N. Krishnaih Setty

Vs

Gopalakrishna and Others

Civil Appeal No. 1748 of 1967

(P. Jagmohan Reddy, M. H. Beg, A. Alagiriswami JJ)

03.09.1974

JUDGMENT

ALAGIRISWAMI, J. -

1. This is an appeal by certificate against the judgment of the High Court of Mysore in a Second Appeal. It arises out of a suit filed by Respondents Nos. 1 and 2 (who will hereafter be referred to as plaintiffs) for a declaration that the sale held in execution of the decree obtained by the appellant (who was Defendant No. 9 in the suit) in O.S. No. 31 of 1937-38 against their father and other members of their family was void ab initio. O.S. No. 31 of 1937-38 had been filed by the present appellant on the basis of a promissory note executed, as already mentioned, by the father of the plaintiffs and other members of that family. In execution all the sixteen items of property belonging to the family were sold. The sale was in pursuance of an attachment before the judgment, made on September 25, 1937. The suit was subsequently decreed. In the suit the only plea taken was that the defendants were agriculturists entitled to the benefit of the Mysore Agriculturists Relief Act. 1828. The plaintiffs filed the suit for a mere declaration because they continued in possession of the properties which had been sold in execution and purchased by Defendants 10 and 11 in the suit and subsequently purchased by the appellant. The trial Court decreed the suit. It should be mentioned that the suit was filed on May 14, 1952. The plaintiffs were born respectively in the years 1944 and 1950. On appeal the District Judge held that the sale was void but allowed the appeal on the ground that the plaintiffs were not born on the date of the sale. A Division Bench of the Mysore High Court allowed the Second Appeal and restored the judgment of the trial Court.

2. The main question for decision as to whether the execution sale was void ab initio depends on the interpretation to be placed on Section 14 of the Mysore Agriculturists Relief Act, which reads as follows :

> 14. (1) Except as otherwise provided in sub-section (2), (3) and (4) no agricultural land belonging to an agriculturist shall be attached or sold in execution of any decree or order passed after this Act comes into force, unless it has been specifically mortgaged for the payment of the debt to which such decree or order relates, and the security still subsists. For the purposes of any such attachment or sale as aforesaid, standing crops shall be deemed to be movable property.
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> (2) The court may at the time of passing a decree for money directing payment by instalments or at any time during the course of execution of such decree, direct the judgment-debtor for sufficient cause to furnish security for the amount of the decree and if he fails to furnish the security required, order the attachment of any

agricultural land belonging to the judgment-debtor.

(3) The procedure in respect of attachments ordered under sub-section (2) shall be, as far as may be, in accordance with the procedure relating to attachment before judgment under Order XXXVIII of the Code of Civil Procedure, 1908.

(4) No agricultural land ordered to be attached under sub-section (2) shall be sold in pursuance of such attachment unless the judgment-debtor is in arrears in respect of two or more instalments under the decree.

We are in agreement with the view taken by the Courts below and the High Court that the attachment before judgment made in this case was not a valid one, and therefore, the sale in pursuance of that attachment was void. We are unable to accept the argument on behalf of the appellant that Section 14 does no more than lay down the same procedure as Order 38 of the Code of Civil Procedure and, therefore, the attachment was valid. Sub-section (1) of Section 14 lays down that no agricultural land belonging to an agriculturist shall be attached or sold in execution of any decree or order unless it has been specifically mortgaged for the payment of the debt to which such decree or order relates. The suit filed by the appellant, O.S. No. 31 of 1937-38, was not on the foot of a mortgage and, therefore, the sale effected in execution of the decree obtained by the appellant is clearly against the provisions of sub-section (1). Sub-section (2) permits an attachment only in execution of a decree and, therefore, there is no substance in the argument on behalf of the appellant that the attachment effected before judgment at the instance of the appellant is similar to an attachment before judgment under Order 38 of the Code of Civil Procedure.

3. We are in agreement with the learned Judges of the High Court that the view taken by the District Judge that as the plaintiffs were not born on the date of the sale they cannot challenge its validity is wrong. A void sale, as we have already held the sale in execution of the decree obtained by the appellant in this case to be, confers no title on the auction purchaser and, therefore, the joint family to which the properties belonged continued to be the owners of that property and did not lose their title thereto. The plaintiffs got a right to the property as soon as they were born, not by way of succession but by right of birth. Therefore, plaintiffs were certainly entitled to file a suit questioning the sale.

4. The only other argument on behalf of the appellant, which was advanced before the High Court and rejected by it and was also put forward before us, was that the plaintiffs' suit was barred by constructive res judicata. It appears that the appellant filed a suit O.S. No. 535 of 1944-45 for partition of items 1-15 against Defendants 1 and 2 and the widow and son of another of the original judgment-debtors, as also Defendants Nos. 3 and 4. To that suit the plaintiffs were not parties. Plaintiff No. 2 was not even born then. There was another suit, O.S. No. 47 of 1942-43 filed by Defendant No. 11 in respect of item 16. To that suit also the plaintiffs were not parties. As neither plaintiff was born at the time of O.S. No. 47 of 1942-43, they having been born on September 22, 1944 and September 19, 1950, the Plaintiff No. 2 was not born at the time O.S. No. 535 of 1944-45 was filed, and Plaintiff No 1 though born was not made a party there can be no question of res judicata as against them. They are not representatives of their father as contemplated in Section 11 of the Code of Civil Procedure. It also appears that the earlier suits were filed before the Munsiff's Court and were, therefore, not decided by a court of competent jurisdiction as the present suit has been filed in the Subordinate Judge's Court. We are, therefore, satisfied that the appellant cannot succeed in his plea of res judicata.

5. The appeal is, therefore, dismissed. The appellant will pay the cost of Respondent No. 1 and 2.

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