V. B. Arun Kumar and Others

Vs

Jayasingh and Others

Civil Appeal No 4786 of 1992

(M.N. Venkatachaliah, S.C. Agarwal, Dr. A.S. Anand JJ)

11.11.1992

JUDGMENT

S.C. AGRAWAL, J. –

1. Special leave granted.

2. Heard counsel for the parties.

3. This appeal arises out of O.A. No. 407 of 1978 filed by the appellants against the respondents for the partition of properties covered by a lease deed (Ex. A-2) dated May 31, 1944. Sankaran, the common ancestor of the parties had two sons Madhavan and Balgangadharan by his first wife Madhavi. The appellants are the sons of Balgangadharan while the respondents are the sons of Madhavan. Krishnan the Karanavan of the common tarwad had orally leased the suit properties to Madhavan and subsequently Madhavan had executed the lease deed Ex. A-2 in respect of the said lands. In the suit the case of the appellants was that the properties covered by the lease deed were given on lease to Madhavan as he was the eldest male member of the branch of the family consisting of himself and his brother Balgangadharan and their children for the maintenance of the members of the said branch and that the appellants and respondents were jointly entitled to the properties. The said suit was contested by the respondent was claimed that the properties were given on lease to Madhavan alone and that after the death of Madhavan the respondents are entitled to the properties in their own rights and the appellants could not claim any share in the same. They also submitted that the suit was barred by res judicata in view of the preliminary decree in the earlier suit for partition (O.S. No 21 of 1946) as well as the decision of the High Court in A.S. No. 622 of 1971 arising out of the O.S. No. 34 of 1969.

4. The Subordinate Judge, by his judgment and decree dated December 22, 1972 held that the leasehold right under the lease deed Ex. A-2 were in favour of Madhavan in his individual capacity and the said lease deed was not executed for the benefit of the branch consisting of children of Sankaran through his first wife Madhavi. The plea of res judicata was however rejected. It was held that a copy of the judgment in O.S. No. 21 of 1946 the Ottapalam sub-court had not been produced to enable the Court to see the findings therein. With regard to the judgment of the High Court in A.S. No. 622 of 1971 (Ex. B-2) it was held that there was no final decision regarding the right set up by the plaintiffs (appellants herein) in the present suit. In view of the findings recorded against the appellants that the lease deed was executed by Madhavan in his individual capacity and not as the Karanavan of any thavazhi the Subordinate Judge dismissed the suit of the appellants. The High court in the judgment under appeal has disagreed with the finding recorded by the Subordinate Judge on the issue of res judicata and has held that in the judgment Ex. B-2 in A.S. 622 of 1971,

there is a clear finding that the leasehold title in the suit properties under the lease deed Ex. A-2 belonged to the branch consisting of Madhavan and his children and that Balgangadharan had no interest in the leasehold rights. In view of the aforesaid finding that the suit was barred by res judicata, the High Court did not consider it necessary to go into the merits of the contention as to whether the lease deed Ex. A-2 is an acquisition of a leasehold right for the benefit of a branch of the family consisting of the parties of the suit.

5. The present appeal is directed against the said judgment of the High Court dated July 24, 1985.

6. The only question which arises for consideration in this appeal is whether the suit filed by the appellants was barred by res judicata in view of the earlier judgment of the High Court (Ex. B-2) in A.S. 622 of 1971 arising out of O.S. No. 34 of 1969. In order to deal with this question it is necessary to briefly refer to the earlier litigation between the parties.

7. During the lifetime of Madhavan, a suit (O.S. No. 21 of 1946) was filed in the Ottapalam sub-court for the partition of the properties belonging to the common tarwad which included the properties covered by the lease deed Ex. A-2. In the said suit Madhavan was defendant 15 while Balgangadharan was defendant 16. The respondents were impleaded as defendants 17 to 19. They were minors at that time and were represented by Madhavan as guardian ad item. Before he could file the written statement in the suit, Madhavan died in 1946 and thereafter Balgangadharan was appointed as guardian of the respondents. In the said suit, a preliminary decree for partition was passed on June 30, 1948. While proceedings for the final decree were pending in the said suit, the respondents attained majority. They moved an application before the court in the said proceedings for allowing them to file the written statement on the ground that they were not properly represented by the guardian. The said application of the respondent was not allowed. Thereafter respondent 1 filed a suit (O.S. No. 34 of 1969) in the court of Subordinate Judge, Trichur for a declaration that Balgangadharan, who had acted as their guardian, had an interest adverse to the interest of the minor defendants and he did not plead that the leasehold right in the suit properties was the individual right of Madhavan and his children and that the side properties should be divided only after reserving their leasehold right. The said suit was dismissed by the Subordinate Judge by his judgment dated June 30, 1971. Respondent 1 filed an appeal (A.S. No. 622 of 1971) against the said judgment before the High Court. The said appeal was decided by the High Court by judgment Ex. B-2 dated January 13, 1973. The High Court allowed the appeal of respondent 1 on the view that Balgangadharan who was representing the respondents as their guardian in the partition suit (O.S. 21 of 1946) had an interest adverse to the minor and this circumstance rendered the decree void as against the minor. But instead of directing that the preliminary decree passed in O.S. No. 21 of 1946 be reopened to enable respondent 1 to file a written statement raising his defence based upon the lease deed in regard to the suit properties, the High Court declared that since the claim based on the lease deed could appropriately be adjudicated before passing the final decree, the said question will be deemed to have been left open to be considered in the final decree and the preliminary decree would be deemed modified to that extent. The High Court directed the Subordinate Court to post the case to a specific date to enable respondent 1 to file a written statement in that suit in regard to his claims based upon the lease deed and thereafter try the question of the rights if any, set up by respondent 1 and adjudicate on it before passing final decree. In pursuance of the direction given by the High Court, the respondents filed written statement in the partition suit. Balgangadharan contested the said claim of the respondents and contended that the leasehold right belonged to the branch. Balgangadharan died in 1974 and the appellants were impleaded as his legal representatives in the said suit. Thereafter some other parties in that suit also died and since their legal representatives were not impleaded, the final decree application was dismissed and the claim that

was put forward by the respondents was not considered by the court.

8. The High Court has proceeded on the basis that in its judgment Ex. B-2 in A.S. No. 622 of 1971 a finding has been given that the leasehold title in the suit properties under the lease deed Ex. A-2 belonged to the branch consisting of Madhavan and his children and that Balgangadharan had no interest in the leasehold properties. According to the High court, this finding was necessary for the disposal of the appeal (A.S. No. 622 of 1971) as the question involved was as to whether for the failure of the guardian, Balgangadharan to set up the leasehold title of the minor defendants 17 to 19 in O.S. No. 21 of 1946, the preliminary decree was valid and binding on the minors and that it was also necessary to consider whether there was a conflict of interest between the guardian and the minors.

9. We have carefully considered the judgment (Ex. B-2) of the High Court in A.S. No. 622 of 1971. With respect we are unable to agree with the view of the High Court that in the earlier judgment Ex. B-2 in A.S. No. 622 of 1971 the High Court has held that the leasehold title under the lease deed in the suit properties belonged to the branch consisting of Madhavan and his children and that Balgangadharan had no interest in the leasehold right. In the said decision, the High court was only considering the question whether Balgangadharan, as guardian representing the minor defendants 17 to 19 in the suit in O.S. No. 21 of 1946 had an interest adverse to the minors and if so, what was its effect. In this regard the court noticed the contention of respondent 1 that the guardian appointed in the suit had interest adverse to the minor since, it would not have been to the advantage of Balgangadharan to have set up a contention that Madhavan obtained leasehold right for himself as that would have reduced the share of Balgangadharan. The court observed that if the said contention was accepted it may not be necessary to go into the other questions. Thereafter the court has considered the circumstances in the case and the pleadings of the parties to see what exactly was the nature of the claim of the plaintiff (respondent 1 herein) and in that context the court has observed that the document Ex. A-2 executed by Madhavan was a lease deed. But at the same time the court has taken care to say :

> "We are not going into the question whether the lease deed subsisted even after a mortgage of some of the properties was taken by the lessee as is indicated by the evidence in the case. It is seen that subsequent to the lease, some of the properties were mortgaged in favour of Madhavan. That was in the year 1945 under document No. 1512. Whether the leasehold right subsisted nevertheless and whether there was any interest available to the lessees under the lease thereafter are not matters with which we should concern ourselves here."

10. The court has then considered the question as to whether a decree obtained against a minor by the guardian who had interest adverse to the minor is a void or voidable decree and has held that in such a case, the decree would be a nullity as far as the minor is concerned but it would remain binding against the others. The High Court then considered whether the preliminary decree should be reopened. It did not adopt the said course for the reason that seven the preliminary decree, the special right set up by the parties had not been adjudicated and are left open for decision in the final decrees and that if the claim by the plaintiff (respondent 1 herein) had been actually set up normally it would have been directed to be considered at the time of passing of the final decree. The High Court, therefore, directed as under :

> "The claim based on Ex. P-1 (lease deed) could appropriately be adjudicated before passing the final decree. It is sufficient to state here that the question will be deemed

to have been left open to considered in the final decree and it is declared so. The preliminary decree will be deemed modified to that extent. The court will posts the case to a specific date to enable the plaintiff here who is defendant 17 in O.S. No. 21 of 1946 to file a written statement in the suit in regard to his claims based upon Ex. P-1 and thereafter will try the question of the rights, if any, set up by defendant 17 and will adjudicate on it before passing final decree."

11. The said observations of the High Court clearly indicate that there was no adjudication of the claim of the respondents based on the lease deed, Ex. A-2, by the High Court and the same was left open to be considered and adjudicated upon at the stage of final decree in the suit. In the aforesaid circumstances, it cannot be said that the High Court has recorded a finding that the leasehold title in the suit properties under the lease deemed dated May 31, 1944 belonging to the branch consisting of Madhavan and his children and that Balgangadharan had no interest in the leasehold rights. The view of the High Court dismissing the suit of the appellants on the ground that the suit was barred by res judicata cannot, therefore be upheld. Since the High Court did not examine the merits of the contention as to whether the lease deed Ex. A-2 is an acquisition of a leasehold right for benefit of a branch family consisting of the parties to the suit which was found against the appellants by the Subordinate Judge, the matter must be remitted to the High Court for consideration of the said question and other questions arising therein which were not considered by the High Court.

12. The appeal is consequently allowed. The judgment and the decree of the High Court dated July 24, 1985 in A.S. No. 169 of 1979 is set aside and the matter is remitted to the High Court for disposal on merits of all other issues which were not considered by the High Court. The parties are left to bear their own costs.

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