Smt. Ganga Bai

Vs

Vijay Kumar and Others

Civil Appeal No. 582 of 1969

(M. H. Beg, Y. V. Chandrachud JJ)

09.04.1974

JUDGMENT

CHANDRACHUD, J. -

1. This is a plaintiff's appeal on a certificate granted by the High Court of Bombay, Nagpur Bench, under Article 133(1)(a) of the Constitution.

2. On March 24, 1953 Defendant No. 1 executed on behalf of himself and his minor son Defendant No. 2, a deed of mortgage in favour of the plaintiff. Defendant No. 3 is also a son of Defendant No. 1 but he was born, after the mortgage deed, on September 30, 1955. On January 11, 1955 a registered deed of partition was executed amongst the defendants under which the mortgaged property was allotted to the share of Defendants No. 2 and No. 3.

3. On September 1, 1956 the mortgagee filed Civil Suit No. 3A of 1956 to enforce the mortgage. On September 20, 1958 the trial Court passed a preliminary decree for sale of Defendant No. 1's interest in the mortgaged property. It held that part of the consideration for the mortgage was not supported by legal necessity and the balance of the debt incurred on the mortgage was tainted with immorality. Though, therefore, Defendant No. 1 had executed the mortgage as a manager of the Joint Hindu family consisting of himself and Defendant No. 2, the debt was held not binding on the one-half share of defendant No. 2 in the mortgaged property. On the issue relating to the genuineness of the partition effected by Defendant No. 1 between himself and his sons, the trial Court recorded a finding that it was a sham and colourable transaction and its object was to delay or defeat the creditors.

4. Being aggrieved by the decree directing the sale of half the mortgaged property only, the plaintiff filed First Appeal No. 40 of 1959 in the High Court of Bombay. Though the suit was dismissed as against Defendants No. 2 and No. 3, they also filed an appeal in the High Court to challenge the finding of the trial Court that the deed of partition was a sham and colourable transaction. That was First Appeal No. 72 of 1959.

5. During the pendency of these two appeals, the preliminary decree was made final by the trial Court on October 23, 1958. On March 2, 1960 the plaintiff purchased, with the permission of the Court, a joint half share in the mortgaged property in full satisfaction of his decree. On September 21, 1960 the auction sale was confirmed and on November 25, 1960 the plaintiff was put in joint possession of the property.

6. On March 15, 1966 the appeals filed by the plaintiff and by Defendants No. 2 and No. 3 came up

for hearing before a Division Bench consisting of Abhyankar and Deshmukh, JJ. The hearing of the appeals was adjourned from time to time and while the appeals were part-heard, Defendants No. 2 and No. 3 applied on August 2, 1966 for amendment of their Memorandum of Appeal in First Appeal No. 72 of 1959. By the proposed amendment they sought leave of the High Court to challenge the preliminary decree passed by the trial Court. The plaintiff opposed that amendment and applied that she did not desire to prosecute First Appeal No. 40 of 1959 filed by her.

7. The High Court did not pass any orders either on the application for amendment made by Defendants No. 2 and No. 3 or on the purshis of the plaintiff asking that her appeal be dismissed for non prosecution. On August 24, 1966 the High Court adjourned the hearing of the appeals for three months to enable defendants to pay the amount due under the preliminary decree. On November 24, 1966 Defendants No. 2 and No. 3 deposited Rs. 12,500 and applied for an extension of two months for paying the balance. The extension was granted by the High Court and on January 25, 1967 Defendants No. 2 and No. 3 deposited a further sum of Rs. 25,000 towards the satisfaction of the preliminary decree.

8. On February 14, 1968 another Division Bench of the High Court (Tambe and Badkas, JJ.) allowed the application of Defendants No. 2 and No. 3 for amendment of their Memorandum of Appeal in First Appeal No. 72 of 1959. On an application made by their counsel, the High Court granted to those defendants time till February 23, 1968 to pay the deficit court fees, which they did. The High Court then took up the two First Appeals for hearing in March, 1968.

9. As the plaintiff had applied that she did not desire to proceed with First Appeal No. 40 of 1959 filed by her, the High Court dismissed that appeal for non-prosecution. As a consequence of this order the High Court observed that the findings recorded by the trial Court in favour of the defendants and adverse to the plaintiff would stand confirmed.

10. In first Appeal No. 72 of 1959 filed by Defendants No. 2 and No. 3 it was urged by the plaintiff that as the appeal was originally filed to challenge the finding of the trial Court on the question of genuineness of the partition, Defendants No. 2 and No. 3 were not entitled to include new grounds in the Memorandum of Appeal and that the memorandum should not have been permitted to be amended. The High Court held that in view of the provisions of Order 41, Rule 2, Civil Procedure Code, it was open to Defendants No. 2 and No. 3 with leave of the Court, to urge additional grounds in their appeal without amending the Memorandum of Appeal and therefore the objection raised by the plaintiff as against the amendment was futile.

11. The High Court further held that the appeal filed by Defendants No. 2 and No. 3 was competent even though the suit was wholly dismissed as against them. According to the High Court, Defendants No. 2 and No. 3 were aggrieved by the adverse finding on the question of partition and further they were denied under the preliminary decree the right to pay the decretal amount and to redeem the mortgage. It was therefore open to them to file an appeal against that decree.

12. On the merits of the appeal, the High Court set aside the finding of the trial Court and held that the partition was "real and genuine" and that it was not effected in order to defeat the creditors. Defendants No. 2 and No. 3 had therefore become owners of the equity of redemption and they could not be deprived of the right to redeem the mortgage.

13. In the result, the High Court set aside the preliminary decree as also the final decree and with it the auction sale in favour of the plaintiff. The High Court passed a fresh preliminary decree under

Order 34, Rule 4, Civil Procedure Code declaring that the plaintiff was entitled to recover Rs. 34,386 and odd and directing the defendants to entire decretal amount within six months of the date of decree. The plaintiff questions the correctness of that decree in this appeal.

14. It is necessary first to understand the nature of the appeal filed by Defendants No. 2 and No. 3 in the High Court and the relief they sought therein. That appeal was in terms filed only against the finding recorded by the trial Court that the partition between Defendant No. 1 and his sons was a sham and colourable transaction intended to defeat or delay the creditors. The Memorandum of Appeal as filed originally contained seven grounds, each of which was directed against the finding given by the trial Court on the question of partition. The Memorandum contained a note that as the subject-matter in dispute was not capable of being estimated in terms of a money value, a fixed court fee of Rs. 20 was paid thereon. Only one prayer was originally made in the Memorandum of Appeal that the partition deed be declared as genuine. Counsel for Defendants No. 2 and No. 3, furnished to the registry of the High court a written explanation as required by Rule 171 of the High Court Rules that as Defendants No. 2 and No. 3 were only challenging the finding recorded by the trial Court on the question of partition and as they were merely seeking a declaration that the partition was genuine, the fixed court fee of Rs. 20 was properly paid.

15. It is thus clear that the appeal filed by Defendants No. 2 and No. 3 in the High Court was directed originally not against any part of the preliminary decree but against a mere finding recorded by the trial Court that the partition was not genuine. The main controversy before us centres round the question whether that appeal was maintainable. On this question the position seems to us well-established. There is a basic distinction between the right of suit and the right of appeal. There is an inherent right in every person to bring a suit of a civil nature and unless the suit is barred by statute one may, at one's peril, bring a suit of one's choice. It is no answer to a suit, howsoever frivolous to claim, that the law confers no such right to sue. A suit for its maintainability requires no authority of law and it is enough that no statute bars the suit. But the position in regard to appeals is quite the opposite. The right of appeal inheres in no one and therefore an appeal for its maintainability must have the clear authority of law. That explains why the right of appeal is described as a creature of statute.

16. Under Section 96(1) of the Code of Civil Procedure, save where otherwise expressly provided by the Code or by any other law for the time being in force, an appeal lies from every decree passed by any court exercising original jurisdiction, to the Court authorised to hear appeals from the decisions of such court. Section 100 provides for a second appeal to the High Court from an appellate decree passed by a court subordinate to the High Court. Section 104(1) provides for appeals against orders of the kind therein mentioned and ordains that save as otherwise expressly provided by the Code or by any law for the time being in force an appeal shall lie "from no other orders". Clause (i) of this section provides for an appeal against "any orders made under Rules from which an appeal is expressly allowed by rules". Order 43. Rule 1 of the Code, which by reason of clause (i) of Section 104(1) forms a part of that section, provides for appeals against orders passed under various rules referred to in clauses (a) to (w) thereof. Finally, Section 105(1) of the Code lays down that save as otherwise expressly provided, no appeal shall lie from any order made by a court in exercise of its original or appellate jurisdiction.

17. These provisions show that under the Code of Civil Procedure, an appeal lies only as against a decree or as against an order passed under rules from which an appeal is expressly allowed by Order 43, Rule 1. No appeal can lie against a mere finding for the simple reason that the Code does not provide for any such appeal. It must follow that First Appeal No. 72 of 1959 filed by Defendants

No. 2 and No. 3 was not maintainable as it was directed against a mere finding recorded by the trial Court.

18. The High Court mixed up two distinct issues : one, whether it was competent to Defendants No. 2 and No. 3, if they were aggrieved by the preliminary decree to file an appeal against that decree; and two, whether the appeal such as was filed by them was maintainable. If it be correct that Defendants No. 2 and No. 3 could be said to have been aggrieved by the preliminary decree, it was certainly competent for them to challenge that decree in appeal. But they did not file an appeal against the preliminary decree and therefore the question whether they were aggrieved by that decree and could file and appeal therefrom was irrelevant. While deciding whether the appeal filed by Defendants No. 2 and No. 3 was maintainable, the High Court digressed into the question of the competence of Defendants No. 2 and No. 3 to file an appeal against the preliminary decree and taking the view that it was open to them to challenge that decree even though the suit was wholly dismissed against them, the High Court held that the appeal, which in act was directed against a finding given by the trial Court, was maintainable. If the High Court had appreciated that the two questions were distinct and separate, it would not have fallen into the error of deciding the latter question by considering the former.

19. Adverting to the question which the High Court did consider, namely, whether Defendants No. 2 and No. 3 could be said to be aggrieved by the preliminary decree, there is nothing in the terms of that decree which precluded those defendants from depositing the decretal amount to be able to redeem the mortgage. The trial Court had passed the usual preliminary decree for sale in Form No. 5A, under Order 34, Rule 4, Civil Procedure Code. If the amount found due to the appellant under the decree was paid into the Court within the stipulated or extended period, the appellant would have been obliged to deliver to the mortgagors all the documents in her possession or power relating to the mortgaged property and to deliver up to the defendants quite and peaceable possession of the property free from the mortgage. The amount declared to be due to the appellant by the preliminary decree was to paid by the defendants, from which it would appear that they were not interested in paying the amount. It is significant that Defendants No. 2 and No. 3 were served with the notice of final decree proceedings and they appeared therein. The Code in merciful to mortgagors and perhaps rightly, because the mortgagee ought to have no grievance if the loan advanced by him is rapid with permissible interest, costs and expenses. Under Order 21, Rule 89, it was open to Defendants No. 2 and No. 3 as late as after the appellant purchased the property in the auction sale, to pay the amount due to her. These defendants had interest in the mortgaged property by virtue of a title acquired before the sale, that is, under the registered partition dated January 11, 1956. Under Order 21, Rule 89, where immovable property is sold in execution of a decree, any person owning the property or holding an interest therein by virtue of a title acquired before the sale, can apply to have the sale set aside on his depositing in court, for payment to the purchaser a sum equal to five per cent of the purchase-money and for payment to the decree-holder the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered. Nothing of the kind was done and even the last significant opportunity was not availed of by the defendants. Counsel for the appellant seems right that the defendants were content that only half the mortgaged property was directed to be sold and that it was only because of the later appreciation in prices of real property that defendants No. 2 and No. 3 awoke to the exigency of challenging the preliminary decree. That was much too late.

20. So late indeed, that not having any plausible reason to assign for the inordinate delay caused in applying for an amendment of the appeal, they preferred not to file an application for condonation of delay at all. The appeal was filed on January 5, 1959 while the application for amendment was

made on August 2, 1966. Even though no explanation was offered for the long delay of over 7 1/2 years, the High Court allowed the amendment with a laconic order "Application for amendment allowed".

21. Thus, the appeal filed by Defendants No. 2 and No. 3 being directed against a mere finding given by the trial Court was not maintainable; defendants No. 2 and No. 3 were not denied by the preliminary decree the right to pay the decretal amount; and the two defendants could even have applied under Order 21, Rule 89, for setting aside the sale in favour of the appellant but they failed to do so as, presumably, they were not interested in paying the amount. The High Court, was therefore wholly in error in allowing the amendment of the Memorandum of Appeal, particularly when Defendants No. 2 and No. 3 had neither explained the long delay nor sought its condonation.

22. The preliminary decree had remained unchallenged since September, 1958 and by lapse of time a valuable right had accrued in favour of the decree-holder. The power to allow an amendment is undoubtedly wide and may at any stage by appropriately exercised in the interest of justice, the law of limitation notwithstanding. But the exercise of such far-reaching discretionary powers is governed by judicial considerations and wider the discretion, greater ought to be the care and circumspection on the part of the Court. The appeal in terms was originally directed against the finding given by the trial Court that the partition was sham and colourable. "Being aggrieved by the finding given in the Judgment and the Decree ..... it is humbly prayed that findings given by the learned Judge in Para 34 of his Judgment may kindly be set aside, and instead the partition deed dated January 11, 1956 may kindly be declared as genuine" - so ran the Memorandum of Appeal. Defendants No. 2 and No. 3 reiterated through their counsel by filing a note to explain the payment of fixed court fees of Rs 20 that they were "seeking the relief of declaration only" and therefore the court fee paid was proper and sufficient. Long years thereafter, the High Court allowed the Memorandum to be amended - not a reason was cited to explain the delay and not a reason was given to condone it. And it was not appreciated that in granting time to Defendant No. 2 and No. 3 to make up the deficit of the court fees 7 1/2 years after the appeal was filed, and amendment was being allowed which had its impact not only on the preliminary decree which was passed in the meanwhile, the auction sale which was held in pursuance of the final decree and the sale certificate which was granted to the appellant who, with the leave of the Court and in full satisfaction of her decree, had purchased a joint 1/2 share in the mortgaged property. With the striking down of the preliminary decree, these proceedings had to fall but the error really lay in allowing the amendment so as to permit, without good cause shown, a belated challenge to the preliminary decree.

23. One other aspect of the question relating to the maintainability of the appeal yet remains to be examined. Counsel for the respondents argues that the finding of the trial Court on the issue of partition would have operated as res judicata against them and they were therefore entitled to appeal therefrom.

24. In Harachandra Das v. Bholanath Das (ILR (1935) 62 Cal 701 : 39 CWN 567) on which the learned Counsel for the respondents relies in support of this submission, a suit for pre-emption was dismissed by the trial Court on the ground of limitation. In an appeal filed by the plaintiff, the District Court reversed that finding but confirmed the decree dismissing the suit on the ground that the sale effected by Defendants No. 4 and No. 5 in favour of Defendants No 1, No. 2 and No. 3 was to validly registered and there being no "sale", there can be no right of pre-emption. Defendants No. 1 to No. 3 preferred an appeal to the High Court against the finding recorded by the District Court that the sale effected in their favour by defendants No. 4 and No. 5 was not valid as it was not lawfully registered. On a preliminary objection raised by the plaintiffs to the maintainability of the

appeal, the High Court of Calcutta held that though under the Code of Civil Procedure there can be no appeal as against a mere finding, "it may be taken to be the view of courts in India generally, that a party to the suit adversely affected by a finding contained in a judgment, on which a decree is based, may appeal; and the test applied in some of the cases for the purpose of determining whether a party has been aggrieved or not was whether the finding would be res judicata in other proceedings". The High Court, however upheld the preliminary objection on the ground that issue regarding validity of the sale which decided against Defendants No. 1 to No. 3 would not operate as res judicata in any subsequent proceedings and therefore the appeal which was solely directed against the finding on that issue was not maintainable.

25. The position here is similar to that in the Calcutta case. The trial Court decreed the mortgagee's suit only as against Defendant No. 1, the father, and directed the sale of his one-half interest in the mortgaged property on the ground that part of the consideration for the mortgage was not supported by legal necessity, the remaining part of the consideration was tainted with immorality and therefore the mortgage was not binding on the interest of the sons, Defendants No. 2 and No. 3. Whether the partition between the father and sons was sham or real had no impact on the judgment of the trial Court and made no material difference to the decree passed by it. The finding recorded by the trial Court that the partition was a colourable transaction was unnecessary for the decision of the suit because even if the Court were to find that the partition was genuine, the mortgage would only have bound the interest of the father as the debt was not of a character which, under the Hindu law, would bind the interest of the sons. There is no substance in the submission made on behalf of the sons that if the partition was held to be genuine, the property would have been wholly freed from the mortgage encumbrance. The validity or the binding nature of an alienation cannot depend on a partition effected after the alienation; or else, a sale or a mortgage effected by the Karta of a joint Hindu family can easily be avoided by effecting a partition amongst the members of the joint family. As the matter relating to the partition was not directly and substantially in issue in the suit, the finding that the partition was not directly and substantially in issue in the suit, the finding that the partition sham cannot operate as res judicata. Therefore, the appeal filed by Defendants No. 2 and No. 3 against that finding was not maintainable, even on the assumption that the High Court of Calcutta is right in its view that though under the Code there could be no appeal against a finding, yet "on grounds of justice" an appeal may lie against a finding provided that it would operate as res judicata so as to preclude a party aggrieved by the finding from agitating the question covered by the finding in any other proceeding. It is not necessary here to determine whether the view of the Calcutta High Court is correct.

26. For these reasons we allow the appeal with costs, set aside the judgment of the High Court and restore that of the trial Court.

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