

R. Viswanathan

Vs

R. Narayanaswamy Substituted by V. R. Ranganathan and Others

Civil Appeal No. 1202 of 1966

(C.A. Vaidialingam, K.K. Mathew JJ)

23.11. 1971

JUDGMENT

VAIDIALINGAM, J -

1. This appeal, by special leave, is directed against that part of the judgment and order dated February 3, 1965 of the High Court of Mysore, dismissing I.A. 20 in R. A. 109 of 1947-48, filed by the appellant praying for an order nullifying all the proceedings in R.A. 109 of 1947-48 and directing the retransfer of O.S. 61-A of 1947 to the City court with a further direction to the said court to draw up a decree in the suit.

2. Thee circumstances leading up to the filing of the above application before the Mysore High Court may be stated :

3. One V. Ramalinga Mudaliar, owned vast properties and interest in business in the territories of the old Princely State of Mysore, civil and Military Station in Bangalore and in the Madras Presidency. He died in Bangalore on December 18, 1942, leaving behind, his window, three sons and nine daughters. He had executed a will dated September 10, 1942. Under the will the testator bequeathed only small portions of his properties had dedicated to charities, enumerated in the will. Under the will, three executors were appointed. One of the executors died in November 1961 and another renounced his executorship in or about June 1951. Therefore, the only executor who was opposing the application before the High Court was the respondent.

4. When the executors under the will began to take steps to give effect to the directions contained therein, the members of the testator's family began to resist their claim. This led to various proceedings in different courts by the contesting parties. The executors applied on January 17, 1943 to the District Judge, Civil and Military Station, Bangalore (hereinafter to be referred as the Cantonment Court) for grant of Probate of the will. Citations were issued to the members, and the members of the testator's family, including the appellant before us, who is one of the sons of the deceased, entered caveat on February 4, 1943. The challenge made by the members of the family to the will was that the testator was not in a sound disposing state of mind at the time when he is alleged to have executed the will and that, in any event, the deceased had no powder to dispose of the properties by will, as they were joint family properties.

5. In June 1943, the members of the testator's family filed two suits-one in the Cantonment Court, as O.S. 60 of 1944 and another before the District Court Bangalore (hereinafter to as the City Court) as O.S. 56 of 1942-43. Another suit was filed by them on the Original Side of the Madras High Court in or about October, 1944, which suit in the Madras High Court was necessitated because of the fact

that certain items of immovable properties, which had been dealt with under the will, were situated within the original jurisdiction of that High Court.

6. It is not necessary for us to pursue probate proceedings in the Cantonment Court, which were converted into a testamentary suit, except to state that the said Court upheld the truth, genuineness and validity of the will and ordered the issue of Probate to the Executors. This decision was challenged before the British Resident in Mysore by the aggrieved parties in R.A. 1 and 2 of 1944, which were dismissed on July 5, 1944. Though leave to appeal to the Judicial Committee had been granted, the appeal ultimately became infructuous in view of the passing of the Indian Independence Act, 1947.

7. Similarly, the Executors had applied for Probate in 1944 in the City Court, within whose jurisdiction were situated considerable items of properties, dealt with under the will. That proceedings was also contested by the members of the testator's family and in August, 1946, the City Court granted Letters, as prayed for, to the Executors, subject to the result of the appeal pending before the Judicial Committee, against the decision of Cantonment. Both the Executors, as well as the members of the family, filed appeals before the erstwhile High Court, of Mysore challenging the decision of the City Court, in so far as it was against them. As by then, the appeal against the decision of the Cantonment Court, had become infructuous before the Judicial Committee, the appellant, Executors, did not press their appeal against the decision of the City court. The appeal filed by the members of the family, however, was dismissed by the High Court on merits.

8. To resume the narration regarding the proceedings in Original suits 56 and 60 of 1944, referred to earlier, as the Cantonment was retroceded to the Maharaja of Mysore on July 26, 1947, the erstwhile High Court of Mysore, in consequence, acquired jurisdiction over the Cantonment area also. Hence O.S. 56 of 1942-43, which was pending in the City Court, was transferred to the file of the Cantonment Court, to be tried and disposed of along with O.S. 60 of 1944, which was already pending in that Court. After transfer, O.S. 56 of 1942-43 was renumbered as O.S. 61-A of 1947.

Both the suits were tried together and disposed of by a common judgment by the District Judge on December 5, 1947. The Court held that the properties comprised in both the suits were joint family properties of the deceased V. Ramalinga Mudaliar and his sons, and hence the will was not operative in respect of those properties. The suits were decreed and the Executors were directed to deliver possession of properties to the plaintiffs therein. A preliminary decrees for taking an account of the management by the Executors was also passed.

10. The Executors filed two appeals before the High Court of erstwhile Mysore State. R.A. 104 of 1947-48 was against O. S. 60 of 1944, the suit before the Cantonment Court and R.A. 109 of 1947-48 was against the decree, in the transferred City court Suit 61-A of 1947. The Division Bench, which heard the appeals in April, 1948 differed in their opinion and consequence the appeals in April, 1948 differed in their opinion and in consequence the appeal were referred for decision by a Full Bench. The Full Bench of the High Court heard appeals and by its judgment dated July 27, 1949 reversed the decrees in both the suits passed by the District Judge and held that all the properties disposed of under the will were the self-acquired properties of the testator, which he was competent to dispose of by will. It is the decree passed in pursuance of the judgment of the Full Bench in R. A. 109 of 1947-48 against O.S. 61-A of 1947, that is now asked by the appellant to be declared a nullity.

11. We have already referred to the civil suit 214 of 1944 by the members of the family in the Madras High Court contesting the will. The Executors also applied to the same Court in January, 1944 for grant of Probate which again was contested by the plaintiffs in the above suit. Ultimately, the Probate was granted in August, 1944. The application filed by the plaintiffs for revocation of the Probate filed in 1959 was heard along with Civil Suit 214 of 1944. Before the Madras High Court, the Executors filed copy of the judgment of the Full Bench of the Mysore High court in support of their contention regarding the validity of the will. On the other hand, the plaintiffs in Civil Suit 214 of 1944 contested the claim of the Executors on the ground that the Mysore High Court's judgment was a foreign judgment and it could not be acted upon in view of the fact that the said judgment of the Mysore High Court had become Coram Non Judice. The learned Judge, exercising original jurisdiction in the Madras High Court, while holding that the properties covered by the will, were all joint family properties of the testator and his sons, revoked the Probate already granted, accepting the contention of the plaintiffs that the Full Bench decision of the Mysore High court was Coram Non Judice. However, on appeal, the Division Bench disagreed with the views of the trial Judge regarding the effect of the Mysore High Court's Full Bench judgment. On the other hand, the appellate Court held that the judgment of the Mysore High Court was binding on the parties with regard to the immovable properties situated within in jurisdiction of the Mysore High Court, as well as, in respect of movable properties which were the subject of adjudication by the Madras High Court. But the learned Judges held that the Mysore High Court's judgment was not binding, so far as the immovable properties within the jurisdiction of the Madras High Court were concerned. The Division Bench further held that with regard to the said immovable properties within its jurisdiction, the will was inoperative as the properties were joint family properties of the testator and his sons. In consequence, the Division Bench modified the decision of the trial Judge and limited the revocation of Probate only regarding the immovable properties situated within the jurisdiction of the Madras High Court.

12. The present appellant and others challenged the decision of the Madras High Court before this Court, in Civil Appeal 277 of 1958. The executors had also filed civil Appeal 278 of 1958. Both these appeals were dealt with together. There were also certain other appeals with which we are not concerned. This Court on May 4, 1962 in its decision reported in *R. Viswanathan v. Rukn-ul-Mulk Syed Abdul Wajid* ((1963) 3 SCR 22 : AIR 1963 SC 1), agreed with the Division Bench of the Madras High Court on all its findings and dismissed both the appeals. The Court rejecting the contention of the present appellant held that it was not established that the judgment of the Mysore High Court's Full Bench was Coram Non Judice. It was further held that the Full Bench decision of the Mysore High court will have effect in respect of the immovable properties situated within the territory of Mysore and the movable properties situated outside that territory and that the decision of the Madras High Court will have effect in respect of the immovable properties situated within its jurisdiction. It has been further observed "The judgment of the Mysore High Court qua the immovable in Mysore has become final and it is not and cannot be challenged in this court". It is after a consideration of the contention regarding the effect of the Mysore High court's judgment regarding the immovable situated outside its territories that this Court agreed with the decision of the Madras High Court. In the decision of this Court there is a reference to the various litigations between the parties, as well as the circumstances under which the appellant before us, though he was the eldest son of the testator, was disinherited under the will.

13. From the above narration of facts it will be seen that regarding the immovable properties situated within the State of Mysore and movable properties outside the said State, the full Bench decision of the Mysore High Court holding that the properties are self-acquired properties and that the will has effect, holds the field. On the other hand in respect of the immovable properties dealt

with under the will and situated within the jurisdiction of the Madras High Court, in view of the decision of this court approving that of the Madras High Court, the position is that the will is not operative.

14. An attempt was made by the members of the family to have the Full Bench decision of the Mysore High Court reviewed but with no success. Again a Writ Petition 287 of 1958 filed before the Mysore High court to quash the full Bench judgment of the erstwhile High court of Mysore, did not also meet with any success. Leave to appeal to this Court against the dismissal of the Writ Petition 287 of 1958 though asked for was refused by the High court and an application filed to review the said order of refusal was also dismissed on November 13, 1959.

15. In the view of the different judgments, holding in different ways, about the properties covered by the will, one can appreciate the frantic efforts made by the members of the testator's family, particularly the appellant, to reopen the judgment of the full Bench of the erstwhile Mysore High Court. In addition to the unsuccessful attempt by way of review and also by writ petition, made to reopen the Full Bench judgment of the Mysore High Court, the filing of the present application I.A. 20 to declare the judgment of the Mysore court in R.A. 109 of 1947-48, a nullity, must be considered as one further attempt to reopen the judgment of the Mysore High Court, if possible. He also prayed for retransfer of O.S. 61-A of 1947 to the City Court, with a further direction to the said court to draw up a decree.

16. The two grounds, on which the appellant prayed for the above relief were : (i) No decree had been drawn up by the Cantonment court in the Original Suit 61-A of 1947 and the appeal R. A. 109 of 1947-48 having been filed without any decree copy, the decision of the High court is void and is a nullity, (2) the Executors who filed the said appeal, did not have any representative capacity either at the time when the appeal was filed or at the time of its disposal and therefore, the decree in appeal having been passed in respect of an estate wholly unrepresented before the High court, is a nullity.

17. From the averments contained in the affidavit filed by the appellant on October 5, 1963 before the High Court in support of the said application, it is seen that he was under the impression all along that a decree had been drawn up in the city court in O.S. 61-A of 1947 and that the Executors had filed a proper appeal R.A. 109 of 1947-48, in the Mysore High Court. He has further stated that he was only recently disillusioned, when he came to know that a decree had not at all been drawn up in the said suit and that the Executors carried the matter in appeal to the High Court and the latter reversed a non-existing decree. The non-drawing up and non-existence of the a decree, according to the appellant, was discovered by him by accident when he made an application for grant of a certified copy of the same on October 20, 1962.

18. The Executor who contested the application, by reference to various proceedings, pleaded that a decree had been drawn up by the trial court in O.S. 61-A of 1947 and that the appeal before the High court was also properly filed accompanied by a certified copy of the decree of the trial Court.

19. The High court, in its judgment under attack has rejected both these contentions and dismissed I.A. 20. The High Court considered the first contention under two head : (i) the legal effect of non-filing a copy of the decree and (ii) whether as a fact a certified copy of the decree had been filed in the appeal. Regarding the legal aspect the High court held that even if no decree copy had been filed along with the appeal, the appellate Court cannot be considered to have acted without jurisdiction when it dealt with R.A. 109 of 1947-48. On the question of fact, the High Court, after a

consideration of the various materials on record, came to the conclusion that a decree had been drawn up by the trial court in the concerned suit and that a certified copy of the same had also been filed by the executors before the High Court in their appeal R.A. 109 of 1947-48. Regarding the second contention relating to lack of representative capacity of the executors when they filed the appeal, the High court came to the conclusion that the estate was properly represented by the executors in the appeal and therefore the decree of the High court in R.A. 109 of 1947-48 is valid and binding on the estate.

20. The same two contentions that were raised before the High Court have been urged before us by Mr. B. Vedantha Iyengar, learned Counsel for the appellant.

21. Mr. Somnatha Iyer, learned Counsel for the respondent has referred us to various circumstances to show that the appellant had at no stage raised the contention that the appeal R.A. 109 of 1947-48 has been filed without a certified copy of the decree in O.S. 61-A of 1947. The counsel also urged that the members of the testator's family including the appellant who were all parties, to the various proceedings never challenged the Full Bench judgment of the Mysore High Court that it is a nullity, on the ground that is now taken in I.A. 20. On the other hand, they have proceeded on the basis that the appeal by the High Court. The binding nature of that judgment was contested before the Madras High court only on the ground that it has become Coram Non Judice. Even the second contention that the executor who filed the appeal did not have a representative capacity was not raised by the appellant who was a party to the appeal; nor by any member of the family. That contention is one relating to the merits and it should have been raised at the time when the appeal was being disposed of by the Mysore High Court. None of these contentions, the counsel pointed out, was raised even before this Court in C.A. 277 of 1958.

22. We are of the opinion that this appeal is totally devoid of merits. According to the appellant he had applied on October 20, 1962 to the cantonment court for a certified copy of the decree in O.S. 61-A of 1947. The officer-in-charge had made a note that no decree is found to have been drawn up in the said suit. The actual note was as follows :

Since a common judgment was passed in O.S. 60 of 1947 and O.S. 61-A-47 a decree is found in O.S. 60/47 only and no decree is found to have been drawn up in O.S. 61-A/47."

The District Judge also on the basis of this office note passed the following order rejecting the copy application filed by the appellant.

"Common judgment was passed in O.S. 60/47 and O.S. 61-A/47. No separate decree is drawn up in O.S. 61-A/47. Hence application rejected."

23. It is really on the basis of the above office note and the order of the District Judge, referred to above, that the appellant filed I.A. 20 seeking the reliefs mentioned earlier. The High Court has declined to give much importance to this office note as well as the order of the District Judge on the ground that the District Judge, who made the endorsement was not the Presiding Officer in the Cantonment Court in 1947 and that the Ministerial Officer, who had put up the note did not have personal knowledge about what happened in 1947. This reasoning of the High court is very strenuously attacked by Mr. Iyengar.

24. It is pertinent to note that at no stage prior to the filing of this I.A. 20, the appellant had pleaded that the Full Bench judgment of the Mysore High court is a nullity in view of the fact that no decree

copy in O.S. 61-A of 1947 was filed along with the memorandum of appeal. There are several circumstances to show that this plea of the appellant is an after thought and has absolutely no foundation whatever on facts.

25. We will now briefly refer to the various circumstances which will clearly show that not only was a decree drawn up in O. s. 61-A of 1947 and that a certified copy of the decree was also filed along with the appeal R.A. 109 of 1947-48. We have already pointed out that the appellant never raised this plea in any of the proceedings, on the former occasions. His only attack against the judgment of the Full Bench of the Mysore High court was that it has become coram non judice.

26. In paragraph 14 of the memorandum of appeal in R.A. 109 of 1947-48, it was stated as follow :

"Since a copy of the judgment, which is a common judgment for O.S. 60 of 1944 on the file of the District Judge, Civil Station, Bangalore, and O.S. 56 of 1942-43 on the file of the District Judge, Bangalore and numbered as O.S. 61(A) of 1947, has been filed in this Hon'ble Court in R.A. 104 of 1947-48, only a decree copy separately drawn up for O.S. 61(A) of 1947 is filed herewith."

27. Ground 14-A was as follow :

"The Decree is not in accordance with the Judgment."

28. The records in the above appeal, as well as the connected appeal 104 of 1947-48 were inspected by the learned Judges of the High Court and they were satisfied that the above statements are contained in the memorandum of grounds accompanying the appeal. Paragraph 14 of the memorandum of appeal in R.A. 109 of 1947-48 clearly shows that though there was a common judgment in both the suits by the trial Court, a separate copy of the decree drawn up in O.S. 61-A of 1947 has been filed. That shows that as a fact, the certified copy of the decree in the said suit had been filed along with the appeal. It would not have been possible for the appellant therein to file a certified copy of the decree, unless the decree had been drawn up by the trial Court. The appellant who was a party in the said appeal, and on whom a copy of the memorandum of appeal must have been served, should have known about this recital therein. Notwithstanding that, he never raised any objection before the Full Bench of the Mysore High Court, which heard the appeal, that no degree copy has been filed. The further statement in ground 14-A, referred to above could not have been taken unless a decree copy had been made available to the appellant therein and filed along with the appeal. The specific plea is that the decree as drawn up by the trial Court in O.S. 61-A of 1947 is not in accordance with the judgment in the said suit.

29. The High Court office did not return the appeal, which would have been the case, if a decree copy had not been filed. There is an endorsement, as noted by the High Court, in the memorandum of appeal made by the Receiving Clerk of the Mysore High Court that a court-fee of Re. 1 has been paid on the "copy". The word "copy", it is not controverted, refers to the decree copy on which a court fee of Re. 1 had to be affixed. There is also an additional circumstance that in the Schedule of the cost attached to the degree in R.A. 109 of 1947-48, the sum of Re. 1 paid on the decree copy has been made payable to the appellant therein, and it has also been included along with other items.

30. There is also another circumstance to be noted. In the judgment of Ramaswami, J. of the Madras High Court, when exercising original jurisdiction in respect of the application for Probate and the suit filed by the members of the family, there is a reference to the Full Bench judgment of the

Mysore High Court. It has been noted that though a common judgment has been delivered by the trial Court in the two suits, separate decrees have been drafted therein. This observation clearly shows that even at that time it has been noted by the Madras High Court that a separate decree has been drawn up in O.S. 61-A of 1947.

31. All the above circumstances clearly show that a decree had been drafted in O.S. 61-A of 1947 and a certified copy of the same was filed by the Executors in R.A. 109 of 1947-48. Mere endorsement of the Ministerial Officer and the order of the District Judge relied on by the appellant, do not, as rightly pointed out by the High Court, afford any assistance to the appellant excepting to create some confusion regarding the facts. We are in agreement with the finding of the learned Judges that appeal filed by the Executors, namely, R.A. 109 of 1947-48 was accompanied by a certified copy of the decree in O.S. 61-A of 1947 and therefore, the decree of the High Court cannot be treated as a nullity.

32. The effect to non-filing of a certified copy of the decree as well as the procedure to be adopted in respect of such appeals, have been considered by this Court in Jagat Dhish Bhargava v. Jawahar Lal Bhargava ((1961) 2 SCR 918 : AIR 1961 SC 832 : (1963) 2 SCJ 11). Phoolchand v. Gopal Lal ((1967) 3 SCR 153 : AIR 1967 SC 1470 : (1968) 2 SCJ 155), and Shakuntala Devi Jain v. Kuntal Kumari ((1969) 1 SCR 1006 : AIR 1969 SC 575 : (1969) 1 SCJ 912). As we have agreed with the finding of fact recorded by the High Court regarding the certified copy of the decree of the trial Court, having been filed, along with the appeal R.A. 109 of 1947-48, it is not necessary for us to deal in any great detail with the propositions laid down in the above decisions.

33. Regarding the second contention that there was no proper representation of the estate when the appeal 109 of 1947-48 was filed, in our opinion, this contention should not have been allowed to be raised by the appellant. This contention, even if accepted, is not one going to the root of the jurisdiction of the High Court to entertain the appeal so as to make the decree in appeal a nullity as claimed by the appellant. On the other hand, this is really a matter relating to merits which should have been raised during the hearing of the appeal. If the appeal was not maintainable, on any ground available in law, the appellant who was a party to the said appeal before the Mysore High Court, should have raised it at the proper stage and invited a decision on the same. The said question requires investigation into various facts. No doubt, the High Court in the present judgment has dealt with that contention and rejected the same holding that the estate was properly represented. As we are of the view that such a question should not have been allowed to be raised, it is not necessary for us to pursue this aspect further.

34. In the result, the appeal fails and is dismissed. However, there will be no order as to costs.

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