

SUPREME COURT OF INDIA

P.Kunjukrishna Pillai

Vs.

D.Sreekantan Nair

C.A.No.4439 of 2008

(R.V.Raveendran and Lokeshwar Singh Panta JJ.)

14.07.2008

ORDER

1. Leave granted. Heard the learned counsel.

2. The first respondent married one Omana on 02.9.1985. The said Omana died issueless on 19.12.1987. Omana's father had gifted suit schedule item Nos.1 to 4, 6 and 7 to her, during her life time in 1966 and 1974. The first appellant, brother of Omana, had executed a deed of gift in her favour, in regard to the suit schedule item no.5 on 31.8.1985.

3. After the death of Omana, the first respondent filed a suit (OS No.52 of 1990) for a declaration that he is the absolute owner of the suit schedule properties and for possession. In the said suit, Omana's brother (first appellant), her four sisters and sister-in-law (second appellant) were impleaded as defendants 1 to 6. He contended that the parties being Hindu Nairs, were governed by section 17 of the Hindu Succession Act, 1956 in the matter of succession; and as per the said section, in the absence of children, as husband he alone was entitled to succeed to her assets.

4. The defence was that there was no valid marriage; that marriage was not consummated; and that first respondent (plaintiff) had deserted Omana immediately after the marriage. It was contended that as first Respondent was not the 'husband', he was not entitled to succeed to her assets.

“Alternatively, it was contended that even if first respondent was the husband, the succession was governed by section 15(2)(a) of the *Hindu Succession Act, 1956* (‘Act’ for short) as the suit properties were inherited from her father.”

5. The trial court decreed the suit holding that section 17 of the Act will apply. The contention of defendants that section 15(2)(a) will apply was rejected as none of the suit properties were inherited by deceased Omana from her parents. The said judgment dated 10.4.1995 was challenged by the appellants herein (brother and sister-in-law of Omana) in AS No.41 of 1996 before the High Court of Kerala. In the said appeal, the appellants filed an

application under Order 6 Rule 17 CPC for amendment of their written statement and another application under Order 41 Rule 27 CPC for additional evidence. By the amendment application the appellants wanted to plead that the gift of suit schedule item No. 5 made by first appellant in favour of his sister Omana was neither accepted by her nor acted upon by the parties, and that the first appellant had continued in possession as owner and has been paying the taxes and, therefore, the gift was null and void and had not come into effect. The High Court held that as the application for amendment was not filed before the trial was commenced, and as there was a delay of about six years, the application deserved to be rejected. It also rejected the application under Order 41 Rule 27 CPC as it was not the case of the appellant that the documents had come to his knowledge only after trial had commenced. It also dismissed the appeal confirming the findings and decision of the trial court. The said judgment is challenged in this appeal by special leave.

6. At the outset, we find that in so far as suit schedule item nos. 1 to 4, 6 and 7 are concerned, no ground is made out for interfering with the judgment of the trial court as confirmed by the High Court. In fact, learned counsel for Appellants fairly submitted that the attack is only with reference to suit schedule item no.5 in regard to which first appellant (first defendant) had executed the gift deed.

7. We, however, find that the High Court ought to have allowed the applications under Order 6 Rule 17 and Order 41 Rule 27 CPC. While it is true that the amendment application was not filed before the trial commenced, that by itself cannot be a ground for rejecting the application.

“The first defendant was not attempting to put forth any ground inconsistent with what was stated in the written statement. He was only attempting to introduce an additional ground in so far as suit schedule item no.5 is concerned. On the facts and circumstances of this case, we are satisfied that the said amendment application requires to be allowed, and, as a consequence, application under Order 41 Rule 27 for additional evidence has to be allowed.”

8. We accordingly allow this appeal as follows:

“(i) The judgments and decrees of the trial court and the High Court are upheld in regard to suit schedule items 1, 2, 3, 4, 6 and 7 (which were gifted by Omana's father in her favour).

(ii) Applications under Order 6 Rule 17 and Order 41 Rule 27 CPC are allowed. The judgments and decrees of the trial court and the High Court, in so far as suit schedule item no.5, are set aside and the matter is remitted to the trial court to give an opportunity to the parties to file amended pleadings and for the court to frame additional issues and take additional evidence in so far as suit schedule item no.5 and decide the matter in accordance with law.

(iii) Parties to bear their respective costs.”