C. M. Vareekutty

Vs

C. M. Mathukutty

Civil Appeal No. 1819 of 1969

(R.S. Sarkaria, O. Chinnappa Reddy JJ)

10.10.1979

JUDGMENT

CHINNAPPA REDDY, J. –

1. Two brothers, untouched by any trace of fraternal affection, have been waging war in the courts without grace and with sheer cantankerousness for over thirty years. Mathu, their father, died in February, 1944 having executed a will on January 11, 1935. By the will Mathu made dispositions of various properties and directed the two brothers to take the residuary estate in equal share. In 1946 Mathukutty, respondent herein, instituted the suit out of which the present appeal arises for partition of the residuary estate. The defendant-appellant entered appearance in the suit and, without filing a written statement, filed an application under Section 34 of the Arbitration Act seeking stay of the proceedings in the suit. Along with his application under Section 34 of the Arbitration Act the appellant filed Ex. A-1 dated December 19, 1945 claimed to be an arbitration agreement and Ex. A-10 dated January 23, 1946, a compromise said to have been filed before the arbitrators during the pendency of the arbitration proceedings. The plaintiff-respondent denied the genuineness of Exs. A-1 and A-10. The trial Court allowed the defendant's application under Section 34 of the Arbitration Act. The plaintiff preferred an appeal to the High Court of Madras. The High Court remanded the application for fresh disposal directing the trial Court to decide upon the question of the genuineness of Exs. A-1 and A-10. After remand the trial Court found that Exs. A-1 and A-10 were true and valid and, therefore, stayed the proceedings in the suit. The plaintiff once again preferred an appeal to the High Court. Before the High Court it was agreed that the application under Section 34 of the Arbitration Act should not be pursued by the defendant, that the plaintiff should give up his contest regarding the genuineness of Ex. A-10 and that the plaintiff was at liberty to raise the question of the validity of Ex. A-10 which was to be made an issue in the suit itself. The order of stay granted by the trial Court was, therefore, set aside and the suit was directed to be disposed of with the maximum expedition 'at any rate up to the point of the preliminary decree'. It was reiterated in the order of the High Court that the question of genuineness of Ex. A-10 was not to be made an issue in the suit. The suit was to be tried on that footing. Thereafter the suit was taken up by the learned Subordinate Judge. The defendant declined to file a written statement and contended that there was nothing further to be done in the suit except to pass a preliminary decree for partition in terms of Ex. A-10. The plaintiff, however, filed an application for amendment of the plaint by substituting a new schedule of properties. In this new schedule fuller and correct particulars were given of the properties previously mentioned in the original plaint. A few new items were also included. The application for amendment of the plaint was opposed by the defendant. The learned Subordinate Judge allowed the amendment but the High Court of Kerala allowed a civil revision petition filed by the defendant and dismissed the application for amending the plaint. Varadaraja Iyengar, J. who disposed of the civil revision petition took the view that the application for amendment ought not

have been allowed as according to the learned Judge the direction given by the High Court previously barred the trial Court from deciding any question other than that relating to the validity of Ex. A-10. In that view the learned Judge directed the trial Court to decide the question of validity of Ex. A-10 and passed a preliminary decree. Thereafter the learned Subordinate Judge pronounced upon the validity of Ex. A-10 and, holding it to be valid, passed a preliminary decree. The plaintiff preferred an appeal to the High Court of Kerala against the preliminary decree passed by the High Court and in the appeal he once again pleaded that the application for amending the plaint should have been allowed. The High Court found merit in the contention of the plaintiff, directed the plaint to be amended and remanded the suit to the trial Court for fresh disposal. The High Court was of the view that its earlier order did not preclude the plaintiff from seeking an amendment of the plaint nor did it prescribe any special procedure for the disposal of the suit. According to the High Court all that the High Court had done on the earlier occasion was to preclude the parties from agitating the question of genuineness of Ex. A-10. It was said that the earlier order of the High Court did not and could not enable the trial Court to pass a preliminary decree without a written statement and a trial of the suit.

2. In this appeal by the defendant Shri Vepa P. Sarathi learned counsel contended that the High Court was wholly unjustified in interfering with the judgment and decree of the learned Subordinate Judge as it could not be said that the learned Subordinate Judge had committed any error. On the other hand Shri Govindan Nair, learned counsel for the plaintiff argued that no decree could have been passed on the basis of Ex. A-10 when the defendant had not filed any written statement claiming that a decree should be passed in terms of Ex. A-10 and when there had been no trial of the court. He drew our attention to the circumstance that Ex. A-10 was never marked as an exhibit in the suit. The exhibit mark given to the document was in the application for stay of the proceedings in the suit.

3. Having heard both the learned counsel we do not think that we will be justified in interfering with the order of the High Court. As pointed out by the High Court the defendant had not filed any written statement claiming that a decree should be passed in terms of Ex. A-10, no issues had been framed and there was no trial as such of the suit. It is also clear from a perusal of the first order passed by the High Court of Madras that it did not bar a trial of the suit; all that it did was to bar the question of the genuineness of Ex. A-10 from being freshly agitated. The appropriate procedure for the defendant was to file a written statement claiming that a decree should be passed in terms of Ex. A-10, if he so desired and thereafter for the trial Court to follow the procedure prescribed by law. Ex. A-10 itself does not specify the items of properties and it was, therefore, clearly open to the parties to specify how the various items of properties had to be allotted to them. The plaintiff claimed that some properties had not been fully and correctly described in the original plaint schedule and that due to ignorance some properties had been omitted. The High Court allowed the application for amendment of the plaint and we do not see any justification for interfering with the decision of the High Court allowing the amendment of the plaint. Shri Sarathi urged that even after the passing of the preliminary decree it would be open to the parties to give correct particulars of the properties and, therefore, there was no need to set aside the preliminary decree now. Instead of the parties continuing to wilfully agitate the question of the identity of every item of property in the final decree proceedings, we think that it is desirable that the plaintiff should be permitted to amend the plaint to raise in the written statement to be filed by him. That is precisely what the High Court has ordered to be done in the judgment under appeal. The appeal is, therefore, dismissed but in the circumstances there will be no order as to costs.

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