F.M. DEVARU GANAPATI BHAT A

v.

PRABHAKAR GANAPATHI BHAT

DECEMBER 19, 2003

[Y.K. SABHARWAL AND DR. AR. LAKSHMANAN, JJ.] B

Deed and Documents :

Gift deed—Execution of—Sister gifting the property bought from her brother to her nephew—Stipulation that if other male child born to her brother, shall be joint holder—Construction of—Held : Document read as whole shows that the intention of the donor was to make all male children of her brother joint holders of properties and not create an absolute right in favour of her nephew—Further, the son born after the execution of gift deed has interest in the property—Creation of such right is permissible under Section 20—Transfer of Property Act, 1992, Section 20. C D

Interpretation of statutes :

Rules of construction—Intention of the executant—To be ascertained after considering all words in their ordinary natural sense and reading the document as whole. E

Sister of G purchased all the properties from G on account of his helpless conditions. The sister was issueless and she gifted the property under the gift deed to her nephew-appellant with the stipulation that if other male children are born to her brother they shall be joint holders with the appellant. The gift properties were ancestral. When the gift deed was executed appellant was a minor and few years later his brother-respondent was born. Respondent filed suit for partition and possession claiming one-half share in the properties. Trial Court decreed the suit. Appellant filed an appeal. High Court dismissed the appeal. Hence the present appeal. F G

Appellant contended that on true construction of the gift deed on demise of the donor, the appellant became the absolute owner of property and the respondent has no right over it; and that since the donor did not create the interest of the entire property for the benefit of unborn male child, the interest sought to be created under the gift H

A deed is invalid.

Dismissing the appeal, the Court

HELD : 1.1. The words 'this property will be your and nobody else shall have right and title over it' in the gift deed cannot be read B in isolation. These words are immediately followed by the words that 'in case any male children are born to your parents, you shall enjoy the described immovable property and house with those male children as joint holder'. No exception is made in respect of property. When the donor stated that 'nobody else shall have right or title over it', she was C only reiterating what was stated earlier that she had decided to gift the immovable property and house to the appellant since at that time, the appellant was the only male child of the brother of the donor. There are no such qualifying words in the gift deed to show an intention of the donor to exclude the unborn male children from the title of property which she had retained for maintenance during her liveli- D hood. The language and tenor of the document read as a whole clearly shows the intention of the donor that all the property gifted shall remain in the family of her brother, being their ancestral properties and shall be enjoyed by the appellant and other male children as may be born, as joint holders without exception of any property; and that E the donor did not intend to create an absolute right in favour of the appellant. [1270-B-E]

1.2. There is no ban on the transfer of interest in favour of an unborn person. Section 20 of the Transfer of Property Act, 1892 permits an interest being created for the benefit of an unborn person F who acquires interest upon his birth. No provision has been brought to notice which stipulates that full interest in a property cannot be created in favour of unborn person. In the instant case, the donor gifted the property in favour of the appellant, then living, and also stipulated that if other male children are later born to her brother they shall be G joint holders with the appellant. Such a stipulation is not hit by Section 13 of the Act. Creation of such a right is permissible under Section 20 of the Act. The respondent, thus became entitled to the property on his birth. [1270-D-F]

Raj Bajrang Bahadur Singh v. *Thakurain Bakhtraj Kuer,* AIR (1953) H SC 7, distinguished.

2. The rule of construction is well settled that the intention of the executor of a document is to be ascertained after considering all the words in their ordinary natural sense. The document is required to be read as a whole to ascertain the intention of the executant. It is also necessary to take into account the circumstances under which any particular words may have been used. [1269-F-G]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4385 of 2001.

From the Judgment and Order dated 16.2.99 of the Karnataka High Court in R.F.A. No. 391 of 1991.

R.S. Hedge, Chandra Prakash, Ms. Savitri Pandey and P.P. Singh for the appellant.

S.N. Bhat and Diwakar Chaturvedi for the Respondent.

The Judgment of the Court was delivered by

Y.K. SABHARWAL, J. : Parties are brothers. The appellant/defendant is the elder brother. The respondent/plaintiff is the younger brother. The suit for partition and possession filed by the respondent claiming one-half share in suit properties has been decreed by the trial court. The first appeal of the appellant has been dismissed by the High Court by the impugned judgment.

The basis of claim in the suit was the gift deed dated 9th September, 1947 executed by Smt. Mahadevi, younger sister of Ganapathi, father of the parties. When gift deed was executed, the appellant was a minor aged 13 years. At that time, respondent was not born. In the year 1936, the suit properties were sold by Ganapathi to his younger sister Mahadevi. The sale was effected due to some helpless conditions of Ganapathi. Mahadevi was issueless. She enjoyed properties from the year 1936 upto execution of the gift deed. The same properties were gifted under the gift deed in question. The dispute in this appeal is, however, restricted to one gifted property, namely, survey No. 306. The appellant is not disputing the claim of the respondent in respect of partition of remaining properties. According to the appellant, property survey No. 306 under the gift deed was given to him absolutely and the respondent, on true construction of the gift deed, has no right to claim partition of the said property. Alternatively, it is

A contended that creation of interest in favour of the respondent who was not born when the gift deed was executed is invalid in view of Section 13 of the Transfer of Property Act, 1882 (for short, 'the Act'). Both these contentions have not found favour with the trial court and the High Court.

B Two questions that fall for consideration in this appeal are :

1. Construction of gift deed dated September 9, 1947; and

2. Validity of creation of interest in the property in question in favour of respondent in view of Section 13 of the Act.

C In the gift deed, the donor retained property survey No. 306 for her livelihood till demise. The contention is that on true construction of the gift deed on demise of Mahadevi, the appellant became the absolute owner of property survey No. 306. The respondent has no right over it. The answer would depend upon the construction of the gift deed. The original D gift deed is in Kannada language. When translated in English, it reads as under :

"THIS DEED OF GIFT OF IMMOVABLE PROPERTIES AND HOUSE in village is executed on this the 9th day of September, 1947 by Smt. Mahadevi, w/o Subraya Bhat, aged about 25 years, E Occupation, House wife, belonging to Havyaka Community, R/o Keramane, Yalugar Village of Siddapur Taluk, in favour of Devaru Ganapathi Bhat, aged about 13 years, R/o Keramane, Yalugar Village of Siddapur Taluk.

F WHEREAS, I am the owner of the below mentioned immovable properties and house. In order to protect the interest of the below mentioned properties and house, I am thinking to gift all the properties by way of a gift to a suitable person. As you are my brother's son and also you have gained love and affection of mine, and also as the land and house were previously your G ancestral property, hence I have decided to gift the immovable property and house therein to you. As described herein my malki right in the below mentioned schedule immovable property, house and the Betta land/Bena land and Kumki land, etc., situated in Yelugar village of Keremane in Siddapur Taluk within the H jurisdiction/range of Siddapur Sub-Registrar have been gifted and

given to you today. Henceforth neither myself nor anybody is having right, title and interest in any manner over the schedule immovable property and house etc. and you have to enjoy this property as full owner. Therefore, in future you have to pay and bear the Revenue, Tax, Local Funds and repair the Government boundary stones, etc. You have to enjoy and succeed to the property as your own. Since you are a minor, the schedule property immovable property and house are to be cultivated/ managed by your father Ganapathi Devaru Bhat as the guardian of minor child and the same is to be reserved for you till you attain the age of majority. Among the property, I have retained the property of Sy.No.306, area 1-6-0, Assessment 16-0-0, for my livelihood till my demise and after my death, this property will be your and nobody else shall have right or title over it. In case any male children are born to your parents, you shall enjoy the described immovable property and house with those male children as a joint holder. Therefore, this Deed of Gift of immovable properties, house etc., has been executed.

Description/Scheduled of immovable property situated at Yalugar Village of Siddapur Taluk."

The execution of the gift deed is not in question. The validity of the gift deed is also not in question except to the extent indicated hereinbefore.

The rule of construction is well settled that the intention of the executor of a document is to be ascertained after considering all the words in their ordinary natural sense. The document is required to be read as a whole to ascertain the intention of the executant. It is also necessary to take into account the circumstances under which any particular words may have been used.

Now, keeping in view the above principles, let us consider the admitted facts of the present case. The donor purchased all properties from her brother on account of his helpless conditions. When the gift was made, the parents of the parties were alive. The properties were ancestral. The donor was issueless. The appellant was minor. The respondent was not born. Date of birth of the respondent is 9th November, 1949.

A We would now revert to the gift deed. It clearly shows the intention of the donor that if after execution of the gift deed any male children are born, the properties should be enjoyed by the appellant with them as joint holder. With reference to property survey No. 306, the words "this property will be your and nobody else shall have right and title over it" cannot be B read in isolation. These words are immediately followed by the words that "in case any male children are born to your parents, you shall enjoy the described immovable property and house with those male children as joint holder". No exception is made in respect of property survey No. 306. When the donor stated that 'nobody else shall have right or title over it', she was only reiterating what was stated earlier that she had decided to gift C the immovable property and house to the appellant since at that time, the appellant was the only male child of the brother of the donor. There are no such qualifying words in the gift deed to show an intention of the donor to exclude the unborn male children from the title of property survey No.306 which she had retained for maintenance during her livelihood. The D document read as a whole clearly shows the intention of the donor that all the properties gifted shall remain in the family of her brother, being their ancestral properties and shall be enjoyed by the appellant and other male children as may be born, as joint holders. The words in the gift deed upon which reliance has been placed by the appellant cannot be seen in isolation. E The document read as a whole does not show that the donor intended to create an absolute right in favour of the appellant. The language and tenor of the document clearly shows that the intention of Mahadevi was to make all male children of her brother joint holders of the properties without exception of any property. The gift deed has been properly construed by F the courts below.

The answer to the second question hinges upon the interpretation of Sections 13 and 20 of the Act, which read as under :

> *"13. Transfer for benefit of unborn person*–Where, on a transfer G of property, an interest therein is created for the benefit of a person not in existence at the date of the transfer, subject to a prior interest created by the same transfer, the interest created for the benefit of such person shall not take effect, unless it extends to the whole of the remaining interest of the transferor in the H property.

20. When unborn person acquires vested interest on transfer for his benefit.— Where, on a transfer of property, an interest therein is created for the benefit of a person not then living, he acquires upon his birth, unless a contrary intention appears from the terms of the transfer, a vested interest, although he may not be entitled to the enjoyment thereof immediately on his birth." A B

The contention of learned counsel for the appellant is that since the donor did not create the interest of the entire property survey No. 306 for the benefit of unborn male child, namely, the respondent, the interest sought to be created under the gift deed is invalid. In support, learned counsel places reliance on the observations made in para 14 of the decision in *Raj Bajrang Bahadur Singh* v. *Thakurain Bakhtraj Kuer,* AIR (1953) SC 7 which reads as under : C

"Of course this by itself gives no comfort to the defendant; she has to establish, in order that she may be able to resist the plaintiff's claim, that the will created an independent interest in her favour following the death of Dhuj Singh. As we have said already, the testator did intend to create successive life estates in favour of the successive heirs of Dhuj Singh. This, it is contended by the appellant is not permissible in law and he relied on the case of *Tagore* v. *Tagore,* 18 W.R.359. It is quite true that no interest could be created in favour of an unborn person but when the gift is made to a class or series of persons, some of whom are in existence and some are not, it does not fail in its entirety, it is valid with regard to the persons, who are in existence at the time of the testator's death and is invalid as to the rest. The widow, who is the next heir of Dhuj Singh, was in existence when the testator died and the life interest created in her favour should certainly take effect. She thus acquired under the will an interest in the suit properties after the death of her husband, commensurate with the period of her own natural life and the plaintiff consequently has no present right to possession." D E F G

The brief facts of the relied decision are that a will was executed by one Raja Bisheshwar Bux Singh. The will, *inter alia, stated that after* the death of the testator his younger son and his heirs and successors, H

A generation after generation, may not feel any trouble and that there may not be any quarrel between them, therefore, it as being executed with respect to certain villages so that after the death of the testator, his younger son may enjoy the said properties. The younger son and his heirs, without power of transfer, shall exercise other rights in respect of the said B properties. When the will was executed, the defendant, being the wife of the younger son of Raja Bisheshwar Bux Singh was already there. On the construction of the will, it was held that the younger son had only a life interest in the properties under the terms of his father's will. Had it been an absolute interest, the property would have reverted to the elder son of the testator. Construing the will, it was held that the testator did intend C to create successive life interest in favour of the successive heirs of his younger son that was held to be not permissible in law. Under these circumstances, the Court observed that no interest could be created in favour of an unborn person. The decision relied upon has no applicability in the facts and circumstances of the instant case. The present is not a case D where any successive interest has been created under the gift deed.

There is no ban on the transfer of interest in favour of an unborn person. Section 20 permits an interest being created for the benefit of an unborn person who acquires interest upon his birth. No provision has been brought to our notice which stipulates that full interest in a property cannot E be created in favour of unborn person. Section 13 has no applicability to the facts and circumstances of the present case. In the present case, the donor gifted the property in favour of the appellant, then living, and also stipulated that if other male children are later born to her brother they shall be joint holders with the appellant. Such a stipulation is not hit by Section F 13 of the Act. Creation of such a right is permissible under Section 20 of the Act. The respondent, thus, became entitled to the property on his birth. In this view, there is also no substance in the second contention.

For the aforesaid reasons, the appeal is dismissed. The parties are left to bear their own costs.

G

N.J. Appeal dismissed.