Gogula Gurumurthy and Others

Vs

Kurimeti Ayyappa

Civil Appeal No. 1817 of 1967

(K. K. Mathew, A. Alagiriswami JJ)

14.03.1974

JUDGMENT

ALAGIRISWAMI, J. -

1. Venkanna, the father of the appellants, had a brother Ramamurti who died childless in the year 1908 leaving behind him his widow Narasimham. After Ramamurti's death a series of litigations started between Venkanna and Narasimham and it is not over yet. Venkanna filed O.S. No. 14 of 1913 against the widow in respect of acts of waste committed by her of Ramamurti's estate and was appointed a receiver in that suit. In that suit he got a decree against Narasimham for Rs. 13,539 as she failed to furnish security as originally decreed by the Court. Venkanna as receiver filed three suits on the foot of three mortgages in favour of Ramamurti. One was O.S. No. 24 of 1916. In execution of that decree item No. 1 of the 'A' Schedule properties was purchased in court auction. O.S. No. 443 of 1918 was filed on the foot of another mortgage in favour of Ramamurti executed in 1904 and items Nos. 2 and 5 of the plaint schedule properties were purchased in execution of decree in that suit. These three items of properties are the subject-matter of this appeal. It is unnecessary for the purpose of this appeal to refer to the third suit.

2. Venkanna died in 1947 and Narasimham in 1951 after executing a will bequeathing in favour of her brother Venkata Sattayya all her properties. Venkata Sattayya filed the suit, out of which this appeal arises, for possession of the properties bequeathed to him under the will and for mesne profits. The Subordinate Judge who tried the suit held that items Now. 1, 2 and 5 became accretions to the main estate of Ramamurti and those properties till the death of Venkanna. The appeal against the Subordinate Judge's judgment came up for hearing before Justice Satyanarayana Raju and Justice Venkatesam of the Andhra Pradesh High Court. The learned Judges called for a finding with regard to the interest on the two mortgages in execution of the decrees in which items Nos. 1, 2 and 5 had been purchased, relating to the period before Ramamurti's death and the period after Ramamurti's death. After that dinging was received they allowed the appeal in part and held that the plaintiff would be entitled to a 19/34th share of item No. 1, and 12/23rd share of item Nos. 2 and 5. This appeal is filed in pursuance of a certificate granted by the High Court.

3. Mr. Ramasesheya Chaudhri appearing on behalf of the appellants raised four points which we shall deal with seriatim.

4. (I) The learned Judges of the High Court committed an error in confining the appeal after receipt of the finding from the Subordinate Judge's court only to the question of the share, which the appellants and the respondent were entitled to, based on the calculation of the interest due on the mortgages before and after the death of Ramamurti. His contention was that as the High Court had

merely framed issues and referred them for trial to the court of first instance under Order XLI Rule 25 of the Code of Civil Procedure and not remanded the whole case under Order XLI Rule 23, they should have heard the whole appeal was called for. We think that he is right in this contention. Before the High Court the learned Advocate for the appellants had contended that Narasimham owed to the estate of Ramamurti a sum of Rs. 14,639 and that when the decree was sought to be executed by Venkanna, Narasimham claimed that the amount due to her by way of interest under the three mortgage bonds should be set off and that the execution could proceed only for the balance, that the set-off claimed by Narasimham proceed was actually allowed and that therefore she would not be entitled to any share in the properties purchased in execution of the decree obtained on the foot of the mortgage bonds, in lieu of the interest claimed. The learned Judges disallowed him from raising that question on the ground that it was not raised or argued at the time when the finding was called for on the issues framed by them, and that if it had been raised and accepted there would have been no need to call for a finding or at any rate the finding called for would have been different, and that the argument of the learned Counsel impugned the correctness of the conclusions reached by the Court on the basis of which the findings were called for.

5. We consider that when a finding is called for on the basis of certain issues framed by the appellate Court the appeal is not disposed of either in whole or in part. Therefore, the parties cannot be barred from arguing the whole appeal after the findings are received from the court of first instance. We find the same view taken in Gopi Nath Shukul v. Sat Narain Shukul (AIR 1923 All 384 : 74 IC 1014) where it was held that :

Where an appellate Court at the first hearing does not decide the case but merely remits certain specific issues, it is open to the Court before which the case ultimately comes to disregard the findings on those issues and equally to form its own opinion on the whole case irrespective of anything that is said in the remand order.

It was also held that :

An order remanding issues under Rule 25 is not a final order. No appeal lies against it. The responsibility for the decree ultimately passed is entirely that of the Court before which the case comes after remand.

It is quite otherwise with an order of remand passed under Order 41, Rule 23 for this is an order which does finally determine, subject to any right of appeal, the issues which it decides.

A similar view was taken by the Nagpur High Court in Sultan Beg v. Chunilal. (AIR 1918 Nag 193 : 46 IC 922) In Upendra Lal Gupta v. Jogesh Chandra Roy ((1927-28) 32 CWN 1233 : AIR 1928 Cal 186) it was said :

An order of remand made under Order 41, Rule 25 decides nothing. The Court, neither the same or as differently constituted, has jurisdiction, while finally hearing the appeal, to go back on the reasons given or views expressed in the order of remand and must do so when those appear erroneous.

We are, therefore, of opinion that the High Court should have gone into this question and decided the mater, for if it turns out that the interest due on the two mortgages subsequent to the death of Ramamurti had been set off against the amount due to Venkanna in the decree obtained by him against Narasimham in O.S. No. 14 of 1913 there can be no question of Narasimham being entitled

to any share in the properties purchased in court auction in execution of the decree in the two mortgages and her brother getting those properties by virtue of the will executed by her in his favour.

6. In the trial Court the plaintiff's contention was that these properties were purchased out of the accumulated interest on the mortgages and the defendants asserted that they were purchased out of the principal. That Court dismissed the plaintiff's claim on the ground that there was no proof of his allegations. It was before the High Court apparently that the attempt to split the interest due on the mortgages into two portions, one before Ramamurti's death and the other after, was made and accepted by the High Court. It was on that basis that the High Court called for findings. After the findings were received the appellants raised the question about the set-off. They raised the question before the trial Court when it was considering the apportionment of the interest but that Court felt it had no power to go into that question in view of the terms of the High Court's order calling for the finding. And the High Court refused to allow the appellants to raise that question, which as we have just held was not correct.

7. The decree in Venkanna's suit appears to have directed payment of interest to Narasimham [Para iii(c) of the plaint and judgment of the High Court, page 102 of the paper book]. We find that Venkanna had submitted accounts to the court in his capacity as receiver till 1940. We have also evidence in this case that even when Venkanna died a sum of Rs. 4,486 was due to him on the foot of the decree he obtained against Narasimham. It is, therefore, highly unlikely that any amount due to Narasimham was not given credit to. We find from the finding submitted by the trial Court (Page 86 of the paper book) that when the decree in O.S. No. 14 of 1913 was sought to be executed Narasimham claimed that the amounts due to her should be set off and execution should proceed only for the balance and from Ex. A-7 it would appear that the claim was allowed. It seems therefore unlikely, taking the direction in the decree and the order evidenced by Ex. A-7 into account, that the interest due to Narasimham was not one of the items set off. We do not want to express any final opinion on the point but are of opinion that in the circumstances the High Court should consider the aspect of the matter and dispose of the appeal afresh.

8. (II) Out of about 16 acres comprised in item No. 1, 5 acres had been lost in revenue sale because of Narasimham's failure to pay the land revenue on those lands. It was urged before the High Court and it has been urged again before us that in allotting to the appellants a share of items Nos. 1, 2 and 5 these 5 acres which were lost to the estate as a result of Narasimham's negligence should be debited against her share in them. We find ourselves unable to accept this contention just as the High Court, though they gave no reason for their conclusion. Neither on principle nor on authority could the contention on behalf of the appellants be supported. A hindu widow is entitled to the full beneficial enjoyment of the estate. So long as she is not guilty of wilful waste, she is answerable to no one. Her estate is not a life-estate, because in certain circumstances she can give an absolute and complete title. Not is it any sense an estate held in trust for reversioners. Within the limits imposed upon her, the female holder has the most absolute power of enjoyment and is accountable to no one. She fully represents the estate, and, so long as she is alive, no one has any vested interests in the succession. The limitations upon her estate are the very substance of its nature and not merely imposed upon her for the benefit of reversioners. She is in no sense a trustee for those who may come after her. She is not bound to save the income, nor to invest the principal. If she makes savings, she can give them away as she likes. During her lifetime she represents the whole inheritance and a decision in a suit by or against the widow as representing the estate is binding on the reversionary heirs. It is the death of the female owner that opens the inheritance to the reversioners, and the one most nearly related at the time to the last full owner becomes entitled to

possession. In her lifetime, however, the reversionary right is a mere possibility or spes successions. It cannot be predicted who would be the nearest reversioner at the time of her death. It is, therefore, impossible for a reversioner to contend that for any loss which the estate might have sustained due to the negligence on any the part of the widow he should be compensated from out of the widow's separate properties. He is entitled to get only the property left on the date of the death of the widow. The widow could have, during her lifetime, for necessity, including her maintenance, alienated the whole estate. The reversioner's right to institute a suit to prevent waste is a different manner. If it could have been established that in having allowed some part of the properties to be sold in revenue sale she was guilty of wilful waste it would have been a different matter. It would still have been necessary for the reversioner to have instituted a suit on that basis. It is doubtful whether such a suit can be instituted after her death. In any case the necessary averments are not available in this suit. We are, therefore, unable to accept this contention.

9. (III) Another point urged before the High Court as well as before us was that the cost incurred by Venkanna in the suit and in the execution proceedings should have been taken into account in allocating items Nos. 1, 2 and 5 between the appellants and the respondent. The High Court took the view that as the income received by Venkanna and the amounts spent by him including the amounts spent for the suit and the execution proceeding were taken into account at the time of the settlement of the accounts and there was an executable decree in favour of Venkanna for a sum of Rs. 4,486 as the amount due on settlement of account, and it was open to Venkanna to realise the amount against the estate of Ramamurti in execution of the decree, it is not now open to the appellants to claim that these should be separated from the amount of the decree and should be added on to the amount of principal and interest accrued during the lifetime of Ramamurti. We agree with this view. Incidentally it should be noticed that the conclusion in respect of the first point.

10. (IV) Lastly, it was argued that Narasimham, the widow, had treated this property as accretion to the husband's estate and therefore the appellants are entitled to the whole of the property. The facts on the basis of which this contention is urged are :

> (a) When Narasimham's life interest in the estate was sold in E.P. No. 93 of 1927 filed by Venkanna she did not question the legality of the sale on the ground that her interest in the property was not a life interest but was a full interest.
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> (b) In the order in E.A. 624 of 1935 passed by the Subordinate Judge, Visakhapatnam the widow treated items Nos. 1, 2 and 5 as part of the estate of her husband and she had also asserted therein that she had a right to enjoy the same as representative of his estate.
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> (c) Life interest in A-Schedule properties was sold in E. P. 28 of 1940 in execution of the decree in O.S. No. 14 of 1913 and the widow did not object to the sale on the ground that what was being sought to be sold was a life interest but that she was entitled to full interest.

We do not think any one or all of these grounds are sufficient to establish that the widow had treated this property as accretion to the husband's estate. As observed by the Madras High Court in Akkanna v. Venkayya (ILR (1902) 25 Mad 351 : 12 Mad LJ 5)

the acquirer of property intends to retain dominion over it and in the case of a Hindu widow the presumption is none the less so when the fund with which the property is acquired is one which,

though derived from her husband's property, was at her absolute disposal. In the case of property inherited from the husband, it is not by reason of her intention but by reason of the limited nature of a widow's estate under the Hindu Law, that she has only a limited power of disposition. But her absolute power of disposition over the income derived from such limited estate being now fully recognised, it is only reasonable that, in the absence of an indication of her intention to the contrary, she must be presumed to retain the same control over the investment of such income. The mere fact that properties thus acquired by her are managed and enjoyed by her without any distinction, along with properties inherited from her husband, can in no way affect this presumption. She is the sole and separate owner of the two sets of properties so long as she enjoys the same, and is absolutely entitled to the income derived from both sets of properties.

The fact that she wanted possession of these properties or that when in execution of his decree Venkanna bought what he alleged was her life interest in the properties she did not object to it and assert that she had full interest does not affect this question. It was to her advantage to keep quiet. She was not thereby estopped from contending that she had an absolute interest in the properties. It should, moreover, be remembered that the question that the items Nos. 1, 2 and 5 may have to be divided as between the reversioners and the widow in proportion to the respective shares in the husband's estate, and the widow in that property was really a later development. Before the trial Court both parties proceeded on a differing footing altogether as mentioned earlier. The widow was all along doing everything to prevent her husband's reversioners getting anything from the estate. She had transferred quite a good part of it to her brother, which was what enabled the reversioner to file the suit against her for acts of waste. She exhibited a very clear intention that whatever she possessed should go to her brother. There is absolutely no room on the facts of this case to hold that she exhibited the least intention to treat the income from the husband's estate as an accretion to that estate.

11. In the result the appeal is allowed and the judgment of the High Court set aside. The High Court will dispose of the appeal afresh. The costs of this appeal will abide and be provided in the fresh decree to be passed by the High Court.

12. C.M.P. No. 2016 of 1969 is dismissed.

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