Rameshwar Prasad And Ors. vs Satya Narain And Ors. on 5 December, 1952

Equivalent citations: AIR1954ALL115, AIR 1954 ALLAHABAD 115

Author: V. Bhargava

Bench: V. Bhargava

JUDGMENT

V. Bhargava, J.

1. This second appeal arises out of a suit for partition. The plaintiff respondent claimed a 10 annas share in the property in suit. The defendants appellants contended that the share of the plaintiff was 6 annas only. The trial Court held that on merits the evidence justified the finding that actually the share of the plaintiff was only 6 annas and not 10 annas. In the lower appellate Court, this finding of the trial Court was not challenged by the plaintiff in support of the decree which had been passed by the trial Court in his favour holding that his share was 10 annas. On facts, therefore, there is a concurrent finding by the two lower Courts that the plaintiff's share is actually six annas only.

Both the lower Courts, however, held that the defendants were not entitled to challenge the claim of the plaintiff for the 10 annas share on account of a decision by the Special Judge in proceedings under the Encumbered Estates Act. It appears that the plaintiff had applied under Section 4, Encumbered Estates Act on 27-10-1933, and in his written statement under Section 8 he showed a 10 annas share in this property. The whole 10 annas share was published in the notification under Section 11 and no objection under Section 11 was filed by the defendants within the time allowed. The objection was filed beyond time and was ultimately rejected on the ground of its being time barred.

Consequently the 10 annas share shown by the plaintiff in his written statement under Section 8 and notified under Section 11 was determined by the Special Judge to be liable to attachment, sale or mortgage in the debts of the plaintiff who was the landlord applicant. The plea was that this determination by the Special Judge operated as 'res judicata' or in any case barred any plea from the defendants that the share of the plaintiff was 6 annas and not 10 annas.

2. When this appeal came up for hearing a preliminary question arose as to whether this appeal was competent and could be heard by this Court when two persons who were parties in the lower Courts were not served and were exempted from the appeal. These two persons were Jagannath Singh and Dr. Shyam Manohar, who were originally impleaded as respondents 2 and 3 in the memorandum of

appeal. At one stage due to non-service on them, the Court called upon the defendants appellants to have service effected on these two respondents by publication and to take steps for that purpose within ten days. This order was passed on 20-3-1952. The order also directed that, in case steps were not taken within ten days, these two respondents would be discharged.

No steps were taken within the ten days allowed and, consequently, under the orders of the Deputy Registrar dated 7-4-1952 these two respondents were discharged. The Deputy Registrar merely carried out the order of the Court which had directed the discharge of the respondents on default occurring in taking steps within the time allowed. The question thus was whether in the absence of these two respondents the appeal was still competent. It has to be noticed that the defendants appellants in this appeal only challenge the preliminary decree under which the share of the plaintiff respondent has been declared to be 10 annas in the property in suit and desire that that share should be determined to be 6 annas. If this appeal is allowed, the order passed by this Court will benefit all persons who were defendants in, the suit and against whom partition was sought. In the suit, there was no question of determination of the shares of the defendants, 'inter se, in the property left after separating the plaintiff's share. If the share of the plaintiff is reduced from 10 annas to 6 annas, a 10 annas share instead of a 6 annas share will remain out of which all the defendants would get their shares and such a decree would, therefore, enure to the benefit of defendants Jaganuath Singh and Dr. Shyam Mano-har also. It can in no way prejudicially affect their rights in the, property in suit.

Consequently, under Order 41, Rule 33, Civil P. C., it is open to this Court to vary the decree in this appeal even in the absence of Jagannath Singh and Dr. Shyam Manohar in the manner asked for in this appeal. If the appeal succeeds on merits, the absence of Jagannath Singh and Dr. Shyam Manohar from the array of parties in the appeal will be immaterial and the appeal can be allowed so as to enure to their benefit also. This preliminary objection therefore fails.

3. On merits, the only question that has to be examined is whether, as a result of the proceedings under the Encumbered Estates Act, it must be held that the plaintiff's share in the property in suit is 10 annas and not 6 annas though on the evidence on the record, the finding of fact is that the actual share of the plaintiff was only 6 annas and not 10 annas. I cannot see how, if the share of the plaintiff in the property was only 6 annas, he can claim that he has acquired title to a further 4 annas as a result of the Encumbered Estates Act proceedings. The plaintiff came to Court claiming a share of 10 annas and asking for separate possession over that share by partition, and the burden was on the plaintiff to prove that he was owner of this 10 annas share.

The findings of the lower Courts, as I have said earlier, are that the plaintiff's share was only 6 annas. The mere fact that, in the Encumbered Estates Act proceedings, the claim of the plaintiff that a 10 annas share was liable to attachment, sale or mortgage in his debts cannot convey to him title to a further 4 annas share in the property which did not actually belong to him. Under Section 11, Encumbered Estates Act the Special Judge is not required to determine the rights of ownership in the property involved in the proceedings. All he is required to determine is whether that property is liable to attachment, sale or mortgage in the debts of the landlord applicant. That determination may not be open to challenge and, if the property is actually attached and sold, the proceedings of

attachment and sale may also not be open to challenge by the real owner but the mere determination by the Special Judge that property is liable to attachment, sale or mortgage cannot extinguish the ownership of the real owner and convey it to the applicant. This principle was clearly enunciated by a Pull Bench of this Court of which I was a member in -- 'Krishna Pal Singh v. Mt. Babban, AIR 1952 All 227 (A). The principle laid clown by the Full Bench ig fully applicable to the present case and consequently it must be held that, even though no objection had been taken by the defendants appellants in the proceedings under the Encumbered Estates Act, it is open to the Court in this case to hold that the plaintiff's share is only 6 annas and not 10 annas. On facts, the share having been found to be 6 annas, the preliminary decree should have granted only this share to the plaintiff. The appeal is consequently allowed with costs in all the Courts and the preliminary decree is varied inasmuch as the share of the plaintiff shall be 6 annas and not 10 annas in the property in suit.