

K. Leelavathy Bai and Others

Vs

P. V. Gangadharan and Others

Civil Appeal No. 2138 of 1987

(S. Saghir Ahmed, N. Santosh Hedge JJ)

17.03.1999

JUDGMENT

SANTOSH HEGDE, J. -

1. This appeal by special leave is preferred against the judgment and decree of the High Court of Kerala dated 26-11-1986 made in SA No. 681 of 1982-F.
2. The suit pertains to 50 cents of land, two buildings along with some superstructure situated in Calicut city. Originally, the suit property belonged to one S. P. Sadanandan who had executed a will on 23-6-1948, bequeathing properties owned and possessed by him. Under this will, he bequeathed the suit scheduled properties jointly to two of his sons, namely, Earnest Devadas Sadanandan and his younger brother J. G. Sadanandan. The suit property was enumerated as Item 10 to Schedule 'A' to the will. Sadanandan, who died on 10-7-1948, had originally appointed his wife, his elder son E. D. Sadanandan and a chartered accountant by the name of Paramasivan as executors of his will. One of the executors, namely, Paramasivan later on relinquished his status as an executor. Therefore, the remaining two executors, namely, widow of the testator, Suseela and their elder son E. D. Sadanandan filed OP No. 231 of 1963 for probating the will. The High Court before which the probate proceedings were initiated, granted the probate on 12-11-1963. It has come on record that the suit property in question was earlier leased to one S. V. Sivaramakrishna Iyer and during the pendency of the lease, the eldest son E. D. Sadanandan mortgaged the property with possession in favour of the original lessee S. V. Sivaramakrishna Iyer, son of S. G. Venkitachala Iyer for a consideration of Rs. 1000 for a period of 12 years. It has also come on record that one Ramdass filed a money suit being OS No. 63 of 1956 before the Subordinate Judge at Calicut against a company by the name of Standard Cotton & Silk Co. Ltd., of which the widow of late Sadanandan, Suseela and her eldest son E. D. Sadanandan were Directors along with the younger son Sadanandan. The said suit came to be decreed wherein a decree was passed jointly against the elder and the younger sons, regarding the assets of the Company. However, the elder Sadanandan was not personally made liable and there was no decree against the younger Sadanandan. In execution of the said decree, the present suit properties along with other items were attached on 27-11-1961 by an order of the Court. It has also come on record that a notice of attachment was issued on 30-11-1961 detailing the properties attached which included the present suit property also. It has also come on record that on 10-1-1964, the suit properties which were attached, as stated above, were brought for sale privately by the widow Suseela and the elder son Sadanandan in favour of Kerala Transport Co. represented by its partner P. V. Swamy. Consequent to the decree and execution proceedings in the suit filed by the above-stated Ramdass in OS No. 63 of 1956, the attached properties were brought for court auction on 17-9-1962 and the properties to the private sale referred to above. The objections filed against the court auction being rejected by the executing court, a sale certificate was

issued on 2-9-1964 in favour of the auction-purchaser and since the property was under mortgage and in possession of a third party, a symbolic possession was given to the auction-purchaser on 19-12-1964.

3. The auction-purchaser thereafter filed a suit for redemption of the mortgage being OS No. 158 of 1968 on the file of the Munsif, Kozhikode (Calicut), praying for, inter alia, that he be permitted to deposit the mortgage amount and redeem the property in question which right of redemption according to him, was acquired by him pursuant to his purchase of this property in court auction. The said suit of the plaintiff came to be decreed by the judgment and decree dated 19-9-1980 of the trial court negating the defence the District Judge, Kozhikode which came to be substantially allowed by a judgment and decree of the first appellate court dated 21-3-1982. In the meantime, the original plaintiff having died, his legal representatives filed a second appeal referred to above, before the High Court of Kerala which, as stated above, came to be dismissed and the legal representatives of the original plaintiffs are now before this Court in this civil appeal.

4. In the appeal before the High Court, two points were canvassed for its consideration, namely, (i) whether the first defendant is entitled to the tenancy rights as pleaded by him; and (ii) whether the prior sale by the executors will prevail or whether the court sale will have preference over it. Even though with regard to the first question, both the trial court and the lower appellate court had held against the defendants. In view of the fact that the lower appellate court had held in favour of the defendants on the second question, no separate appeal was preferred by the defendants with regard to the findings rendered by the first appellate court on the first question. However, it seems the said question was also seriously canvassed by the defendants before the High Court, taking recourse to the provisions of Order 41 Rule 22 of the Code of Civil Procedure. The High Court after considering the materials on record and hearing the arguments of the parties, held on the first question that the documents of mortgage Ex. A-1, is in fact only a rental arrangement of the buildings, and the transaction under the said document comes within the purview of the Kerala Buildings (Lease and Rent Control) Act. Hence, the possession of the defendants was protected under the said Act de hors the mortgage claim.

5. In regard to the second question also, the High Court came to the conclusion holding that the private sale executed by the two executors on 10-1-1964 in favour of the fourth defendant would prevail over the court sale dated 27-7-1964 in favour of the plaintiff. The contention of the plaintiff that the private sale in favour of the defendant was in violation of the Court's order of attachment dated 24-11-1961, was also rejected, holding that the attachment in question did not bind the executors of the will since at least one of them was not a party to the decree which was sought to be executed and also in view of the fact that the decree sought to be attached was personal only against the younger Sadanandan and in view of the provisions of Section 60 of the CPC, there could be no attachment in execution of the decree of properties belonging to persons other than the judgment-debtor. Reliance was also placed on the provisions of Order 21 Rule 54 of the Code. It was also held that the attachment would not confer any title in favour of the person who gets the property attached. The High Court considered the question whether the executors of the will can transfer the property left behind by the testator and relying upon Section 211(1) of the Indian Succession Act, 1925, it held that an executor or an administrator of the will steps into the shoes of a legal representative of a testator for all purposes, and all property of the deceased vests in the executors as such. It further relied upon Section 307(1) of the Indian Succession Act which provides that an executor or an administrator has power to dispose of the property of the deceased vested in him under Section 211, either wholly or in part, in such manner as it may think fit unless the said right is restricted by the testament itself. On the basis of the findings recorded above, the High Court

dismissed the appeal of the plaintiffs.

6. Before, us, on behalf of the appellant-plaintiffs, Mr. V. R. Reddy, learned Senior Counsel has reiterated the contentions that were urged before the High Court. He also contended that the property bequeathed being specific and one of the executors, who was also a legatee, having given his assent, though impliedly, the same is sufficient to divest the interest of the executors in the property as envisaged by Section 333 of the Act. Elaborating the contention, it was argued that by the conduct of the executor, the elder Sadanandan, it should be deemed that the property had been divested from the executors and the same had vested in the legatees. If so, the property had become available for attachment and court sale. This argument of the learned counsel is based on the fact that the elder Sadanandan had executed a possessory mortgage as per Ex. A-1 on 6-1-1995 and this act of the elder Sadanandan, who was also an executor, had divested the rights of the executors in the property and had made the property available for court sale since the same had vested the younger Sadanandan had suffered a personal decree in OS No. 63 of 1959, at least his share in the suit property was available for court auction.

7. Mr. T. L. V. Iyer, learned Senior Counsel appearing on behalf of the contesting respondents countered the arguments on behalf of the appellants by stating that the judgment under appeal did not call for any interference. He further argued that after the relinquishment of his rights by the third executor, Mr Paramasivan, there were still executors, namely, the widow of the testator, Suseela and the elder son Sadanandan. Learned counsel further contended that in law, an executor of a will becomes a legal representative of the deceased testator and the property vests in him. He further elaborated his executors should act jointly and one executor cannot act to the exclusion of another. Therefore, in his submission, assuming for argument's sake, the execution of Ex. A-1 by the elder Sadanandan was an act amounting to an assent. The same is not valid in law inasmuch as it was only a unilateral act of one of the executors and unless and until the other executor, Smt. Suseela joins the elder Sadanandan to establish a collective assent, there could be no divesting of the property since such collective acts have not been alleged or establish, there could be no divesting of the property as contended by the appellants. Learned counsel in support of his argument has relied upon a judgment of this Court in ITO, 1st v. Suseela Sadanandan ((1965) 57 ITR 168 (SC)).

8. We have carefully considered the arguments advanced on behalf of the parties. We will first address ourselves to the argument of the appellant that there has been an assent on the part of the executors, consequently the suit property had vested in the legatees on 10-1-1964 was an invalid sale. Thus, the suit property was legally available for court sale.

9. On facts, there is no dispute that the testator had originally appointed 3 persons as executors of his will, and after the relinquishment of his duties as executor by Mr. Paramasivan, still two other executors were left, namely, Smt. Suseela and Mr. E. D. Sadanandan (the elder one) who continued to be the joint executors of the will in question. Under Section 211 of the Act, these two executors became the legal representatives of the deceased testator for all purposes and the properties bequeathed vested in these two executors. Until and unless the said executors assent, the title of the property would not pass on to the legatee. (See Section 332 of the Act.) Of Course, in law, by the assent of the executor the title of a specific property or implied. (See Section 333 of the Act.) The appellants want us to infer that such an assent of the executor could be inferred from the act of the elder Sadanandan in executing a possessory mortgage, Ex. A-1 in favour of S. V. Sivaramakrishna Iyer by which act the elder Sadanandan had acted as a legatee which conduct is sufficient to infer at least the implied assent of the executor to the transfer of title in favour of the legatees. If so, in the eye of the law, title of the property had vested in the legatees. Hence, the property in dispute was

available in execution for satisfaction of the decree in OS No. 63 of 1956. In our opinion, this presupposes the fact that the action of the lone executor would suffice to confer the title of the executors on the legatees. We are unable to agree with this proposition of law. Under Section 211 of the Act, the property of the deceased testator vests in all the executors and if there is more than one executor, all of them together become legal representatives of the deceased testator. In such a situation, it is futile to contend that the estate of the deceased testator could be either controlled or represented by one of the legal representatives of the deceased to the conclusion of ours from the judgment of this Court, referred to above, which is incidentally a case arising out of the same will which is involved in this case. The view expressing in that case, though arising out of income tax proceedings, applies on all fours to the facts of this case also. This Court in that case held : (ITR Headnote)

"If there are more than one executor of a deceased person all of them will be his representatives, and for the purpose of section 24-B(2) all of them only can represent the estate of the deceased."

10. On facts, there is no dispute that one of the executors, namely, Smt. Suseela did not join the other executor in execution of Ex. A-1. Hence, the act of the elder Sadanandan in executing Ex. A-1 would not in any manner amount to assenting to vesting of the bequeathed property on the legatees because the elder Sadanandan could not have represented the estate independently to the exclusion of the other legatees. Any such unilateral act of any single executor, when there are more than one executor, would not bind the estate of the deceased. The contention of the appellant based on Section 311 of the Act also, accordingly to us, does not in any way help the case of the appellant. Though Section 311 says that in the absence of any direction to the contrary in the case of several executors, powers of all may be exercised by any one of them but this section itself says that such exercise of power by one of them but this section itself says that such exercise of power by one of the executors should be by any one of them who has proved the will on the date of execution of Ex. A-1. In this case, the will in question was not even probated much less proved by the elder Sadanandan to attract the enabling provision much less proved by the elder Sadanandan cannot be protected under Section 311 of the Act and the said act cannot be construed as grant of an implied assent as contemplated in Sections 332 and 333 of the Act. If this be so, the right of a legatee will remain to be an inchoate right in legacy and the executors will continue to have their right under the will. Therefore, the executors having obtained the probate on 3-1-1963, the sale made by them on 10-1-1964 in favour of Kerala Transport Co. is valid and is not in any way inhibited or restrict by the attachment order of the executing court dated 27-11-1961 since all the executors were not parties to the execution proceedings nor was there any personal decree against them. If as found by us that the sale of the suit property on 10-1-1964 was a valid sale then the said property was not available for court sale. Consequently, by purchasing the property in court sale dated 17-9-1962, the appellants did not acquire any right, title or interest in the suit property.

11. In view of our finding that the younger Sadanandan had only an inchoate right in the suit property, the contention of the appellant that at least to the extent of his share, the court sale should be upheld, cannot also be accepted.

12. In view of the finding given by us with regard to the validity of the private sale executed by Smt. Suseela and the elder Sadanandan on 10-1-1964 and our consequential finding on the validity of the court sale, the question pertaining to the tenancy does not survive for our consideration. In this view of the matter, the judgment and decree of the High Court does not call for any interference and the same is affirmed by dismissing this appeals. No costs.