant, P.B.

PETITIONER:
CHAYA

Vs.

RESPONDENT:
BAPUSHAHEB

DATE OF JUDGMENT27/01/1993

BENCH:
SAWANT, P.B.
BENCH:
SAWANT, P.B.
KULDIP SINGH (J)

CITATION:
1993 SCR (1) 286 1994 SCC (2) 41
JT 1993 (1) 267 1993 SCALE (1)195

ACT:

HEADNOTE:

JUDGMENT:

The Judgment of the Court was delivered by SAWANT, J.- The suit was filed by 56 members of the public claiming declaration of customary right to bury the dead in the land R.S. No. 975/1 admeasuring 2 acres and 38 gunthas and R.S. No. 975/2 admeasuring 5 acres, against 15 original defendants. Defendants 1 to 3 to the suit were brother- owners of the land. The owner-defendants sold portions of the suit land and defendants 4 to 15 are the purchasers of the said portions. Both the owners and the vendees were joined as defendants to the suit as they denied the plaintiff's customary right to bury the dead in the land. In the suit, a permanent injunction restraining the defendants from obstructing the plaintiffs in the exercise of their said right, was also claimed.

2. The evidence disclosed that defendant 1 claimed interest in R.S. No. 975/1, defendant 2 in R.S. No. 975/2 and defendant 3 claimed no interest in either of the pieces of land. Defendants 1 and 2 opposed the reliefs claimed by the plaintiffs contending that the suit land was not a burial ground and that the Municipality had provided sufficient land for burying the dead elsewhere. The

contentions of defendants 1 and 2 were adopted by defendants 4 to 8. In addition, they contended that they were bona fide purchasers of different portions of the suit land under registered sale deeds, and they had constructed houses after taking necessary permission from the Municipality. It does not appear from the record that the rest of the defendants had filed their separate written statements.

3. On March 27, 1967, the trial court decreed the suit against all the defendants in respect of both the suit properties viz., R.S. Nos. 975/1 and 975/2.

4. Against the decision of the trial court, defendant I (eider brother out of the three brother-owners), alone filed an appeal to the District Court being Regular Appeal No. 1236 of 1967. He joined defendants 2 and 3 as Respondents 55 and 56 to the appeal. Similarly, he joined purchaser also as respondents to the appeal. It may be stated that in the appeal, defendant 1 challenged the whole of the decree and did not restrict his appeal to R.S. No. 975/1 alone in which he had claimed ownership before the trial court.

5. During the pendency of the appeal, on September 17,. 1970, defendant 2 i.e., Respondent 55 died leaving behind his widow and minor children who are the appellants before us. They were, however, not brought on record in the appeal. Plaintiff-respondents at no stage in the appeal raised the plea of abatement of the appeal. The District Court decided the appeal on merits and dismissed the same confirming the decree of the trial court in favour of the plaintiffs.

6. Against the decision of the District Court, again defendant 1 alone filed a second appeal in the High Court challenging the whole of the decree without any reservation either regarding the land or the parties. In fact, defendant 2 although, he had died in the meanwhile, was also shown as Respondent 55 to the second appeal. The third brother, defendant 3 and the purchaser- defendants were also joined as respondents to the second appeal.

7. During the pendency of the second appeal, the High Court, by an order, deleted the name of defendant 2 (Respondent 55) from the record. On merits, the High Court held that the customary right was not established and set aside the decree of the trial court. However, the High Court restricted the decree to the appellant i.e., defendant 1 only. The decree against defendants 2, 3 and purchaser-defendants was left undisturbed.

8. The widow and the children of defendant 2, i.e., the present appellants, moved the High Court by a review petition, to modify the decree and to extend the relief to their land also viz., R.S. No. 975/2. The High Court did not entertain the review petition as being barred by limitation. Hence, the present appeal by the widow and the children of defendant 2.

9. The questions of law which arise in the present case are two, viz., whether the appeal before the District Court had abated in view of the non-impleadment of the appellants, and whether the High Court could have passed the decree embracing the entire suit property viz., R.S. Nos. 975/1 and 975/2.

10. Before answering the two questions, it is necessary to take note of the relevant admitted facts in the case. Defendant 1 is elder of the three owner-brothers. There is nothing on record to show that though defendant I claimed interest only in R.S. No. 975/1, and defendant 2 in R.S. No. 975/2 and defendant 3 claimed interest in none, there was a partition of the joint family property, and the family had not continued as joint. However, for the purpose of the present appeal, we will hold that defendants 1 and 2 were holding the two pieces of land separately. As regards the purchaser-defendants, they were the vendees of different portions of both R.S. Nos. 975/1 and 975/2 and, therefore, they had interest in both the said pieces of land along with defendants 1 and 2. It is also not disputed that there were residential houses constructed, particularly, by the purchaser-defendants in both the pieces of land. Under Section 6 of the Hindu Succession Act, upon the death of defendant 2, there was a notional partition vesting 1/4th share in defendant 2, with the widow and the minor sons together getting the remaining 3/4th share. The 1/4th share of defendant 2 will go by succession to Class I heirs comprising the widow, the two sons and the two daughters who are the present appellants. If the decree of the trial court as confirmed by the appellate court is held final, it is only the 1/4th share of defendant 2 which will be burdened by the so-called customary right of burial decreed by the trial court in favour of the plaintiffs. Even this 1/4th share will stand further reduced by the area purchased by the 12 vendee-defendants or by some of them as the case may be. Thus, the customary right claimed would be confined to a small patch of land surrounded by residential houses. The record shows that an approach was made to the Municipality to acquire the entire land for burial purposes. The Municipality rejected the said request by pointing out firstly that enough burial land was available elsewhere and that the present land being surrounded by houses was not suitable for the burial purposes.

11. Coming now to the first question as to whether the appeal had abated, admittedly, defendant 2 had died during the pendency of the appeal before the District Court and the present appellants were not brought on record. It is not disputed that the plaintiff-respondents knew of the death of defendant 2 during the pendency of the appeal. Yet, they did not take any objection to appeal being heard on merits, and in fact, the appeal was heard and decided on merit. The plaintiff-respondents did not raise any objection with regard to the abatement of appeal presumably because tile decree of the trial court embraced both the suit lands and the relief relating to the suit lands was based on the alleged customary right common to both the lands. Defendant I was the elder brother and whatever the relationship of defendants 1 and 2 inter-se between themselves on the one hand and between defendants 1, 2, 3 and the vendee- defendants on the other, the plaintiffs proceeded on the presumption that they were concerned with the entire suit property and the customary right was to be asserted against the whole of the suit property as such, which was sufficiently represented in law by the surviving defendants. Since according to tile plaintiffs, the right to sue survived against the whole of the property and against the surviving defendants, notwithstanding the death of defendant 2, the appeal had not abated. Hence they allowed the appeal to proceed on merits without raising the objection of abatement of the appeal.

12. Since the plaintiff-respondents did not raise tile objection with regard to the abatement of the appeal, they were barred from raising the said objection in the second appeal before the High Court. It is not disputed that In tile present case, the cause of action, viz., the alleged customary right to burial did survive against the suit property as a whole. In this connection, we may refer to the

decision of this Court in Dondapan Sahu v. Arjuna Panda1 where it was held that when tile parties proceeded almost by consent that the deceased was represented by the surviving defendants, it was not open to the defendants to have the matter reopened in appeal. On the facts of tile present case also, it can be held that the plaintiff-respondents had acquiesced in the right of defendant 1 to proceed with the appeal in respect of the entire suit property, in tile absence of defendant 2 or his legal representatives.

13. As regards the question as to whether the High Court could have extended the operation of the decree to the entire suit property instead of restricting it only to R.S. No. 975/1, we are afraid that the High Court has not noticed the true effect of Order 41, Rule 33 of the Code of Civil Procedure which reads as follows:

> "33. Power of Court of 'Appeal.- The Appellate Court shall have power to pass any decree and make any order which ought to have been 1 (1969)3SCC397 passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection and may, where there have been decrees in cross-suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees:
>
> Provided that the Appellate Court shall not make any order under Section 35-A, in pursuance of any objection on which the Court from whose decree the appeal is preferred has omitted or refused to make such order."

14. This provision is based on a salutary principle that the appellate court should have the power to do complete justice between the parties. The object of the rule is also to avoid contradictory and inconsistent decisions on the same questions in the same suits. For this purpose, the rule confers a wide discretionary power on the appellate court to pass such decree or order as ought to have been passed or as the nature of the case may require, notwithstanding the fact that the appeal is only with regard to a part of the decree or that the party in whose favour the power is proposed to be exercised has not filed any appeal or cross-objection. While it is true that since the power is derogative of the general principle that a party cannot avoid the effect of a decree against him without filing an appeal or cross-objection and, therefore, the power has to be exercised with care and caution, it is also true that in an appropriate case, the appellate court should not hesitate to exercise the discretion conferred by the said rule.

15. The present is one such case where according to us, the High Court ought to have used the discretionary power conferred by the rule. The facts which have been sufficiently detailed above, show that a customary right by a section of the public was sought to be asserted against the entire suit property in which rights and interests of all the defendants were involved. The said right could not be exercised partially in respect of only a particular piece of land. The plaintiffs had gone to the court asking customary right in respect of the entire suit property and had not specified any

particular portion of the property as the object of the exercise of the said right. Apart from the fact that R.S. Nos. 975/1 and 975/2 were originally the joint family property of all the defendant-brothers, whatever the inter-se relation between them with respect to the said property, various portions of both the survey numbers were sold to the vendee-defendants. The plaintiffs had not made clear as to which of the remaining portions of the suit land were the subject matter of their customary right. Admittedly, on the sold lands, vendeedefendants had constructed houses. The trial court while granting the decree, had excluded portions of the land which were occupied by the residential houses. The trial court, had further, not granted decree in respect of specific portions of the suit property against specific defendants. It had granted the decree generally against the entire land minus that occupied by the houses, and against all the defendants together. Defendant I had preferred an appeal before the District Court challenging the decree granted by the trial court against the entire land viz., that belonging to himself and to all the other defendants. It is that appeal which was decided on merits by the appellate court notwithstanding the death of defendant 2 during the pendency of the appeal. Thus, granting decree in favour of defendant 1 alone when it was not claimed by the plaintiff in the original suit, and based upon a common right asserted against the entire land which was the relief claimed by the plaintiffs, would in the present case result in contradictory findings viz., that whereas the customary right Could not be claimed against any portion of the suit property (that is the finding of the High Court), the trial court's decree for exercise of such rights would continue to operate against a part of the land merely because the other defendants had not preferred any appeal.

16. We find that in the circumstances, this was a fit case where the High Court ought to have exercised its power under Order 4 1, Rule 33. In fact, the non-exercise of the power has resulted not only in the miscarriage of justice but in contradictory results in respect of the same subject-matter and based on the same alleged right. In this connection, we may refer to the decisions of this Court in Mahabir Prasad v. Jage Ram2, Harihar Prasad Singh v. Balmiki Prasad Singh3, Giani Ram v. Ramji Lal4 and Koksingh v. Deokabai5 to support our conclusion.

17. We, therefore, allow the appeal, modify the decision of the High Court and dismiss the plaintiff's suit in respect of the entire property. In the circumstances of the case, there will be no order as to costs.

MOHD. ASLAM V. UNION OF INDIA ORDER

1. Shri Mohd. Assam alias Bhure seeks the intervention of the Court in what is urged as a serious and urgent matter of public concern with regard to the preservation of certain places of worship in the country.

2. The prayers sought in this petition are:

> "(i) directing the respondents to take steps for safeguarding of religious places i.e. Gyanvapi Masjid and Vishwanath temple at Varanasi and Krishna temple and Idgah at Mathura;

(ii) to take steps to provide appropriate security of these places for restraining any person from causing any mischief to these places;

(iii) to regulate the entry of devotees to these places so that mob of large number of. persons should not assemble near these places for causing any damage;

(iv) to take over/manage the Gyanvapi Masjid and Vishwanath temple and Krishna temple and Idgah at Mathura in public interest by Central Government;

(v) to register cases as per provisions of 'Places of Worship (Special Provision) Act, 1991' against any person who violates the Act by causing damage or converting these places from their existing religion to religion of other denomination;

(vi) direct the Central Government to take steps against BJP, VHP, Bajrang Dal, RSS by restraining them from convening Idgah at Mathura and Gyanvapi Masjid at Varanasi to Hindu temple for their political benefits and in violation of the 'Places of Worship (Special Provision) Act, 1991'.

3. The prayers at (iv) and (vi), in our opinion, are not matters which can be dealt with by the Court on the state of the present pleadings. These prayers are not susceptible of an adjudication on the material placed before the Court. The matter is eminently one for appropriate evaluation and action by the Executive, and may not have an adjudicative disposition or judicially manageable standards as the pleadings now stand. We find no justification to issue notice to the respondents on these prayers at (iv) and (vi).

4. So far as prayer (v) is concerned, it is the statutory obligation of the State to enforce the provisions of the Act. It does not need reiteration that duty is afortiori in matters of such serious public concern. In view of the plain obligations of the State to enforce the law, any direction on the hypothetical possibility of violation, amounts to no more than recanting the provisions of the statute itself.

5. What remain to be considered are the prayers at (i),

(ii) and (iii). We have heard Shri O.P. Sharma, learned Senior Counsel for the petitioner; Shri Milon K. Banerjee, learned Attorney General for the Union of India and Shri A.K. Ganguly, learned Senior Counsel for the State of Uttar Pradesh and its officers.

6. The District Magistrates of Mathura and Varanasi and the Home Secretary to the State Government of Uttar Pradesh are present in Court. Learned Attorney General submitted that after the events of December 6, 1992, both the Central and the State Governments are keenly alive to the need for an appropriate heightened security environment respecting places of worship referred to, and that the Governments are straining every nerve and resource to ensure such safety. Learned Attorney General submitted that adequate security measures for safeguarding these places of worship have been evolved and are in operation. He also submitted that it would not be appropriate

in public interest to make a public disclosure of the details of the security preparations.

7. Shri A.K. Ganguly, upon instructions from the District Magistrates and the Home Secretary, submits that the prayers sought for by the petitioner are, indeed, the subject-matter of deep, anxious and committed concern of the Government and all precautions and safety measures have been evolved and are in operation in respect of these places of worship.

8.In view of these submissions, no specific directions on the prayers at (ii) and (iii) are necessary as the Governments States and Union say that they are keenly alive to the problem and have taken adequate steps and that these measures are already in operation.

9. We accordingly dispose of this writ petition by directing the State and Union Governments to take all necessary steps for safeguarding the religious places as prayed for in prayer (i).

10. The impleadment applications are dismissed.