Kanakarathanammal

Vs

V. S. Loganatha Mudaliar and Another

Civil Appeal No. 528 of 1961

(CJI Gajendragadkar, J.R. Mudholkar, K. Subh Rao, K. N. Wanchoo, N. Rajgopala Ayyangar JJ)

18.12.1963

JUDGMENT

GAJENDRAGADKAR J. –

This appeal arises from a suit filed by the appellant Kanakarathanammal in the Court of the IInd Additional District Judge, Bangalore (O.S. No. 39 of 1947-48) in which she claimed to recover possession of the properties described in the Schedules attached to the plaint. Schedules 1 and 2 consist of movable and immovable properties, while Schedule 3 refers to jewels and silverware. The appellant laid a claim to these properties as the sole heir of her mother Rajambal who died on the 13th September, 1946. Her case was that she was entitled to these properties exclusively under sub-clause (i) of Clause (1) of section 12 of the Mysore Hindu Law Women's Right Act, 1933 (No. X of 1933) (hereinafter called the Act). A gold belt which is an item of jewellery was described by her in Schedule 4 and the same was claimed by her on the ground that it had been presented to her by her father before he died on the 20th March, 1947.

The case set out in the plaint showed that according to the appellant, the properties in Schedules 1, 2 and 3 belonged exclusively to her mother and when she made a claim against the respondents in that behalf, they challenged her title. In that connection, the appellant relied on the fact that a sale-deed had been executed in favour of her mother on the 1st April, 1942 for a consideration of Rs. 28,000 by Mr. Gibs under which several pieces of land together with all buildings and erections standing thereon and movable property consisting of articles of furniture and other things set out in the Schedules attached to the sale-deed (Exhbt. F), were covered.

Respondent No. 1 Loganatha Mudaliar alleged that on the 17th February, 1947, the father of the appellant had executed a will under which he had been appointed an executor and that as such executor, he obtained a probate under the said will, got possession of the properties and handed them over to Respondent No. 2 Mudaliar Sangham, by its President, as directed under the will. Respondents 1 and 2 thus set up a title in respect of the suit properties in the appellant's father. Alternatively, they urged that even if the property belonged to the appellant's mother, she would not be entitled to claim exclusive title to it, because by succession the said property would devolve upon the appellant and her brothers; and the appellant's failure to join her brother made the suit incompetent for non-joinder of necessary parties. The third respondent, Vasudeva Setty & Sons, admitted that he was in possession of the gold belt described in Schedule 4, but urged that the appellant's father had given it to him for purpose of sale and that a sum of Rs. 109-7-9 was due to him. He pleaded that he had no objection to hand it over to the rightful claimant, provided the amount due to him was repaid to him.

On these pleadings, the trial Court framed six substantive issues, three of which were important. These three issues were : (1) whether the appellant's father or mother was the real owner of the property described in Schedules 1 and 2; (2) whether the will set up by respondents 1 & 2 was genuine and valid in law; and (3) whether the suit was not maintainable on the ground that necessary parties had not been joined by the appellant. The learned trial Judge held that the appellant's mother was the owner of the property described in Sch. I. Regarding the movable property, the trial Judge held with some variation that the items admitted by the respondents also belonged to the appellant. As regards the jewels, he found that they had never gone into the possession of respondents 1 and 2, and so, the appellant's claim in respect of the said jewels was rejected. As to the gold belt mentioned in Sch. 4, the decision of the trial Court was that the appellant should recover the same from respondent No. 3 on her paying to him Rs. 109-7-9 claimed by him. Having found the title of the appellant's mother proved, the trial Judge came to the conclusion that the will executed by the appellant's father was invalid. These findings, however, did not materially assist the appellant, because the learned Judge upheld the respondent's plea that the suit was bad for non-joinder of necessary parties. In the result, the appellant's suit was dismissed in regard to the main relief claimed by her.

Against this decision, the appellant preferred an appeal before the High Court of Mysore (R.A. No. 171 of 1951-52). The High Court has held that the main property described in Sch. I did not belong to the appellant's mother, but to her father. It found that the sale-deed in respect of the property was taken by the appellant's father in the name of the appellant's mother benami. Having held that the appellant had not established her title to the said property, the High Court did not think it necessary to consider the validity of the finding of the trial Judge that the suit was bad for non-joinder of necessary parties. It also did not think it necessary to consider whether the will had been proved or not. The appellant however, succeeded before the High Court in respect of one minor point and that was in relation to her claim for the gold belt. The High Court has ordered that Respondent No. 3 should return the said gold belt to the appellant and that the appellant was not bound to pay to Respondent No. 3 the amount claimed by him. The result was that with a very slight modification, the decree passed by the trial Court was confirmed, though on a different ground. It is against this decree that the appellant has come to this Court by special leave. It appears that respondents 1 & 2 had also preferred an appeal in the High Court against a part of the decree passed by the trial Judge, and the said appeal was dismissed. With that part of the case, we are not concerned in the present appeal.

The first point which has been urged before us by the appellant is that the High Court was in error in holding that the immovable property described in Sch. I had been purchased by the appellant's father benami in the name of his wife. Some facts material to this issue are not in dispute. It has been found by both the Courts below that the consideration which was paid for the sale transaction proceeded entirely from the appellant's father; so that in dealing with the question as to whether the title to the property vested in the appellant's mother or not, we have to proceed on the basis that the whole of the consideration was paid by the appellant's father and not by her mother. The case of the appellant, however, is that the subsequent conduct of the parties and particularly the correspondence produced by the appellant clearly showed that the appellant's father admitted the title of the appellant's mother, and it is urged that the High Court was in error in reversing the finding of the trial Court that the property really belonged to the appellant's mother. In order to deal with the merits of this argument, it is necessary to refer to the material correspondence on which the appellant relies. Exhibit B is a letter written by the appellant's father to her (appellant's) husband on the 1st August, 1944. In this letter, the appellant's father has used words which clearly show that he treated the property as belonging to his wife. He says "she (the appellant's mother) tells me that you

almost agreed to come and stay in the estate and for that purpose she has asked me not to let out both the houses occupied by Iyer", and then he adds, "she says that she will give Rs. 50 a month with the above free quarters". Then on the 21st June, 1945, a letter was addressed to the Sub-Division Officer, Bangalore Sub-Division, Bangalore, by the appellant's mother (Exbt. H). This letter is in relation to the properties with which we are concerned, and it has been addressed clearly and unambiguously on the basis that the title to the property vests in the appellant's mother. In the course of this letter, she says that about the 10th May, 1945, the authorities of the Hindustan Aircraft approached her through her husband for permission to put up and install a few electric lights against the runway to the length of about 700 or thereabouts, and that she gave them the permission on the strict understanding that the rest of her plantation should not be disturbed.

Similarly, on the 28th May, 1946, the appellant's father wrote to the Officer-in-charge Claims, Bangalore, acknowledging receipt of a cheque which had been issued by the said Officer in favour of the appellant's mother for Rs. 2511-3-0. On the 23rd May, 1946, the appellant's father wrote a letter to his wife, and some of the statements made in it clearly suggest that the appellant's father admitted his wife's title to the properties in question. "Mr. Loganatha Mudaliar," says the letter, "told me that you had said to write some Estate Will. We have talked about this already. You ought not to have told him without telling me again....Money also should be given along with estate. I will see to all as per convenience. If you be without sorrow, you may come out happily early." At this time, the appellant's mother was ill and was presumably thinking of making a will of her own properties. In that context, the letter sent by the appellant's father to his wife is very significant.

It is true that the actual management of the property was done by the appellant's father; but that would inevitably be so having regard to the fact that in ordinary Hindu families, the property belonging exclusively to a female member would also be normally managed by the Manager of the family; so that the fact that the appellant's mother did not take actual part in the management of the property would not materially affect the appellant's case that the property belonged to her mother. The rent was paid by the tenants and accepted by the appellant's father; but that, again, would be consistent with what ordinarily happens in such matters in an undivided Hindu family. If the property belongs to the wife and the husband manages the property on her behalf, it would be idle to contend that the management by the husband of the properties is inconsistent with the title of his wife to the said properties. What we have said about the management of the properties would be equally true about the actual possession of the properties, because even if the wife was the owner of the properties, possession may continue with the husband as a matter of convenience. We are satisfied that the High Court did not correctly appreciate the effect of the several admissions made by the appellant's father in respect of the title of his wife to the property in question. Therefore, we hold that the property had been purchased by the appellant's mother in her own name though the consideration which was paid by her for the said transaction had been received by her from her husband.

As soon as we reach this conclusion, it becomes necessary to consider whether the appellant's suit must fail for non-joinder of necessary parties. It is common ground that the appellant has brothers alive, and even in the trial Court respondents 1 and 2 took the alternative plea that if the property was found to belong to the appellant's mother, under the relevant Mysore law the appellant and her brother would been titled to succeed to that property and the non-joinder of the brothers was, therefore, fatal to the suit. In fact, as we have already indicated, the trial Court had dismissed the appellant's suit on this ground. The decision about the question as to the appellant's title to this property would thus depend upon the construction of the relevant provisions of the Act. Section 10 is relevant for the purpose. Section 10(1) defines 'Stridhan' as meaning property of every description

belonging to a Hindu female, other than property in which she has, by law or under the terms of an instrument, only a limited estate. Section 10(2) prescribes an inclusive definition of the word 'Stridhan' by clauses (a) to (g). The appellant contends that the property in question falls under s. 10(2)(b), whereas according to the respondents it falls under s. 10(2)(d). There is no doubt that if s. 10(2)(b) take in the property, the appellant would be exclusively entitled to it and the plea of non-joinder of her brothers would fail. On the other hand, if s. 10(2)(d) applies to the property, the appellant will not be exclusively entitled to the property and her brothers would be necessary parties to the suit. In that case the plea of non-joinder would succeed and the appellant's suit would be dismissed on that account. The position with regard to the heirs who succeed to stridhan property belonging to a Hindu female dying intestate has been provided for by s. 12 of the Act and there is no dispute on that account.

Let us, therefore, consider under which clause of s. 10(2) the property in question falls. Section 10(2)(b) refers to all gifts received by a female at any time (whether before, at or after her marriage) and from any person (whether her husband or other relative or a stranger). It is thus clear that all gifts received from the husband at any time would fall under s. 10(2)(b). The appellant's argument is the as soon as it is found that the consideration for the sale proceeded solely from the appellant's father it must follow that the property purchased with the said consideration is a gift by the husband to his wife. The fact that the property has been purchased in the name of the wife does not make any difference in substance. Two transactions have taken place, one a gift of the money by the husband to his wife, and the other purchase of the property with the said money in the name of the wife. Treating the two transactions as integrally connected, it should be held that the purchase itself was made by the husband in the name of his wife and that can hardly be distinguished from the gift of the said property to the wife.

On the other hand, the respondents contend that s. 10(2)(b) can take in only gifts and not properties purchased with the assistance of the gifts. If the appellant's father gave to his wife the amount with which the property was purchased, all that can be said is that the amount given by the husband to his wife was a gift under s. 10(2)(b). What the wife purported or chose to do with the amount gifted to her by her husband is entirely a different matter. She might have purchased the property, or she might have kept the amount in bank. If the amount had continued in the bank and its identity was not in dispute, it may have been impressed with the character of Stridhan as described in s. 10(2)(b). But if the amount was utilised by the wife for purchasing the property in her own name, the purchase is hers and the purchased property cannot be said to be gift from the husband to his wife. Section 10(2)(d) refers to property acquired by a female by purchase, agreement, compromise, finding or adverse possession. The respondents urged that one has merely to read clause 10(2)(d) to be satisfied that the purchase of the property in this case falls squarely under it.

We have carefully considered the arguments thus presented to us by the respective parties and we are satisfied that it would be straining the language of s. 10(2)(b) to hold that the property purchased in the name of the wife with the money gifted to her by her husband should be taken to amount to a property gifted under s. 10(2)(b). The argument about the substance of the transaction is of no assistance in the present case, because the requirement of s. 10(2)(b) is that the property which is the subject-matter of devolution must itself be a gift from the husband to the wife. Can we say that the property purchased under the sale-deed was such a gift from the husband to his wife ? The answer to this question must clearly be in the negative. With what funds the property is purchased by female is irrelevant for the purpose of s. 10(2)(d); so too the source of the title to the fund with which the said property was purchased. All that is relevant the enquire is : has the property been purchased by the female, or has it been gifted to her by her husband ? Now, it seems clear that in deciding under

which class of properties specified by clauses (b) and (d) of s. 10(2) the present property falls, it would not be possible to entertain the argument that we must treat the gift of the money and the purchase of the property as one transaction and hold on that basis that the property itself has been gifted by the husband to his wife. The obvious question to ask in this connection is, has the property been gifted by the husband to his wife, and quite clearly a gift of immovable property worth more than Rs. 100 can be made only by registered deed. The enquiry as to whether the property was purchased with the money given by the husband to the wife would in that sense be foreign to s. 10(2)(d); gift of money which would fall under s. 10(2)(b) if converted into another kind of property would not help to take the property under the same clause, because the converted property assumes a different character and falls under s. 10(2)(d). Take a case where the husband gifts a house to his wife, and later, the wife sells the house and purchases land with the proceeds realised from the said sale. It is, we think, difficult to accede to the argument that the land purchased with the sale-proceeds of the house should, like the house itself, be treated as a gift from the husband to the wife; but that is exactly what the appellant's argument will inevitably mean. The gift that is contemplated by s. 10(2)(b) must be a gift of the very property in specie made by the husband or other relations therein mentioned. Therefore, we are satisfied that the trial Court was right in coming to the conclusion that even if the property belonged to the appellant's mother, her failure to implead her brothers who would inherit the property along with her makes the suit incompetent. In is true that this question had not been considered by the High Court, but since it is a pure point of law depending upon the construction of s. 10 of the Act, we do not think it necessary to remand the case for that purpose to the High Court. Facts which are necessary to decide the question under s. 10(2) have been found and there is no dispute about them. The only point to decide is, on a fair construction of s. 10(2)(b) and (d) which of the said two clauses takes in the property in question.

This appeal was argued before us on the 22nd August, 1963. At the said hearing, we had suggested to the parties to consider whether they could amicably settle the dispute between themselves. Accordingly, we allowed the matter to stand over to enable the parties to negotiate the settlement, if possible. Ultimately, on the 13th September, 1963, the Appellant's counsel reported to the office that no settlement was possible. However, in the meanwhile, on the 6th September, 1963, the appellant's counsel filed an application for leave to add the appellant's two brothers T. Narayanaswamy and T. Vasudevan as co-plaintiffs to the plaint, or if they are not willing to join as co-plaintiffs, then as defendants 4 and 5. This application is opposed by respondents 1 and 2. That is how this appeal was placed before the same Bench once again on the 13th December, 1963.

We do not think there is any justification for allowing the appellant to amend her plaint by adding her brothers at this late stage. We have already noticed that the plea of non-joinder had been expressly taken by respondents 1 and 2 in the trial Court and a clear and specific issue had been framed in respect of this contention. While the suit was being tried, the appellant might have applied to the trial Court to add her brothers, but no such application was made. Even after the suit was dismissed by the trial Court on this ground, it does not appear that the appellant moved the High Court and prayed that she should be allowed to join her brothers even at the appellate stage, and so, the High Court had no occasion to consider the said point. The fact that the High Court came to the contrary conclusion on the question of title does not matter, because if the appellant wanted to cure the infirmity in her plaint, she should have presented an application in that behalf at the hearing of the appeal itself. In fact, no such application was made even to this Court until the appeal was allowed to stand over after it was heard. Under the circumstances, we do not think it would be possible for us to entertain the said application. In the result, the application for amendment is rejected.

It is unfortunate that the appellant's claim has to be rejected on the ground that she failed to implead her two brothers to her suit, though on the merits we have found that the property claimed by her in her present suit belonged to her mother and she is one of the three heirs on whom the said property devolves by succession under s. 12 of the Act. That, in fact, is the conclusion which the trial Court had reached and yet no action was taken by the appellant to bring the necessary parties on the record. It is true that under O. 1 r. 9 of the Code of Civil Procedure no suit shall be defeated by reason of the misjoinder or non-joinder of parties; but there can be no doubt that if the parties who are not joined are not only proper but also necessary parties to it, the infirmity in the suit is bound to be fatal. Even in such cases, the Court can under O. 1 r. 10, sub-rule 2 direct the necessary parties to be joined, but all this can and should be done at the stage of trial and that too without prejudice to the said parties' plea of limitation. Once it is held that the appellant's two brothers are co-heirs with her in respect of the properties left intestate by their mother, the appellant suit filed by the appellant partakes of the character of a suit for partition, and in such a suit clearly the appellant alone would not be entitled to claim any relief against the respondents. The estate can be represented only when all the three heirs are before the Court. If the appellant persisted in proceeding with the suit on the basis that she was exclusively entitled to the suit property, she took the risk and it is now too late to allow her to rectify the mistake. In Naba Kumar Hazra & Anr. v. Radheshyam Mahish & Ors. (A.I.R. 1931 P.C. 229) the Privy Council had to deal with a similar situation. In the suit from which that appeal arose, the plaintiff had failed to implead co-mortgagors and persisted in not joining them despite the pleas taken by the defendants that the co-mortgagors were necessary parties in the end, it was urged on his behalf that the said co-mortgagors should be allowed to be impleaded before the Privy Council. In support of this plea, reliance was placed on the provisions of O. 1 r. 9 of the Code. In rejecting the said prayer, Sir George Lowndes, who spoke for the Board observed that "they are unable to hold that the said Rule has any application to an appeal before the Board in a case where the defect has been brought to the notice of the party concerned from the very outset of the proceedings and he has had ample opportunity of remedying it in India."

In the result, the appeal fails and is dismissed. The appellant has been granted special leave to file this appeal as a pauper. In the circumstances of this case, however, we direct that she need not pay the Court-fees which she would have had to pay if she had not been allowed to appeal as a pauper. There would be no order as to costs throughout.

MUDHOLKAR J. –

I regret my inability to agree with the conclusion of my learned brother Gajendragadkar J. on the second point and consequently with the ultimate decision of the appeal as proposed by him. My reasons for taking a different view are these :

The sale deed on which the appellant relies admittedly stands in the name of her mother. It is no longer in dispute that the consideration for transaction proceeded not from her mother but from her father. It was because of this latter circumstance that the respondents contended that the transaction was benami. After examining the entire evidence adduced by the parties, the trial court negatived the respondent's contention. Though the High Court took a different view, my learned brother has held and in my opinion rightly, that the conclusion of the High Court was wrong and that of the trial court was correct on this point. The position, therefore, is that the property in question was that of the appellants mother at her death. The respondents, however, contended that even so the suit must fail because the appellant had failed to join her brothers as parties to the suit because they were co-heirs of their mother along with her. That would be the correct position under s. 12 of the Mysore Hindu Women's Rights Act provided the property is deemed to have been purchased by the mother

herself. The short question, therefore, is whether upon the findings that the property was not purchased by the appellant's father benami in the name of her mother and that the consideration for the transaction entirely flowed from the father, the inference must be that the property was purchased by the mother. No doubt, the sale deed stands in her name. But the fact remains that the consideration did not flow from her but from the appellant's father. It is interesting to mention that on February 9, 1948 the respondent's counsel made an application under O. VI, rr. 5 and 11, Code of Civil Procedure calling upon the appellant to furnish further particulars with regard to her claim to the property in question in view of s. 12 of the Mysore Hindu Women's Right Act. She furnished the following particulars on February 17, 1948 :

> "The property detailed in Schedules I and II was all conveyed to Rajambal under one sale deed as stated in paragraph 5 of the plaint. She stood by her husband in his adversity sacrificing her possessions for him which she got as presents from her own parents. He was deeply attached to her, and indeed they were a loving couple. Out of love, affection and gratitude and with a view to make her self-sufficient, he provided the money to acquire the property for her own absolute use, which she while alive had even decided and announced to give away to the plaintiff ultimately."

The appellant's case, therefore, clearly is that the purchase money was provided by her father for acquiring property for the absolute use of her mother. By negativing the finding of benami made by the High Court we are in effect holding that the property was acquired by the appellant's father with his own money for her mother. In this state of affairs it is difficult to see how the transaction could be split up into two parts, i.e., a gift of the money by the father to the mother in the first instance and the purchase by the mother of that property subsequently with that money. In my judgment, upon the pleadings there is no scope for splitting up the transaction into two parts like this. It is not even an alternative contention of the respondents that the transaction was in two parts and that what the father gifted was the money and not the property. It would be indeed an artificial way of looking at the transaction as was done by the trial court as being constituted of two parts. The transaction in my judgment is one indivisible whole, and that is, the father provided the money for acquiring the property in the mother's name. Therefore, in effect it was the father who purchased the property with the intention of conferring the beneficial interest solely upon the mother. Such a transaction must therefore amount to a gift. In that view the property would not fall under cl. (d) of s. 10 of the Act but under cl. (b) of that section. Therefore, the appellant would be the sole heir of her mother and non-joinder of her brothers would not defeat the suit so far as she is concerned. In the result I would set aside the decree of the courts below in so far as the property in question, Beverley Estates, is concerned and decree the appellant's suit with respect to it in addition to the property with respect to which she has already obtained a decree in the court below. I would further direct that the respondents will pay to the appellant proportionate costs in all the courts.

ORDER BY COURT

In accordance with the opinion of the majority the appeal is dismissed. No order as to costs. Appellant need not pay court fees.

</html