M. Nagendriah vs M. Ramachandraiah And Anr. on 23 September, 1969

Equivalent citations: 1969(1)UJ697(SC)

Bench: J.M. Shelat, C.A. Vaidialingam, I.D. Dua

JUDGMENT

Dua, J.

1. The appellant M. Nagendriah instituted in September, 1949, a suit against his two brothers M. Ramachandraiah and M. Shamiya for a declaration that he was entitled to half share in the properties described in the schedule attached to the plaint and that the debts mentioned in the said schedule were binding on the plaintiff and Ramachandraiah possession of the half share by partition was also claimed. According to the plaintiff M. Shamaiya had separated himself from his two brothers in September 1927 and it was on this averment that no relief was claimed against him. The plaintiff and Ramachandraiah were, however, stated to have continued joint, constituting a Hindu co-parcenary. Both of them, according to the plaint, had been doing business in silk and in the manufacture of drugget to and carpets. Rainachandraiah started acting in a manner prejudicial to the plaintiff's interest some-time in May, 1949 and the plaintiff thereupon demanded accounts of the business. The defendant, however, asserted his own right to the plaintiff's exclusion. It was on these pleadings that this suit was instituted.

2. In October, 1949 M. Ramachandraiah, respondent aforesaid instituted against the appellant Nagendriah a suit for declaration that he was absolute owner of the property mentioned as item No. 6 in the schedule attached to the plaint in the appellant's suit for partition and that the defendant should be directed to vacate the name. The claim was founded on the averments that Ramachandraiah was the absolute owner of the property in question and that Nagendriah had been permitted as a mere licensee to remain in possession thereof. Both these suits were tried together and the parties led one set of evidence and addressed common arguments in both the suits.

3. The trial court in a fairly detailed judgment came to the conclusion that Nagendriah and Ramachandraiah were not members of a joint Hindu family and that the properties mentioned in the schedule attached to the appellant's plaint were therefore not joint family properties. The appellant had accordingly no share in them. As Ramachandraiah had disclaimed any interest in the 1/3rd share in item No. 2 and in the entire properties at item Nos. 9 and 10 in the schedule the appellant was held to be the owner thereof. The Court upheld the plea of partition amongst the three brothers in October 1927 and the joint family was thus found to have disrupted. The partition was held binding on the plaintiff-appellant. In this connection, it may be pointed out, that the appellant's

position in regard to the partities on 1927 was that though he was a major at that time, he was not made a party thereto and he was wrongly impleaded as a minor represented though the guardianship of his mother. This plea was negatived by the trial Court which came to the conclusion that the appellant was not born on July 2, 1909 as alleged by him and that he was a minor during the partition proceedings. The plaintiff was also held disentitled to any share in items of property at Nos. 4 and 5 of the schedule. The appellant was thus held entitled only to 1/3rd share in item No. 2 and to the entire properties shown at item Nos. 9 and 10 of the schedule. In other respects the appellant's suit was dismissed.

4. In regard to the suit by Ramachandraiah, he was held entitled to item No. 6 of the schedule as owner thereof. Nagend-riah was found to be a mere licensee and his plea of adverse possession was also negatived. The plea of adverse possession, it may be pointed out, was only raised at the time of arguments without including it in the pleadings and without there being any issue thereon and therefore without the production of any evidence in support thereof. While directing Nagendtiah to. vacate item No. 6 the trial Court gave him an option either to retain the two-super structures existing thereon or to receive from Ramachandraiah the value thereof which was fixed at Rs. 3,500/-.

5. Feeling aggrieved by the decrees of the trial Court two appeals were preferred by the appellant in the High Court of Mysore. That Court in an equally detailed judgment agreed with the conclusion of the court below. But in regard to the superstructures on the property described as item No. 6, it was directed that Ramachandraiah could retain super-structures on payment of Rs. 4000/- to Nagendriah. The High Court felt that in view of the situation of the structures, it would not be conducive to the interests of either party to allow Nagendriah to retain possession of the structures and that it would be more appropriate to compensate him for their value.

6. It is in these circumstances that the present two appeals have been presented in this Court on certificate of fitness granted by the High Court. Before us Shri Gupta, learned counsel for the appellant, did not press the argument that there was no partition of the joint family property or that the partition is not binding on the appellant on the ground that he was major at that time and was wrongly impleaded as m'inor represented by his mother as his guardian. These conclusion being 'concurrent conclusions of fact were rightly not challenged before us. The only argument which the counsel tried to develop is that item Nos. 2, 4 and 5 were acquired by the plaintiff and the defendant out of the joint funds of the carpet business carried on by them in the property described as item No. 6 in the schedule attached to the appellant's plaint in the earlier suit. The counsel very fairly conceded that this was not his case as pleaded and also that this was not the case as developed in the trial Court or even in the High Court but he argued that this case being fully established on the facts admitted or found and the question being one of pure law, he was entitled to raise it in this Court. We do not think the counsel is right in his submission in any event on the evidence on the record, to which our attention was drawn, it is not possible for us to hold that there is any acquisition of property out of the joint funds. Indeed neither of the two Courts have so held. Apart from the fact that the silk and drugget business said to have been carried on in the property at item No. 6 has not been shown to be the joint business of the appellant and respondent Ratnachandraiah, there is no cogent evidence on the record to establish that this business was prosperous enough to spare

adequate funds for the purchase of the other properties claimed by the appellant. It is not denied that all these properties were purchased in the name of Ramachandraiah. Now if that is so, then the onus of proving that these purchase were ben ami was on the appellant and it was for him to show by convincing evidence that the source of money for these acquisitions was traceable to the joint funds from this business. Admittedly this has not been shown by any affirmative evidence, Shri Gupta, however, laid stress on the contention that the respondent had also not been shown to possess sufficient funds with which properties in question could be acquired. On this reasoning the counsel tried to induce us to infer that the properties must be held to be joint of the appellant and Ramachandraiah. This, in our opinion, is not a correct approach. Ostensible owner must be held to be a true owner in the absence of cogent evidence establishing that he is a mere benamidar, or js holding property for another person who claims to be the beneficial or real owner. The onus also does not change merely because the beneficial owner and the ostensible owner are brothers or they may be owning some other property jointly. The mere circumstance that the ostensible owner has not proved that he had himself paid the price or that he had sufficient funds to be able to do so, would also net be enough by itself to sustain the claim of the alleged beneficial owner. The initial onus is always on the party seeking to dislodge the ostensible title. We are not unmindful of the fact that in this country benami transactions are not uncommon and they are certainly not forwarded upon. We are equally conscious of the fact that the appellant and respondent Ramachandraiah are real brothers and not utter strangers. But at the same time it cannot be ignored, as just observed, that the initial onus must as a matter of law be on the party asserting benami nature of little. The amount and nature of evidence required to discharge the onus would of course depend on the facts and circumstances of each case. In some cases the onus may be discharged with very little evidence whereas in others it may require much stronger evidence to displace the ostensible title. In the case in hand the evidence to which our attention has been drawn does not seem to be strong enough to displace the concurrent conclusions of the courts below that the appellant is not joint owner of the properties in dispute along with the respondent.

7. In regard to item No. 6 the appellant tried to make out a case of irrevocable license in his favour on the basis of Section 60 of the Indian Easement Act. Here again here is an insurmountable hurdle in the appellant's way because a plea within the contemplation of Section 60 was not raised by the appellant in his written statement in the suit for his eviction and there was naturally no issue framed and no evidence led on the point. The plea of irrevocable licence was not raised or pressed at any stage. The appellant's counsel also conceded that there was no finding of any work of permanent character having been constructed on the site which is the subject matter of item No. 6. The decision in Basratan v. Shiedattaraj (1) cited by Shri Gupta is obviously not very helpful became the facts there were entirely different We have, therefore, no option but to agree with the concurrent conclusions of the courts below that Ramachandraiah is the sole and absolute owner of this item of property. We are further of the view that on the existing record the appellant cannot resist his eviction by relying on Section 60 of the Indian Easement Act.

8. As a last resort Mr. Gupta prayed that the case be remanded to the trial Court so that a proper inquiry be held into the true factual position According to him Ramachaniraiah's case was also not quite true and that the interest of justice would be better served if the case is tried denove. We are wholly unimpressed with this prayer. There is no justification for reopening the whole case, and

sending it back for retrial. It appears to us that after the death of the parties' father as far back as 1921 the respondent treated the appellant who is his younger brother with usual affection as the head of the family and brought him up and helped him to the fullest extent possible to properly settle down in life. It was out of this affectionate concern that he allowed the appellant to do his business in the property at item No. 6. The mortgage deed Ex. J on which considerable reliance was sought to be placed by Shri Gupta, in our opinion, supports the respondent more than the appellant. On the basis of this document this property cannot be held to be joint property. If the business was described in this document to be joint then the appellant could not justifiably institute the present suit for partition though it may have afforded him a possible ground for a suit for dissolution of partnership-an aspect on which we need say nothing in these proceedings.

9. In regard to the super structures on the property at item No. 6 we have not been persuaded by the appellant to take a view different from that of the High Court.

The appeals accordingly fail and are dismissed with costs.