SUPREME COURT OF INDIA

Shahazada Bi and Others

Vs

Halimabi (Since Dead) By Her Lrs

Appeal (Civil). 5507 of 1999

(S. B. Sinha and S. H. Kapadia)

30/07/2004

JUDGMENT

S. H. KAPADIA, J.

This appeal by special leave is filed by the defendants against the judgment and order of the Karnataka High Court dated 31st August, 1998 passed in R.S.A. No. 76 of 1996 whereby the High Court allowed the second appeal and restored the judgment and decree of the trial Court decreeing the original suit filed by the respondents-plaintiffs for declaration of title to property described more particularly in schedule 'A' and for possession of seven rooms in possession of the defendants-appellants herein, which seven rooms form part of schedule 'A' and more particularly described as schedule 'B' to the plaint.

The short point which arises for consideration in this civil appeal is whether the suit for possession filed by the respondents-plaintiffs stood abated in its entirety as held by the Civil Judge at Kolar Gold Fields in Regular Appeal No. 13 of 1991 (hereinafter referred to for the sake of brevity as "the lower appellate Court").

The facts giving rise to this civil appeal are as follows:

Plaintiffs are the wife and children of Essanullah.

They inter alia filed suit no. 417 of 1979 in the court of Additional Munsiff at Kolar Gold Fields for declaration of title to schedule 'A' property and for possession of seven rooms in schedule 'A' more particularly described in schedule 'B' to the plaint. In the present matter, we are concerned with plaintiff's right to recover possession of the seven rooms. According to the plaintiffs, the property (schedule 'A') was a self acquired property of Essanullah who died on 8.1.1970, whereas according to the defendants herein the said property belonged to all the heirs of Moosa Saheb, the father of Essanullah, K.M. Ziauddin (defendant no.3) and K.M. Obeidulla (defendant no.4). In 1973, after the demise of Essanullah, defendant no.1 herein (daughter-in-law of Moosa Saheb) had instituted suit no. 49 of 1973 in the court of Subordinate Judge, Thirupathur, North Arcot district, Tamil Nadu for partition alleging that the property in question was not the self acquired property of Essanullah and that they belonged to all the heirs of Moosa Saheb. She was supported by defendants no.2 to 4. However, that suit was dismissed. It was held that the property in schedule 'A' including the seven rooms was self acquired property of Essanullah. The decree passed by the trial Court in suit no.49 of 1973 was confirmed in appeal. Consequently, the present suit was filed by the heirs of Essanullah for declaration of title to properties mentioned in schedule 'A' and for recovery of possession of the seven rooms more particularly described in schedule 'B' to the plaint.

In the present suit, defendant’s no.1 to 4 once again alleged that the suit properties belonged to all the heirs of Moosa Saheb and they denied that the suit property was self acquired property of Essanullah. They pleaded that Moosa Saheb had started business in tobacco. That Moosa Saheb died on 6.3.1948. On his demise, his heirs continued the business as family business. The business was run in the name and style of Moosa Tobacco House and after the death of Moosa, the tobacco business continued in the name and style of K.M. Essanullah & Company. It was pleaded in the written statement that all the heirs of Moosa Saheb were tenants-in-common. That they were the partners of the Essanullah & Company. In the written statement, it was pleaded that the suit property was bought out of the income earned by M/s Moosa Tobacco House and consequently, the suit property was the property of the heirs of Moosa Saheb as tenants-in-common and not exclusive property of the deceased Essanullah, from whom the plaintiffs claimed title. Alternatively, the defendants pleaded that they had perfected their title by adverse possession as they, as heirs of Moosa Saheb, have been in permissive possession of the seven rooms for more than 12 years.

They conceded that defendant no.4 had let out a portion to the 5th defendant in 1961 on rent. However, at the same time the defendants pleaded that all the heirs of Moosa Saheb had acquired a joint title in the property along with the plaintiffs; that the suit property was a part of a common estate and consequently defendants no.3 and 4 (sons of Moosa Saheb) were entitled 2/15th share; that defendants no.1 and 2 and Hamida Begum as heirs of Rahamatulla were also entitled to 2/15th share; and that similarly the plaintiffs as heirs of Essanullah were entitled to 2/15th share in the suit property. Therefore, it was urged that the plaintiffs had no exclusive title to the suit property or to any portion thereof except to the extent of 2/15th share along with other heirs of Moosa Saheb.

On above pleadings, the trial Court framed certain issues. Two main issues framed by the trial court were whether the suit property was the self acquired property of Essanullah; and whether the defendants had perfected their title by adverse possession over the suit property? During the pendency of the suit, defendant no. 4 died on 8.5.1987. At the request of the plaintiffs, time was granted repeatedly to bring the legal representatives of the 4th defendant on record. The plaintiffs

failed to take steps, therefore, on 1.8.1987, the trial Court recorded that as the steps to bring the LRs of defendant no.4 on record have not been taken, the suit against defendant no.4 alone shall stand abated. As stated above, in the present case, the only point for determination is whether the High Court was right in coming to the conclusion that the suit against defendant no.4 alone abated and that the entire suit did not abate?

However, to complete the chronology of the events, we may state that the trial Court came to the conclusion that the suit property was the self acquired property of Essanullah. In this connection, the trial Court placed reliance on the judgment and decree passed in the earlier suit no.49 of 1973, which decree was passed by the Subordinate Judge, Thirupathur, North Arcot district, Tamil Nadu, and which decree was affirmed by the appellate Court. The trial Court dismissed the claim of the defendants herein based on adverse possession. Consequently, the trial Court decreed the suit filed by the plaintiffs in the present case for recovery of seven rooms more particularly described in schedule 'B' to the plaint. At this stage, it may be stated that the decree of the trial Court for possession of seven rooms is based on the map (Ex.P8) showing the entire property in schedule 'A' and the seven rooms mentioned in schedule 'B' in possession of each of the defendants. The trial Court further found that the deceased defendant no.4 admittedly had let out the room in his possession to defendant no.5, which indicated that defendant no.4 was occupying a separate room out of seven rooms. The trial Court further found that each of the four defendants had asserted their rights in respect of the seven rooms as tenants-in-common and they had asserted that they were in adverse possession having perfected their title to each of the seven rooms. In the circumstances, the trial Court held that on the demise of defendant no.4 and on failure of the plaintiffs to bring on record the heirs of defendant no.4, the entire suit did not abate. The trial Court, therefore, decreed the suit against defendants' no.1 to 3 and dismissed the suit against defendant no.4.

Being aggrieved by the decree passed by the trial Court, defendant's no.1 to 3 preferred an appeal to the Civil Judge at Kolar Gold Fields being R.A. No.13 of 1991. It was held in appeal that the plaintiffs had sought for a decree jointly against defendants no.1 to 4; that the plaintiffs have not sought for decree against a particular defendant in respect of a particular portion of the property; that the plaintiffs have not stated in their plaint as to in what capacity defendants no.1 to 4 were in possession of the seven rooms; that the plaintiffs have merely averred that they were in possession of one portion of the building and that the defendants were in occupation of the other portion of the building and, therefore, the plaintiffs had sought for a joint decree against all the defendants and consequently on the demise of defendant no.4 and on the plaintiffs' failing to take steps to bring the LRs of defendant no.4 on record, the entire suit stood abated. The lower appellate Court further held that even though the plaintiffs had sought relief against all the defendants jointly and severally, the trial Court had proceeded to pass judgment and decree only against defendant's no.1 to 3. In this connection, the lower appellate Court further observed that the plaintiffs were not entitled to recover possession of the seven rooms from defendant's no.1 to 3 alone as there was no evidence adduced by the plaintiffs as to the portion/rooms in possession of defendants no.1 to 3.

That except for Ex.P8 showing each room to be in possession of the said defendants, no evidence has been led by the plaintiffs to show as to which room was exactly in possession of defendants no.1, 2 and 3. That the relief sought for against the defendants was joint and inseparable and consequently the entire suit stood abated on the demise of defendant no.4 and on failure of the plaintiffs to bring the LRs of defendant no.4 on record.

It was held that the interest of the defendants was joint interest and, therefore, it was not possible to sue some of the defendants without the other. Consequently, the lower appellate Court dismissed the entire suit as having abated. The appeal was allowed and the judgment and decree dated 28.11.1990 passed by the trial Court in suit no.417 of 1979 was set aside.

Aggrieved by the judgment passed by the learned lower appellate Court dated 11.10.1995 in R.A. No.13 of 1991, the plaintiffs preferred appeal under section 100 CPC to the High Court. At this stage, it may be mentioned that the High Court framed the following substantial question of law at the time of admission of the second appeal:

"Whether the dismissal by the first appellate Court on the ground that the LRs of defendant no.4 were not brought on record was correct in view of the dictum in 1972 (1) My. L.J. 656, 1974 (2) KLR 123, AIR 1964 SC 234; and 1973 (2) My. L.J. 395?" *

The High Court came to the conclusion that in the present case, the facts were not in dispute and in the light of the above judgments as each of the defendants was in separate independent possession of each of the rooms, the reliefs prayed for were divisible and the decree was enforceable separately against each of the defendants. Accordingly, the second appeal was allowed. The High Court restored the decree of the trial Court after setting aside the judgment of the lower appellate Court. The High Court also remitted the matter to the lower appellate Court as an application was made by the plaintiffs to bring the LRs of defendant no.4 on record. The lower appellate Court has been directed to deal with the rights of defendant no.4 alone as the decree has been made against other defendants no.1 to 3. Hence, this civil appeal.

We do not find any merit in this civil appeal. As stated above, the plaintiffs instituted the suit inter alia for recovery of possession of seven rooms more particularly described in schedule 'B' to the plaint. Schedule 'B' gave detailed description of the suit property. Each of the seven rooms has been marked on the sketch tendered in evidence as B1 to B7. In the plaint, the original plaintiffs separately mentioned the rooms in possession of each of the defendants vide paragraph no.5. They gave a separate schedule to the plaint, which described the rooms in possession of each of the above defendants. Schedule 'B' also gave the dimension of each room. Further, plaintiffs sought possession of each of the rooms separately from each of the defendants vide paragraph no.11 read with schedule 'B' to the plaint. In the evidence, plaintiffs produced and proved the map (Ex.P8) based on the description of the seven rooms which tallied with the description in schedule 'B'. Further, the defendants herein alleged that they were in possession of the seven rooms with consent of Essanullah. In the suit, the defendants further contended that they had perfected their title in respect of each of the seven rooms by adverse title. The most clinching fact was that defendant no.4 had died during the pendency of the suit. Defendant no.4 was in possession of a room leased out to defendant no.5 for rent. Taking into account the above circumstances, the trial Court was right in holding that the suit against defendant no.4 alone stood dismissed as abated. **The trial Court was, therefore, right in decreeing the suit of the plaintiffs as prayed for only against defendants no.1 to 3. Order 22 Rule 4 CPC lays down that where within the time limited by law, no application is made to implead the legal representatives of a deceased defendant, the suit shall abate as against a deceased defendant. This rule does not provide that by the omission to**

implead the legal representative of a defendant, the suit will abate as a whole. What was the interest of the deceased defendant in the case, whether he represented the entire interest or only a specific part is a fact that would depend on the circumstances of each case. If the interests of the co-defendants are separate, as in case of co-owners, the suit will abate only as regards the particular interest of the deceased party. # [See: Masilamani Nadar v. Kuttiamma & Ors. reported in 1960 (4) Kerala Law Journal 936]. In the case Sant Singh & Anr. v. Gulab Singh & Ors. reported in 1928 AIR(Lahore) 573], it has been held that under Order 22 Rule 4 (3) read with Order 22 Rule 11 CPC where no application is made to implead the legal representative of the deceased respondent, the appeal shall abate as against the deceased respondent. That, so far as the statute is concerned, the appeal abates only qua the deceased respondent, but the question whether the partial abatement leads to an abatement of the appeal in its entirety depends upon general principles. If the case is of such a nature that the absence of the legal representative of the deceased respondent prevents the Court from hearing the appeal as against the other respondents, then the appeal abates into. Otherwise, the abatement takes place only in respect of the interest of the respondent who has died. The test often adopted in such cases is whether in the event of the appeal being allowed as against the remaining respondents there would or would not be two contradictory decrees in the same suit with respect to the same subject matter. The Court cannot be called upon to make two inconsistent decrees about the same property, and in order to avoid conflicting decrees the Court has no alternative but to dismiss the appeal as a whole. If, on the other hand, the success of the appeal would not lead to conflicting decrees, then there is no valid reason why the Court should not hear the appeal and adjudicate upon the dispute between the parties.

It was further held in the said judgment that a distinction must be made between the cases in which there is specification of shares or interests, and those in which there is no specification of interests. That in cases where there is a specification of share or interest, the appeal cannot abate as a whole. That in such cases, the appeal abates only in respect of the interest of the deceased respondent and not as a whole. To the same effect is the ratio of the judgment of this Court in the case of Sardar Amarjit Singh Kalra (Dead) by LRs. & Ors. v. Pramod Gupta (SMT) (Dead)by LRs. & Ors. reported in [5], in which it has been held that existence of a joint right as distinguished from tenancy-in-common alone is not the criteria but the joint character of the decree de hors relationship of the parties inter-se and the frame of the appeal will take colour from the nature of the decree challenged. Laws of procedure are meant to regulate effectively, assist and aid the object of doing substantial and real justice. A careful reading of Order 22 CPC would support the view that the said provisions were devised to ensure continuation and culmination in an effective adjudication. It was further observed that the mere fact that a khata was a joint khata was not relevant for deciding the question of abatement under Order 22, as long as each of the appellants had their own independent, distinct and separate shares in the property. It was held that wherever the plaintiffs are found to have distinct, separate and independent rights of their own, joined together for sake of convenience in a single suit, the decree passed by the Court is to be viewed in substance as the combination of several decrees in favour of one or the other party and not as the joint decree. The question as to whether the decree is joint and in-severable or joint and severable has to be decided, for the purposes of abatement with reference to the fact as to whether the decree passed in the proceedings vis-a-vis the remaining parties would suffer the vice of inconsistent decrees or conflicting decrees. A decree can be said to be inconsistent or contradictory with another decree only when two decrees are incapable of enforcement and that enforcement of one would negate the enforcement of the other.

In the present case, the 4th defendant was found by the trial Court to be in possession of one of

seven rooms. He had let it out on rent to defendant no.5. The trial Court on evidence found that Ex.P8 showed different rooms to be in possession of different defendants who claimed to be tenants-in-common in possession of each of the seven rooms. They claimed to have perfected their title by adverse possession to each of the seven rooms. There was no challenge to Ex.P8 in evidence. Nor was there any challenge to description of the suit property in schedule 'A' and schedule 'B'.

In the result, we do not find any merit in this civil appeal. Accordingly, we dismiss the civil appeal and uphold the judgment of the High Court. However, in the facts and circumstances of the case, there shall be no order as to costs.