Kameshwari Devi (Smt.) Alias Kaleshwari Devi and Others

Vs

Barhani (Smt.) Dead By Lrs. and Others

Civil Appeal No. 2354 of 1986

(S. Saghir Ahmed, K. Ramaswamy JJ)

20.02.1997

ORDER

1. This appeal by special leave arises from the judgment of the Patna High Court, made on 25-2-1986 in appeal from Appellate Decree No. 17 of 1977.

2. The admitted facts are that one Hulash Kumhar, the common ancestor had two sons, Jitram Kumhar and Gudar Kumhar. The appellants represent the branch of Jitram Kumhar and the respondent represented the branch of Gudar Kumhar. Bigan was the father of the appellant and his mother was Anandi Kauri. Bigan died in 1957 leaving behind him the original plaintiff, Arujun Mahato and his sisters, Defendants 8-11 and brothers Defendants 13 and 14. One Bajani Kumari, Defendant 1 in the present suit, representing the branch of Gudar Kumhar, filed Suit No. 178 of 1957 for partition impleading Bigan and five others. The suit for partition was filed on 20-9-1957 and Bigan died before summons were served on him on 27-9-1957. Subsequently, his widow, Anandi Kauri was brought on record as Defendant 1. The appellant was impleaded therein as 4th defendant. Summons, ultimately, were taken to his mother as natural guardian. Since she refused to receive the notice, an application was taken out to appoint a court guardian, which accordingly came to be ordered. The court guardian represented the appellant in OS No. 178 of 1957. The suit was decreed confirming grant of 1/42nd share of each of the branches of Bigan. The appellant, after attaining majority, filed the present suit for setting aside the earlier partition decree and for fresh partition contending that the decree in Suit No. 178 of 1957 did not bind him. The trial court granted a preliminary decree. But, on appeal, the District Judge reversed that decree and dismissed the suit and in the second appeal the High Court confirmed the same. Thus, this appeal by special leave.

3. The only controversy in this appeal is whether the appellant is bound by the decree passed in Suit No. 178 of 1957. The findings recorded by all a the courts are that there was no written statement filed on behalf of the appellant in Suit No. 178 of 1957. The thrust of the case set up by the appellant is that the Phatbandi, Ex. C, does not bind him and the parties and the interest of the estate of the appellant as a minor was not properly safeguarded in that behalf in Suit No. 178 of 1957. It is an undisputed fact that Phatbandi was a registered document of the year 1920 by which time even the plaintiff was not born. It is the common case of the parties of the branch of Bigan in Suit No. 178 of 1957 that it was a nominal document with a view to defraud the creditors and was not acted upon. The controversy was gone into up to the High Court in the earlier litigation in detail and ultimately the finding recorded was that it was a valid document in the nature of a partition and was acted upon. That finding had become final. The question is whether the estate of the minor was properly represented in Suit No. 178 of 1957 ?

4. It is true, as rightly contended by Dr. Shankar Ghose, learned Senior Counsel, that in a case where the estate of the minor is involved in an action for partition or any other suit, the estate of the senior is required to be properly represented taking all diligent steps by either guardian ad litem or the court guardian. If the interest of the estate of the minor is not protected, necessarily, the minor on his attaining majority or within three years thereafter is entitled to file the suit under Section 7 of the Limitation Act, after cessation of the disability to question the correctness of a decree which is sought to be made binding on him. But in that case, the limited defence that could be open to him is that either the decree in the earlier suit was obtained by fraud/collusion or by negligence by the court guardian or that the guardian ad litem did not safeguard the interest of the estate of the minor. On proof of those facts, necessarily, the decree does not bind him and it is open to the court to go behind the decree and consider the right of the minor dehors the decree. But, in this case, whether that question arises for decision is to be seen. It is true, as found by all the courts, that the document, Ex. C, Phatbandi was a document marked as D/2 in Suit No. 178 of 1957. The sheet-anchor, in that suit, the defence open to all the parties on the document was that it was not a genuine document and was brought into existence only to defraud the creditors. That question was common to the interest of all the persons including the minor. The parties had hotly contested the suit and the matter was carried up to the High Court and the High Court had considered it and recorded the finding that it was true, valid and binding deed being a registered partition deed and was acted upon; and it bound the parties. Under these circumstances, though the court guardian had not filed any separate written statement, it makes little difference on the facts in this case, for the reason that the defence on Ex. was common to all and the estate of the minor was sufficiently represented by appointment of the court guardian and that court had, in fact, gone into that question. It binds the appellant and operates as res judicata. If it were a case dehors the document and any other independent right was available and not set up nor considered in the earlier suit, necessarily that question could be gone into in the present suit since that was not pleaded by filing any written statement or contested by the court guardian in that behalf. No other plea was raised in this suit. Under these circumstances, the finding that Phatbandi, Ex. binds the parties including the appellant is a finding validly recorded.

5. Equally, the finding recorded by the appellate court and confirmed by the High Court that the court guardian had acted neither negligently nor fraudulently also is well justified on the facts and circumstances in this case. Ex. C-2 operates as res judicata and binds the appellant. The appeal, therefore, warrants no interference.

6. The appeal is accordingly dismissed. No costs.