
(1999) 03 KAR CK 0003
In the Karnataka High Court
Case No : R.P.A. 381 of 1983

Babu Mother Savavva Navelgund and Others

APPELLANT

Vs

Gopinath

RESPONDENT

Date of Decision : 25-03-1999

Acts Referred:

Citation : AIR 2000 Kar 27 : (1999) ILR (Kar) 3129

Hon'ble Judges : S.R. Bannurmah, J;G.C. Bharuka, J

Bench : Division Bench

Advocate : Jayakumar S. Patil, for the Appellant; Ajjappa, for Kaleemulla Sharieff, for the Respondent

Final Decision : Partly Allowed

Judgement

Bharuka, J.—This appeal is filed by defendants Nos. 1 and 8 to 15. They are aggrieved by the part of the impugned Judgment and decree of the Trial Court by which certain transactions of gift and sales effected by late Shivamurthappa, being the adoptive father of the plaintiff (Respondent herein) as illegal and void and has granted consequential reliefs of permanent injunction in respect of gifted properties and possession in respect of sold properties with future mesne profits from the date of the suit.

2. It is not in dispute that the suit properties were ancestral in nature in the hands of late Shivamurthappa which he got in 1941 as a consequence of family partition. He adopted the plaintiff on 1-11-1957 under a registered deed of adoption after observing the customary ceremonies. Subsequently on 3-4-1979 Shivamurthappa died. His wife had died much earlier to the date of adoption of the plaintiff. He had kept the mother of the first defendant as concubine in his house.

3. It also bears out from the evidence recorded during the course of the trial that the house property being item No. 1 of Schedule A to the plaint was gifted by Shivamurthappa under a registered deed dated 3-10-1968 jointly to defendant

No. 1 and one Prahlad, since dead. The wife and children of the said late Prahlad are defendants 2 to 7. Similarly Item No. 1 of Schedule B being agricultural lands were gifted by late Shivamurthappa under a registered deed dated 4-10-1968 to defendants 15 and 16. It is also a fact that Item Nos. B-3 to B-7 had been conveyed by sale deeds dated 19-6-70 to defendant Nos. 1, 8 and 9. So far as the conveyed lands at Item Nos. 5 and 6 of Schedule-B are concerned it appears that defendant No. 8 In turn had sold the same to defendant No. 12 under a sale deed dated 12-2-73 which In a family partition had subsequently fallen in the hands of defendant Nos. 13 and 14. So far as the Item No. 7 of Schedule-B is concerned defendant No. 8 had sold it to defendant No. 11.

4. The Trial Court at paragraph 55 of its impugned judgment has held the above referred two gifts as null and void by taking the view that Shivamurthappa as a kartha had no right to gift away the undivided family properties. Sri Jayakumar S. Patil, learned Counsel appearing for the appellants, has assailed the said declaration by contending that the Court-below has erred in declaring the entire gift as null and void because according to him such a declaration could have been only in respect of the share of the plaintiff. In our opinion the contention so raised is devoid of any merit. The legal aspect on this Court has now been finally settled by the Supreme Court in the case of Thamma Venkata Subbamma (Dead) by Lr Vs. Thamma Rattamma and Others, . In para 14 of the judgment it has been held that :

".....It has been already stated that an individual member of the Joint Hindu family has no definite share in the coparcenary property. By an alienation of his undivided interest in the coparcenary property, a coparcener cannot deprive the other coparceners of their right to the property. The object of this strict rule against alienation by way of gift is to maintain the jointness of ownership and possession of the coparcenary property. It is true that there is no specific textual authority prohibiting an alienation by gift and the law in this regard has developed gradually, but that is for the purpose of preventing a joint Hindu family from being disintegrated.

The rigor of this rule against alienation by gift has been to some extent relaxed by the Hindu Succession Act. 1956. Section 30 of the Act permits the disposition by way of Will of a male Hindu in a Mitakshara coparcenary property. The most significant fact which may be noticed in this connection is that while the Legislature was aware of the strict rule against alienation by way of gift, it only relaxed the rule in favour of disposition by a Will the Interest of a male Hindu in a Mitakshara coparcenary property. The Legislature did not, therefore, deliberately provide for any gift by a coparcener of his undivided interest in the coparcenary property either to a stranger or to another coparcener. Therefore, the personal law of the Hindus, governed by Mitakshara School of Hindu Law, is that a coparcener can dispose of his undivided interest in the coparcenary property by a Will, but he cannot make a gift of such interest."

5. In Article 258 of Mulla's Hindu Law, 16th Edition, it has been said that :

"258. Gift of undivided interest :-- According to the Mitakshara law as applied in all the States, no coparcener can dispose of his undivided interest in coparcenary property by gift. Such transaction being void altogether there is no estoppel or other kind of personal bar which precludes the donor from asserting his right to recover the transferred property. He may, however, make a gift of his interest with the consent of the other coparceners.

6. Again in Article 267 of the above text it has been said at page 309 that :

"267. Setting aside gifts.--A coparcener, according to the Mitakshara law, cannot make a gift of the coparcenary property, not even of his own interest in the property. Therefore, where such a gift is made, and it is objected to by the other coparceners, the Court will set aside the gift in its entirety. The gift is not valid even to the extent of the donor's interest in the property."

7. For the above reasons we affirm the view taken by the trial Court and hold that the above two gifts made by Sri Shivamurthappa after the adoption of the plaintiff were abolition void and null in its entirety. This being the position there was no occasion for seeking cancellation or setting aside of all the instruments of gifts attracting any period of limitation. The transactions were null and void since their inception and has to be ignored by the Court while entertaining the prayer for recovery of the possession of the properties covered by such instruments of gifts.

8. Now coming to the validity of the sales effected by late Shivamurthappa since admittedly the properties are covered by the sale deeds, were undivided in nature, it was for the alienees to show that the sales were effected for a legal necessity or the discharge of antecedent debts. In the case of Smt. Rani and Another Vs. Smt. Santa Bala Debnath and Others, it has been held as follows :

"Legal necessity to support the sale must however be established by the alienees. Sarala owned the land in dispute as a limited owner. She was competent to dispose of the whole estate in the property for legal necessity or benefit to the estate. In adjudging whether the sale conveys the whole estate, the actual pressure on the estate, the danger to averted, and the benefit to be conferred upon the estate in the particular insistence must be considered. Legal necessity does not mean actual compulsion : it means pressure upon the estate which in law may be regarded as serious and sufficient. The onus of proving legal necessity may be discharged by the alienee by proof of actual necessity or by proof that he made proper and bona fide enquiries about the existence of the necessity and that he did all that was reasonable to satisfy himself as to the existence of the necessity."

9. In the present case as could be found on an analysis of the evidence adduced by the defendants, they have miserably failed to discharge the above onus in order to save the transactions of the sales as a whole. The plaintiff (P.W. 1) had categorically stated in his evidence (para 7) that Shivamurthappa was getting an income of Rs. 2,000/- to Rs. 3,000/- per year as rent from his shops and Rs.

12,000/- to Rs. 13,000/- per annum from the lands. He has also specifically stated that Shivamurthappa was from a rich family and there was no need for him to sell his ancestral properties. This testimony of the plaintiff was not questioned by the defendant by disputing the same in the cross-examination. On the other hand, D.W. 1. who is none else than defendant No. 1, D.Ws. 3, 4 and 5 have merely made a vague statement that Shivamurthappa had sold the land for family necessity since he had suffered some loss in his arrack and toddy business. There is no evidence to show that loss, if any, suffered by Shivamurthappa was of an extent which was causing any pressure on his estate or immovable properties.

10. For these reasons we are constrained to hold that the defendants have miserably failed to prove the legal necessity for effecting the sales in question.

11. For the above said reasons we do not find any ground to interfere with the findings of the trial Court on this count but in our opinion the trial Court has erred in taking a view that for the absence of any proof of existence of legal necessity, the sales were bad in entirety.

12. In Article 268 of Mulla's Hindu Law, 16th Edition, it has been said that :

"268. Selling aside sales and mortgage-Bombay and Madras.-- (1) were a member of a Joint family governed by the Mitakshara law as administered in the Bombay and Madras States sells or mortgages more than his own interest in the joint family property, the alienation not being one for legal necessity or for payment by a father of an antecedent debt, the other members or persons to whom their interests in the property have passed, are entitled to have the alienation set aside to the extent of their own interest therein."

13. Admittedly the present case is from old Bombay area, therefore the impugned sales can be held to be bad and not binding on the plaintiff only to the extent of his half share in the property. Accordingly we set aside the judgment and decree of the Court below in relation to the declaration of nullity of the impugned sales in entirety. But at the same time we hold that the alienation covered by the sale deeds is null and void to the extent of half share of the plaintiff and he is entitled to recover the possession thereof.

14. Sri Jayakumar S. Patil, learned counsel for the appellants, has then submitted that the first defendant (appellant No. 1 herein) who is the son of the concubine of late Shivamurthappa, is entitled to half of the share in the house property which is the subject matter of the first gift dated 3-10-68 whereunder the house being item No. 1 of the Schedule-A had been gifted jointly to the first defendant and one Prahlad. In support of his submission he has relied on the judgment of the Supreme Court reported in the case of Gur Narain Das and Another Vs. Gur Tahal Das and Others, . In our opinion, in the present case, that question need not be gone into because that requires adducing of evidence in relation to the status of his mother as to whether she was merely a concubine being short of dasiputri, in respect of which the Supreme Court has laid down the

law. More over such an issue can be decided only in a suit which can be filed by the first defendant for seeking partition or possession by exerting his rights. Accordingly we hold that any observation made by the trial Court on this aspect will be treated as inconsequential to determine the rights and obligations of the parties based on any such pleas which has to be adjudicated and decided as and when raised in an appropriately constituted suit.

15. For the aforesaid reasons the appeal is allowed in part. It is clarified that the judgment and decree passed by the Court-below with regard to mesne profits will be applicable in respect of half share of the plaintiff out of the property conveyed by the above referred sale deeds only. Parties to bear their own costs.