SUPREME COURT OF INDIA

Azeez Sait

Vs.

Aman Bai

C.A.No.3496 of 1996

(Ashok Bhan and Dr. A. R. Lakshmanan, JJ.)

13.10.2003

JUDGEMENT

Dr. AR. LAKSHMANAN, J.:-

1. This appeal is directed against the judgment and order dated 21-4-1994 passed by the High Court of Karnataka at Bangalore in R.F.A. No. 247 of 1982 wherein the Division Bench of the High Court affirmed the judgment and decree of the Principal Civil Judge, Mysore. While dismissing the appeal filed by the appellants the Division Bench affirmed the judgment and decree dated 12-2-1982 passed by the Principal Civil Judge, Mysore in O.S. No. 69/1972 wherein the trial Court decreed the suit for partition filed by the plaintiff in respect of Item Nos. 2, 3 and 4 of plaint schedule properties and for possession in respect of Item Nos. 2, 3 and 4 and dismissed the suit in respect of Item No. 1 of plaint schedule properties.

2. The brief facts for the purpose of filing this appeal in short are as follows :

Late Sattar Abba Sait filed a suit for partition and separate possession of the plaint schedule properties into two equal shares and to put the plaintiff in separate possession of his half share after dividing the schedule properties comprising of each property owned by the then joint family of Abba Sait.

3. Defendants 1-4 filed written statements denying the plaint allegation. They stated that there was already a partition in 1914 between the two brothers and denied the statement that Sattar Abba Sait was jointly enjoying the properties in question. They further stated that the said partition deed was acted upon as soon as the deed was entered into between the two brother and the plaintiff, that is, the father of the appellants herein accepted his share in the said partition deed and has acted upon the recitals. They further stated that Mohd. Abba Sait and Sattar Abba Sait have dealt with the properties as independent owners and never as joint owners.

4. The fifth defendant filed written statement stating that he is neither a mortgagee of the 1st item of the plaint schedule property or any other items of the suit properties and prayed for dismissal of the suit against him. The sixth defendant filed written statement stating that she is the mortgagee of Item No. 1 of plaint schedule property. The plaintiffs replied to the written statement of defendants 1-4 reiterating the stand taken in the plaint and further stated that the properties mentioned in Item Nos. 1-5 are joint family properties and they are entitled for half share as the properties derived from Abba Sait and the plaintiff and the late Mohd. Abba Sait never acted upon the partition deed of 1914 and the same was formal by producing large number of documents which are produced before the High Court and also along with this appeal. The trial Court framed the necessary issues out of the pleadings. After framing the issues, the plaintiff was examined as P.W. 1 and the first appellant herein as P.W. 2. The defendants examined Abdul Rahman Sait, first defendant, as D.W. 1. The trial Court held that the plaint schedule Item No. 1 was purchased in the name of the plaintiff and suit Item No. 4 was purchased in the name of Mohd. Abba Sait.

5. The trial Court passed the judgment and decree as indicated in paragraph supra and decreed the suit.

6. Aggrieved by the judgment and decree of the trial Court in regard to Item No. 1, the appellants herein and their late mother filed R.F.A. No. 247/1982 before the High Court of Karnataka and raised several contentions contending that the Civil Judge has erred in not properly considering Exs.P-2 to P-12 produced by the plaintiff which go to show the manner in which the parties dealt with the properties even after the partition deed of 1914 and that the Civil Judge has erred in not considering that the parties have dealt with the properties as if the said Item No. 1 of plaint schedule property continued to be a joint property of late Mohd. Abba Sait and Sattar Abba Sait. It was further contended that the learned Civil Judge has failed to consider that as the business was continued, earlier debts had to be discharged and hence all the properties were sold subsequently or alienated as evidenced as per Exs. P-5 to P-8 irrepsective of the partition deed and hence the partition is sham and nominal and that it was not acted upon.

7. Before the High Court defendants 1-4 have not challenged the findings of the trial Court in regard to Item Nos. 2-4 of the property either by way of separate appeal or by way of cross-objections. The defendants supported the findings of the trial Court in regard to Item No. 1 of plaint schedule property and contended that the property mentioned in Ex. D-2 came to the share of late Mohd. Abba Sait and the plaintiff and the properties in succession has come to defendants 1-4 and Item No. 1 was hypothecated by the two brothers and the plaintiff never took any interest in discharging the loans and the entire loan was discharged by the legal heirs of late Mohd. Abba Sait as the property fell into their share as per Ex. D-2 and they were continuously paying the taxes in respect of the property in question.

8. During the pendency of the appeal before the High Court, the mother of the appellant herein died. The first defendant also died and respondents 1-5 herein were brought on record as legal representatives of the deceased-Ist defendant. On consideration of the entire evidence, the High Court had no option but to reach the conclusion that the plaintiff/appellants and his legal representatives have failed to establish that Ex. D-2, partition deed, as a sham and nominal document, that never intended to be acted upon. The High Court accordingly, recorded its answer to the point holding that the appellants have failed to establish that they are the joint owners of Item No.1 of the property along with defendants Nos. 1-4 and that they have half share in it. The High Court has further held that the learned trial Judge had rightly declined to grant decree in favour of the legal representatives of the appellant/plaintiffs. In respect of Item No. 1 mentioned in the Schedule forming part of the plaint and held that the decree in that regard is sound and flawless deserving affirmance. Aggrieved by the judgment and decree passed by the High Court in R.F.A. No. 247/1982, the appellant/plaintiffs preferred the above appeal.

9. The main controversy between the appellants and the legal representatives of the deceased-Abba Sait in this appeal centres around the property mentioned as Item No. 1 in the schedule forming part of the plaint. It is a house property named as "Abba Manzil," Abba Road, bounded on the East by site of late Sri Chammaiah, by West Sattar Manzil belonging to Dr. Sambashivan, North by lane, and Shakoor Manzil by South Abba Road consisting of vacant site as enclosed by the compound.

10. Mr. NDB Raju, learned counsel appearing for the appellants submitted that the High Court has failed to consider many crucial documents (Exs. P-1 to P-12) and without considering the evidence that all the properties were mortgaged, purchased and sold jointly by both the brothers and in all the transactions both the brothers put their signatures even though they entered into in partition deed in 1914 which they never acted upon. He further submitted that both the Courts failed to look into the contention put forward by the appellants that the partition in the year 1914 is a sham and nominal and the properties continued to be the joint property belonging to two brothers. According to the learned counsel for the appellants, the properties belong to both the brothers and they have dealt with those properties and incurred debts and sold those properties. Learned counsel also submitted that both the Courts have not rightly applied the principles of law in the matter of succession and inheritance in the present case as parties in the present case are Cutchi Memons and are governed by

Cutchi Memons Act, 1938.

11. Concluding his arguments, learned counsel for the appellants submitted that both the Courts have erred in not passing the decree as prayed for in respect of Item No. 1 of plaint schedule and have erred in passing only a decree for partition only in respect of Item Nos. 2, 3 and 4 of the plaint schedule property and for possession in respect of Item Nos. 3 and 4 of the plaint schedule property.

12. Learned counsel appearing for the appellants, at the time of hearing, invited our attention to the pleadings, evidence, both oral and documentary and exhibits filed by both the parties.

13. Per contra, Mr. P. R. Ramasesh, learned counsel appearing for the respondents, submitted that the special leave petition/appeal does not involve any substantial question of law of public importance which requires to be considered by this Court and that the only issue involved in the appeal refers to one item of the property, a residential building known as Abba Manzil (Item No. 1) of plaint schedule property which has been allotted to the share of the father of the defendant/respondents by way of partition deed in 1914. Learned counsel would further urge that the High Court as well as the trial Court has concurrently accepted the validity of the partition of 1914 on the basis of the admissions made by the plaintiff himself during the course of the depositions as well as all other material evidence on record and that has been acted upon admittedly. Thus it is submitted that the special leave petition gives rise only to a queston of fact decided on appreciation of evidence concurrently held by both the Courts in favour of the defendants, therefore, does not call for interference by this Court under Art. 136 of the Constitution of India. Learned counsel for the respondents have also invited our attention to the detailed discussion made by the Courts below in regard to the various exhibits and the findings in regard to the various issues and, in particular, issue Nos. 4 and 7.

14. We have given our thoughtful consideration in regard to the contentions raised by both the parties. We have perused the pleadings and exhibits marked and, in particular, the partition deed. In our opinion, it is not correct to say that the original plaintiff and Mohd. Sait effected a nominal partition deed. The plaintiff, in fact, has accepted the rights under the partition deed and has acted upon its recitals. He has on his own account sold the Bungalow that was allotted to him known as 'Shukoor Manzil' to Mrs. Ganjami, w/o Mr. Abdul Rahim Ganjami. The original plaintiff has utilised the sale proceeds for himself and he has also disposed of the site which was allotted to him under the said partition deed. Therefore, in our opinion, the plaintiff/appellants are estopped from alleging that the partition deed was a nominal one and not intended to be acted upon. The original plaintiff and Mohd. Sait have dealt with the properties as independent owners and never as joint owners.

15. The evidence adduced in this case would clearly disclose that the original plaintiff and Mohd. Sait have dealt with the properties as independent owners and never as joint owners. The partition

deed, in our view, is complete, effective and irrevocable. Even on the assumption that provisions of Hindu law or Muslim law are attracted as alleged by the learned counsel for the appellants, the said partition is valid and effective and has vested in the plaintiff and Mohd. Sait absolute and unalterable right in the properties under the said deed.

16. We have also perused the pleadings. It transpires from the pleadings that Item Nos. 3 and 4 and some other land situate at Malli-halli and Bannur were purchased by Abba Sait and that Abba Manzil and Item No. 2 were purchased by Sattar Sait and Mohd. Abba Sait in addition to other properties which are not the subject-matter of the suit.

17. It was argued by the learned counsel for the appellants that if the properties mentioned in Ex. D-2, partition deed, had really been allotted to the share of the plaintiff and Mohd. Abba Sait and if the debt obtained by Mohd. Abba Sait under Ex. P-12 in his individual capacity and for himself, there was no need to include the two items of the properties mentioned in Ex. D-2 allotted to the share of the plaintiff in Ex. P-12 and for the plaintiff to join Mohd. Abba Sait in execution of Ex. P-12. The argument appears to be attractive at its first flush. But on a deeper consideration of the evidence, it appears to be very facile and weak. In the first instance, the possibility of S. Channaiah having insisted the two properties allotted to the share of plaintiff under Ex. D-2 being included in the hypothecation deed as a security for the repayment of loan advanced by him to Mohd. Abba Sait and the plaintiff to join Mohd. Abba Sait to execute the deed in view of the fact that plaintiff and Mohd. Abba Sait were carrying on business jointly, living jointly and acquiring properties in their names out of the family business profits, is again a reasonable possibility that cannot be excluded. There is again the possibility of S. Channaiah to ensure complete security for the repayment of the loan, having asked Mohd. Abba Sait to hypothecate the two properties of his brother and of having compelled Mohd. Abba Sait to persuade the plaintiff to join the execution of the hypothecation deed, which cannot be dismissed as unacceptable. The subsequent conduct of Mohd. Abba Sait and his legal representatives in the matter of discharge of hypothecation debt highlights the conclusion that the loan obtained under Ex. P-12 was by Mohd. Abba Sait for himself. As rightly pointed out by the High Court, clear evidence has come on record to show that Mohd. Abba Sait, during his lifetime, to discharge part of the hypothecation debt, sold his two sites in favour of S. Channaiah under Ex. P-7. To discharge the hypothecation debt, after his death, his legal representatives mortgaged a portion of Abba Manzil, Item No. 1, in favour of defendant No. 6 for Rs. 60,000/- on 24-4-1970. Though the plaintiff was a party to the suit filed by S. Channaiah and in the execution taken out by Boraiah Basaviah and Sons, he did not contribute a single pie to discharge the decretal amount. That belies his claim that Item No. 1, subsequent to 1914, was treated as a family property. It is also in evidence that the plaintiff himself built Shukoor Manzil in 1924 and sold it in 1935 and that he sold the site allotted to him under Ex. D-2 in 1935 which would also show that the inclusion of the said two properties in Ex. P-12 did not constitute an impediment to dispose of the same as owner. It is also clear from the evidence that ever since 24-6-1914, Item No. 1 was in possession of Mohd. Abba Sait till his lifetime and after his death, his legal representatives have continued to remain in possession of the same, letting out a portion of it. There is unimpeachable evidence placed on record to show that for a long period between 1925-26 and 1967-68, it was Mohd. Abba Sait who was paying taxes levied in respect of Item No. 1 to the Municipality.

18. In our opinion, the fact that the plaintiff and Mohd. Abba Sait even after the partition continued the business jointly, stayed together under the same roof for some time or the other and acquired properties out of their business in the names of either of them, cannot render Ex. D-2 a sham document. We have, therefore, no option but to reach the inevitable conclusion that the plaintiff and his legal representatives have failed to establish that Ex. D-2 is a sham and nominal document and it was not acted upon.

19. As already noticed, the suit was contested by the respondents herein on the basis that there was a partition in the year 1914 itself between the brothers Sattar Abba Sait and Mohd. Abba Sait, that the partition was acted upon and Abba Manzil, Item No. 1, fell to the share of the defendant's father. The partition deed was executed in 1914. The suit was filed in 1972. Thus, the documents stood for 50 years till the suit was filed in 1972 and accepted by all the parties including the late plaintiff himself. Sattar Abba Sait, during the course of his evidence before the trial Court (page 29 of Vol. II of the appeal paper book), has accepted the partition deed of 1914 as well as the division of properties then. Shakoor Manzil, another property which fell to the share of the plaintiff was sold by him as belonging to him exclusively.

20. Learned counsel appearing for the appellants contended that the parties are governed by the provisions of Cutchi Menons Act. We are of the view that the issue as to whether Hindu Law or Mohammedan Law should be applied to the parties under suit is not really relevant and does not alter the situation because the partition had taken place in the year 1914 as between the brothers. The factum of partition and the deed of 1914 having been accepted, and in the absence of any evidence to destroy the validity of the partition deed the application of Hindu Law or Muslim Law would not alter the findings in the case. When the partition of 1914 has been accepted and acted upon by the brother for all these years and had brought about an equitable settlement of the distribution of the properties between them, the plaintiff/appellants cannot now come round and say that the document is sham and nominal. A reading of the plaint would show that the plaintiff had never asked for a share in 'Abba Manzil' during the lifetime of Mohd. Abba Sait, and the suit was filed only after the death of Mohd. Abba Sait in 1967, it is also admitted by the plaintiff that suit Item No. 1 was in possession of Mohd. Abba Sait during his lifetime. Subsequently, defendants are in possession of the same. The entire evidence on record shows that the parties have been in possession and occupation of their respective shares and properties allotted under the partition deed and have dealt with the same. The trial Court as well as the High Court have accepted the partition of 1914 for the cogent and convincing reasons recorded thereunder. The appellants have not shown any reason to interfere with the judgment of the High Court.

21. The High Court, on a careful and meticulous examination, has held that the appellant had failed to establish that he is the joint owner of Item No. 1 with Abba Sait and that he is entitled to half share in it. The above finding deserves affirmance and we, therefore, affirm the same.

During the pendency of the appeal, the appellant-Azeez Sait died on 28-12-2001 leaving behind his legal representatives who are as follows :

1.Zubeda Bai	wife	widow	75
2.Tasneem Bai	Daughter	married	52
3.Adil Sait	son	married	50
4.Shehnaz Bai	Daughter	married	47
5.Yasmeen Bai	Daughter	marrried	39
6.Shaheena Bai	Daughter	married	36
7.Tanveer Sait	Son	married	34

22. The death certificate issued on 4-4-2002 by the Mysore City Corporation was filed as an Annexure along with the application for substitution of legal representatives of late Azeez Sait. Civil Appeal came up for hearing on 6-8-2003. A representation was made on behalf of the appellant that appellant No. 1 expired and, therefore, time was sought for filing the application for bringing heirs of the deceased-appellant on record. By order dated 6-8-2003, this Court adjourned the matter for four weeks for the said purpose. Thereupon, the appellants filed the application for substitution on 8-9-2003 which again came up before this Court on 17-9-2003 for directions with office report. This Court on the said date passed the following order :

"Application for bringing on record the legal heirs of the deceased-appellant No. 1 is allowed.

At the request of the learned counsel for the appellants for filing vakalatnama on behalf of the legal representatives of deceased-appellant No.1, adjourned for two weeks."

23. At the time of hearing on 7-10-2003, learned counsel for the appellant submitted that he has entered appearance on behalf of all the legal representatives except Adil Sait who refused to engage him for arguing the appeal on his behalf. Therefore, fresh notice may be ordered to him. We are unable to countenance the said submission. A close scrutiny of the averment made in the application for substitution clearly shows that Adil Sait has knowledge of the pendency of the appeal. Paragraphs 5 to 8 of the application for substitution read thus:

"5. That the legal representatives were not aware of the case pending in Supreme Court. The case was fully handled and corresponded only by deceased-Mr. Azeez Sait. Later on when the old papers were searched the petitioners got the correspondence of lawyer and case pending in the Supreme Court.

6. That two of the daughters also reside abroad and they also were to be appreciated to prosecute the appeal and as such the delay is caused.

7. That the legal representatives were not aware of the procedure of this Hon'ble Court and there is some delay in filing the substitution application. And the same be condoned in the interest of justice.

8. That the legal representatives are very much interested in prosecuting the appeal. Hence, the legal representatives be brought on record and the appeal may be heard on merits."

24. The application for substitution was ordered by this Court on the basis of the averments made in the application and on the basis of the representation made by the counsel for the appellant on 17-9-2003. Therefore, we hold tht all the legal representatives mentioned in the application for substitution are aware of the proceedings and, therefore, it is up to them to engage or not to engage a counsel to argue the case to which they have knowledge. This apart, the estate of the deceased-appellant is also represented by all other legal representatives. It is the duty of the legal representatives who have knowledge about the pending proceedings in this Court to engage the counsel. When they fail in engaging the counsel in spite of the knowledge of the pendency of the appeal the said legal representative is responsible for his lapse. We, therefore, hold that this judgment of ours is binding on all parties to the proceedings including the seven legal representatives of Azeez Sait who died on 28-12-2001.

25. For the foregoing reasons, we have no hesitation to dismiss the appeal. Since the parties to this action are near relatives, we order no costs.

Appeal dismissed.