1930

TUKA v. GANU

Shingne J.

may be noted that it has been held that if the grant of a permanent lease by a Mahant has been affirmed by a judgment, the judgment will operate as *res judicata* and the succeeding Mahant will be bound by it: *Maharanee Shibessouree Debia* v. *Mothooranath Acharjo*[1] and *Prosunno Kumari Debya* v. *Golab Chand Baboo*.[2]

15. I am fully conscious of the responsibility attaching to us to observe the injunction laid upon the Courts in India by their Lordships' remarks in *Mata Prasad* v. *Nageshar Sahai*,[3] against questioning any principle enunciated by the Board, but their Lordships' observations in the case concede to the Courts in India the right to examine the facts of a case to see how far the principle on which stress is laid applies to the facts of the particular case. On a careful consideration of the facts in the present case and of the observations of their Lordships in the case of *Madhavrao* v. *Raghunath Venkatesh Deshpande*,[4] I respectfully agree with the view of the Full Bench in *Radhabai's* case.[5]

16. I agree with my learned brother in dismissing the appeal with costs.

Decree confirmed.

B. G. R.

[1] (1869) 13 Moo. I. A. 270.
[2] (1875) L. R. 2 I. A. 145.
[3] (1925) L. R. 52 I. A. 393 at p. 417.
[4] (1923) L. R. 50 I. A. 255.
[5] (1885) 9 Bom. 198.

APPELLATE CIVIL.

Before Mr. Justice Patkar.

1930
June 27.

NARAYAN RAGHUNATH KULKARNI (ORIGINAL PLAINTIFF), APPELLANT *v.* KRISHNAJI GOVIND KULKARNI AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Hereditary Offices Act (Bom. Act III of 1874), section 5 (1) (a)—Devise by will—Devise by watandar of watan property in favour of another watandar of the same watan, validity of—"Alienate", meaning of—.

A devise by will of watan property made by a watandar in favour of a watandar of the same watan is not prohibited under section 5 (1) (*a*) of the Hereditary Offices Act, 1874.

*Second Appeal No. 75 of 1928.

Bhimappa v. *Mariappa*,[1] and *Bai Devkore* v. *Amritram Jamiatram*,[2] referred to.

The word " alienate " in section 5 (1) (*a*) of the Act does not exclude a devise by will.

SECOND Appeal No. 75 of 1928 from the decision of D. V. Yennemadi, Assistant Judge at Satara in Appeal No. 535 of 1926.

Suit for partition.

The property in suit consisted of Kulkarni Watan lands regarding which there was commutation of service. The property belonged to one Laxman Bhagwan. He devised it to defendants Nos. 1, 2 and father of defendant No. 3 who were watandars of the same watan, by a will dated January 19, 1914. Laxman died on January 21, 1914. On his death the plaintiff and defendant No. 4 claimed to be his reversionery heirs. In 1925 the plaintiff filed a suit in the Court of the Joint Subordinate Judge at Islampur to recover by partition a half share in the suit property alleging that he along with defendant No. 4 were the nearest reversionery heirs of the deceased Laxman, and that the property in suit being watan property, the deceased Laxman had no power to devise it by will in favour of defendants Nos. 1 to 3.

The trial Court held that the will was valid and dismissed the suit.

In appeal the decree of the trial Court was confirmed.

The plaintiff appealed to the High Court.

V. B. Virkar, for the appellant.

K. N. Koyajee, for respondents Nos. 1 to 3.

PATKAR, J. :—The question involved in this second appeal is whether a watandar can validly devise his watan property by will in favour of a watandar of the same watan.

[1] (1886) 3 Bom. H. C. 128 (A. C. J.)

[2] (1885) 10 Bom. 372.

1930

NARAYAN RAGHUNATH v. KRISHNAJI GOVIND

Patkar J.

The lands in suit are admittedly Kulkarni watan lands. The Kulkarni service is commuted. Mere commutation of service does not affect the rule as to inalienability embodied in section 5 (1) (*a*) of the Watan Act unless the right of alienation without the sanction of Government is conferred on the watandars by the terms of the settlement or has been acquired by them under the same terms. The property in suit is not alleged to be watan property assigned under section 23 as remuneration of an officiator. Section 7 of the Watan Act will not, therefore, apply. It is common ground that section 5 (1) (*a*) of the Watan Act applies to the property in suit. Section 5 (1) (*a*) of the Watan Act says that without the sanction of Government it shall not be competent to a watandar to alienate for a period beyond the term of his natural life any watan to any person who is not a watandar of the same watan. Under section 5 (1) (*a*) of the Watan Act the power of alienation of a watandar is restricted to his lifetime only in case the alienation is to a stranger and not to a watandar of the same watan. An alienation to a watandar of the same watan is not prohibited. In the present case the devise by will is in favour of defenants Nos. 1, 2 and 3 who are watandars of the same watan. The plaintiff claims the property by inheritance along with defendant No. 4.

The question, therefore, in the case is whether the word " alienate " excludes a devise by will. It is urged on behalf of the appellant that the word " alienate " means to transfer by sale. It is conceded on behalf of the appellant that the watandar can make a gift of the watan property to a watandar of the same watan. If a watandar can alienate the property by gift *inter vivos*, he would presumably have the right to alienate by will in favour of a watandar of the same watan.

The word " alienation " according to Stroud's Judicial Dictionary, Vol. I, p. 65, means " to make a thing another man's." " Alienate," according to Wharton's Law Lexicon, means " to transfer property." Alienation would, therefore, include a devise by gift if the effect of it is to make the property another man's by means of a bequest. It is urged on behalf of the respondents that if the word " alienation " excludes a bequest it would lead to the anomalous result that a bequest in favour of a stranger would not be prohibited by section 5 (1) (*a*) of the Watan Act.

In *Bhimappa* v. *Mariappa*[1] it was held that the interest enjoyed by one of a body of coparceners, in possession of land attached by way of emolument to a hereditary office, cannot be bequeathed to one or more of the other coparceners, as the estate held by each sharer is only a life interest, subject to the right of the Collector, under Act XI of 1843, to assign a fit remuneration from the rent and profits for the maintenance of the person appointed to conduct the duties of the office. This decision was prior to the enactment of Bombay Act III of 1874. The original section 5 of the Watan Act III of 1874 ran as follows :—

" No watandar shall, without the sanction of Government, sell, mortgage, or otherwise alienate or assign any watan or part thereof or interest therein to any person not a watandar of the same watan."

The words " otherwise alienate " would include a devise by will, and an alienation in favour of a watandar of the same watan would be valid under the original section and also under the present section substituted by Bombay Act V of 1886. In *Bai Devkore* v. *Amritram Jamiatram*[2] a bequest in favour of a stranger was described as an alienation by will, and it was held that the alienation by will of what was a watan held for service in favour of a stranger being in its inception

[1] (1866) 3 Bom. H. C. 128 (A. C. J.) [2] (1885) 10 Bom. 372.

1930

NARAYAN RAGHUNATH v. KRISHNAJI GOVIND

Patkar J.

invalid as against the heirs did not become valid because of a change in the tenure of the estate after his life interest had terminated. Though the estate devised comes into existence on the death of the testator under a will, the beneficial interest is created in favour of the devisee in the lifetime of the watandar and stands so long as it is not revoked by the testator during his lifetime. The alienation, therefore, by will by a watandar during his lifetime would be valid beyond the term of his natural life if it is in favour of a watandar of the same watan.

I think, therefore, that the view taken by both the lower Courts is correct, and this appeal must be dismissed with costs.

Decree confirmed.

B. G. R.

APPELLATE CIVIL.

Before Mr. Justice Patkar.

1930
July 3

TUKARAM VITHU SHEDGE (ORIGINAL PLAINTIFF), APPELLANT, *v.* YESU KOM MARUTI KORE AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

Hindu law—Gift by widow to stranger—Consent of next reversioner—Gift not validated by consent as against other reversioners.

Under Hindu law a gift by a widow of the whole or part of an estate in favour of a stranger is not validated by the consent of the next reversioner as against the eventual reversioners or the adopted son.

Bajrangi Singh v. *Manokarnika Bakhsh Singh*,[1] distinguished.

SECOND Appeal against the decision of A. Montgomerie, District Judge of Satara, reversing the decision of B. C. Patil, Joint Subordinate Judge, Islampur.

Suit to recover possession of property.

One Vithu Ganu died leaving him surviving a widow, Paru, and a daughter, Yesa.

On or about September 4, 1915, Paru made a gift of the whole property of Vithu to one Maruti, who was the husband of Yesa, with the consent of Yesa and the next

*Appeal No. 1048 of 1927 from Appellate Decree.

[1] (1907) 30 All. 1 : L. R. 35 I. A. 1.