SUPREME COURT OF INDIA

Narendra Kante

Vs.

Anuradha Kante

C.A.No.8290 of 2009

(Altamas Kabir and Cyriac Joseph JJ.)

15.12.2009

JUDGEMENT

Altamas Kabir, J.

1. Leave granted.

2. This appeal is directed against the judgment and order dated 13th October, 2008, passed by the Gwalior Bench of the Madhya Pradesh High Court dismissing Miscellaneous Appeal No.478 of 2007 filed by the appellant herein. The said 2 Miscellaneous Appeal had been preferred by the appellant against the order dated 14th February, 2007, passed by 5th Additional District Judge, Gwalior, in Civil Suit No.08A of 2006 filed by the appellant rejecting the appellant's application under Order 39 Rules 1 and 2 of the Code of Civil Procedure.

3. The appellant herein had filed the above- mentioned suit for declaration and permanent injunction and also mandatory injunction in respect of the suit property situated at Nadigate Jayendra Ganj, Lashkar, Gwalior, bearing Survey No.37/903 on the ground that the suit property was the ancestral property of his father, Bapu Saheb Kante, who had died intestate on 13th May, 1976. The application for ad-interim injunction had been filed in the suit which was rejected by the Trial Court on the ground that a partition had been effected between the legal heirs of Bapu Saheb Kante. It was also 3 held that a Family Settlement had been effected between the heirs of Bapu Saheb Kante, whereby Smt. Putli Bai and Surendra Kante, the widow and son of Bapu Saheb Kante, acquired a 50% share of House No.95/21. The Respondent Nos.1 and 2 herein are the widow and daughter of late Surendra Kante, and after his death their names were recorded in the Municipal records.

4. At this juncture it may be pertinent to mention that Bapu Saheb Kante is said to have had two wives, Smt. Putli Bai and the mother of Jai Singh Rao. The appellant herein is one of the sons of Bapu Saheb Kante through his wife, Smt. Putli Bai. When, after the death of Bapu Saheb Kante a son by his second wife, Jai Singh Rao, came to claim a share in his estate, a family settlement was arrived at by which the properties of Bapu Saheb Kante were divided

amongst the heirs by a Family Arrangement dated 8th February, 1967, by metes and 4 bounds. Under the said arrangement, Jai Singh Rao was allowed to retain possession of plot No.25/528 and after his death on 15th June, 1971, his wife and children was allowed to live in the said premises. However, since the concession granted to them was misused, Surendra Kante filed a suit against them for possession in respect of the property in dispute and the same was partly decreed on 14th September, 1993.

5. First Appeal No.76 of 1993 was filed by the legal heirs of Jai Singh Rao, wherein it was sought to be asserted that no partition had at all been effected in respect of the properties of late Bapu Saheb Kante and that the alleged document of partition could not be acted upon since the same had not been registered and was not, therefore, admissible in evidence. In the First Appeal it was held that there was a previous oral partition which was reduced into writing later on, on 8th 5 February, 1967, which could in fact be said to be a Memorandum of Partition in the eyes of law. It was observed that while a document of partition does require registration, the Memorandum of Partition subsequently executed after an oral partition entered into on the basis of a mutual agreement could not be said to be inadmissible on account of non-registration, since the same did not require registration within the meaning of Section 17 of the *Registration Act, 1908*.

6. The High Court accepted the contention that a partition had been effected between the heirs of Bapu Saheb Kante and that a document had been executed in that regard on 8th February, 1967, and that it was not open to the defendants, as well as to the predecessor-in-title of Jai Singh Rao, to wriggle out of the said agreement which had been admitted by the defendants. The First Appeal filed by Surendra Kante was allowed and the other appeal 6 filed by the predecessor-in-interest of Jai Singh Rao was dismissed. A Letters Patent Appeal was filed by Jai Singh Rao questioning the judgment and decree passed by the Trial Court, which was also dismissed by the Division Bench of the High Court upon holding that the partition deed dated 8th February, 1967, is a Memorandum of Partition pertaining to a previous oral partition.

7. In the present suit filed by the appellant herein an attempt has been made to make out a case that the alleged partition deed of 8th February, 1967, was executed only with the intention of giving a separate share to Jai Singh Rao and the rest of the properties remained joint as there was no partition by metes and bounds. Accordingly, the Respondents Nos.1 and 2 had no right to execute an agreement and Special Powers of Attorney in respect of the suit property in favour of the Defendant Nos.8 and 9 on 27th November, 2004, nor 7 did the Defendant Nos.8 and 9 have any right to execute a sale deed in favour of Defendant No.10 on 31st March, 2006. The appellant herein prayed for a decree of permanent injunction against the defendants not to deal with the property without a partition having been effected and also prayed for a mandatory injunction on the defendants to remove the wall which had been erected in the disputed property. The appellant herein also prayed for a grant of temporary injunction which was rejected by the Trial Court on 14th February, 2007, upon holding that a partition had been effected between the legal heirs of Bapu Saheb Kante and that the Family Settlement had been reduced into writing on 8th February, 1967.

8. Before the High Court proof of partition and the Family Settlement, which was also accepted by the appellant herein without any objection, were produced, as was the decision of the High Court in 8 First Appeal No.9 of 1994 in which the learned Single Judge had held that the documents of 8th February, 1967, had been held to be a Family Settlement for which no registration was required under Section 17 of the Registration Act, 1908.

> "It was also urged that since the disputed property had come to the share of Surendra Kante, and, thereafter, to the Respondents Nos.1 and 2, they had the right to transfer their share in favour of the transferees and that the defendant No.10 was a bona fide purchaser for value. It was also pointed out that the decision of the learned Single Judge had been upheld by the Division Bench."

9. The High Court in the Miscellaneous Appeal observed that the matter of grant of temporary injunction had been considered in detail by the Trial Court which had exercised its jurisdiction in refusing to grant temporary injunction to the appellants. It also observed that in case 9 injunction was granted, it would be the defendants who would suffer irreparable loss and injury. It was observed that the defendant No.10, the transferee from Respondents/defendant Nos.1 and 2, had acquired a right to the suit property. He was, therefore, allowed to carry out construction activities over the disputed land, but was restrained from alienating or transferring the property in question or from creating any third party rights during the pendency of the civil suit.

The Trial Court was, however, directed to decide the suit expeditiously and to dispose of the same within six months from the date of appearance of the parties before the Trial Court.

10. Questioning the aforesaid decision of the High Court, Mr. Vivek Kumar Tankha, learned Senior Advocate, submitted that the High Court had erred in accepting the stand taken on behalf of the defendants/respondents herein that a valid 10 partition had taken place by metes and bounds, on account whereof the Respondents/defendant Nos.1 and 2, as the heirs of Surendra Kante, had acquired title to his share in the suit property and were, therefore, competent to dispose of the same in favour of Defendant No.10. Mr. Tankha urged that a partition of joint family property could be effected only by metes and bounds and by delivery of actual possession. In the absence of the same, it could not be contended that a partition had, in fact, been effected between the co-sharers. Mr. Tankha urged that both the Trial Court, as well as the High Court, had erred in pre-supposing a partition between the parties simply on the basis of the Deed of Family Settlement executed on 8th February, 1967. It was submitted that in the absence of evidence of partition by metes and bounds, the learned Courts below had erred in refusing to grant ad-interim injunction as prayed for by the appellant since once the portion of the 11 property allegedly transferred in favour of Respondent No.9 was permitted to be developed, the very object of the suit would stand frustrated.

11. Apart from the above, Mr. Tankha urged that the learned Courts below had erred in acting upon the Deed of Family Settlement executed on 8th February, 1967, which, in fact, was a Deed of Partition and could not have been acted upon without being executed by all

the co-sharers and without being registered as provided for under Section 17 of the Registration Act, 1908. Mr. Tankha submitted that if the Deed of Family Settlement was to be acted upon, as has been done by the Courts below, it must also be held that partition had been effected thereby and, therefore, the same required registration. In the absence thereof, the Courts had wrongly placed reliance on the same in refusing to allow the appellant's prayer for grant of temporary injunction pending the hearing of the 12 suit. In support of his aforesaid submissions, Mr. Tankha referred to and relied upon the decision of this Court in *M.N. Aryamurthy vs. M.D. Subbaraya Setty (dead) through Lrs.*[1] wherein in the facts of the case it was held by this Court that under the Hindu Law if a family arrangement is not accepted unanimously, the Family Settlement has to fail as a binding agreement.

12. Mr. Tankha urged that there could be little doubt that in the facts of this case, the balance of convenience and inconvenience lay in favour of grant of temporary injunction during the pendency of the suit, as prayed for by the appellant herein as otherwise the appellants would suffer irreparable loss and injury.

13. Mr. Anoop G. Chaudhary, learned Senior Advocate, appearing for the Respondent No.6, while supporting Mr. Tankha's submissions, reiterated that the Deed of Family Settlement had not been 13 acted upon as would be evident from the Deed of Settlement itself. It would be clear therefrom that one of the co-sharers, Sau. Pratibha, who was shown as the eighth executant of the Deed of Settlement dated 8th February, 1967, had, in fact, not signed the said document. She was not also made a party in the First Appeal, although, admittedly she was one of the daughters of Bapu Saheb Kante through his first wife.

14. On the other hand, Mr. Ranjit Kumar, learned Senior Advocate, appearing for the Respondent Nos.1, 2, 8, 9 and 10, reiterated that the family settlement of 8th February, 1967, had been duly acted upon, as would be evident from the sale deeds executed by Narendra Kante, which have been exhibited by Narendra Kante in the suit pertaining to the suit property. Mr. Ranjit Kumar also referred to a copy of the agreement made Annexure P-1 to the Special Leave Petition, which is an 14 agreement alleged to have been executed by Udai Kante, Narendra Kante and Surendra Kante in favour of one Ram Bharose Lal Aggarwal regarding Municipal House No.15/642, known as "Kante Saheb Ka Bara". Reference was also made to a suit, being Case No.32A of 1991, filed by Ram Bharose Lal Aggarwal in the Court of Third Additional District Judge, Gwalior, for specific performance of the agreement dated 8th February, 1967.

15. Similarly, several other documents were also referred to by Mr. Ranjit Kumar, which were also executed during the hearing of the suit, in order to establish the fact that the parties, including the present appellant, had acted in terms of the said Deed of Settlement and had dealt with the properties which had fallen to their respective shares.

16. Mr. Ranjit Kumar submitted that as far as the second question raised on behalf of the appellant 15 was concerned, it was well-settled that a Deed of Family Settlement which was reduced into writing was not required to be registered under Section 17 of the Registration Act, 1908. Learned counsel submitted that when an oral settlement had been arrived at and

acted upon and a subsequent document was prepared only for the purpose of recording such settlement, the provisions of Section 17 of the Registration Act were not attracted, since except for recording a settlement, no actual transfer takes place by virtue of such document.

17. In support of his aforesaid submission, Mr. Ranjit Kumar firstly relied on the decision of the Three Judge Bench in *Kale vs. Dy. Director of Consolidation*[2] in which the question of registration of a family arrangement had fallen for consideration. Their Lordships held that a family arrangement may be even oral in which case no registration is necessary.

16 Registration would be necessary only if the terms of the family arrangement are reduced into writing but there also a distinction should be made between a document containing the terms and recitals of a family arrangement made under the document and a mere Memorandum prepared after the family arrangement had already been made, either for the purpose of recording or for information of the Court for making necessary mutation. In such a case, the Memorandum itself does not create or extinguish any right in the immovable properties and, therefore, neither does it fall within the mischief of Section 17(2) of the Registration Act nor is it compulsorily registrable. Their Lordships went on further to conclude that a document, which was no more than a memorandum of what had been agreed to, did not require registration.

18. While holding as above, Their Lordships also indicated that even if a Family Arrangement, which required registration was not registered, it would operate as a complete estoppel against the parties, which had taken advantage thereof.

19. Learned counsel urged that as had been held by this Court in *Mandali Ranganna vs. T. Ramachandra*[3] while considering an application for grant of injunction, the Court has not only to take into consideration the basic elements regarding existence of a prima face case, balance of convenience and irreparable injury, it has also to take into consideration the conduct of the parties since grant of injunction is an equitable relief. It was observed that a person who had kept quiet for a long time and allowed another to deal with the property exclusively, ordinarily would not be entitled to an order of injunction. Mr. Ranjit Kumar also referred to the recent decision of this 18 Court in *Kishorsinh Ratansinh Jadeja vs. Maruti Corpn. & Ors.*[4] in which the observation made in Mandali Ranganna's case (supra) was referred to with approval.

20. From the submissions made on behalf of the respective parties and the materials on record, we have to see whether the Courts below, including the High Court, were justified in refusing the appellant's prayer for grant of interim orders pending the hearing of the suit. Though the Deed of Family Settlement has been heavily relied upon by the Courts below and the Respondents herein, it will have to be considered whether reliance could have been placed on the same since the same was not registered, though it sought to apportion the shares of the respective co-sharers. It has also to be seen whether the document could at all be relied upon since all the co-sharers were not signatories thereto.

21. As far as the first point is concerned, since the same is a question of fact and has, on a prima facie basis, been accepted by the Courts below, we are not inclined to interfere with the prima facie view taken that an oral partition had been effected which had been subsequently reduced into writing as a Memorandum and not as an actual Deed of Partition. Of course, these observations are made only for the purpose of disposal of the Special Leave Petition and not for disposal of the suit itself.

22. As far as the second question is concerned, a Deed of Family Settlement seeking to partition joint family properties cannot be relied upon unless signed by all the co-sharers. In the instant case, admittedly, the Respondent No.8, Sau. Pratibha, was not a signatory to the Deed of Settlement dated 8th February, 1967, although, she is the daughter of Bapu Saheb Kante by his first 20 wife. As was held in the case of M.N. Aryamurthy (supra), under the Hindu Law if a Family Arrangement is not accepted unanimously, it fails to become a binding precedent on the co-sharers. Both Mr. Vivek Tankha and Mr. Anoop G. Chaudhary, learned Senior Advocates, brought this point to our notice to indicate that all the co-sharers had not consented to the Deed of Family Settlement which could not, therefore, be relied upon. The argument would have had force had it not been for the fact that acting upon the said Settlement, the appellants had also executed sale deeds in respect of the suit property. Having done so, it would not be open to the appellants to now contend that the Deed of Family Settlement was invalid.

23. Now, coming to the question of balance of convenience and inconvenience and irreparable loss and injury, it has to be kept in mind that the Respondent No.10 has already acquired rights in 21 respect of the share of the Respondent Nos.8 and 9 to the suit property and in the event an interim order is passed preventing development of the portion of the property acquired by it, it would suffer irreparable loss and injury since it would not be able to utilize the property till the suit is disposed of, which could take several years at the original stage, and, thereafter, several more years at the appellate stages. The appellant herein has been sufficiently protected by the order of the High Court impugned in this appeal. While the Respondent No.10 has been permitted to carry out construction activities over the disputed land, it has been restrained from alienating or transferring the property or from creating any third party right therein during the pendency of the suit.

24. As mentioned hereinabove, there is yet another question which goes against the case made out by 22 the appellant, viz., that after the Deed of Family Settlement, even the appellant has executed Conveyances in respect of portions of the suit property, thereby supporting the case of the respondent that the Deed of Family Settlement dated 8th February, 1976, had not only been accepted by the parties, but had also been acted upon.

25. In such circumstances, we are not inclined to interfere with the order passed by the High Court, but we are also concerned that the suit should not be delayed on one pretext or the other, once such interim order is granted.

26. We, accordingly, dispose of the appeal by directing the Trial Court to dispose of the pending suit within a year from the date of communication of this judgment. In the

meantime, the co-sharers to the suit property shall not create any third party rights or encumber or transfer their respective shares in the suit property in any 23 manner whatsoever and all transactions undertaken in respect thereof shall be subject to the final decision in the suit.

27. There will be no order as to costs.

[1]*(1972) 4 SCC 1*
[2]*(1976 (3) SCC 119*
[3]*(2008) 11 SCC 1*
[4]*(2009) 5 SCALE 229*