

(1985) 02 KAR CK 0021

In the Karnataka High Court

Case No : Regular First Appeal No's. 87 and 90 of 1975

Ganapati Santaram Bhosale and Another

APPELLANT

Vs

Ramachandra Subbarao Kulkarni and Others

RESPONDENT

Date of Decision : 12-02-1985

Acts Referred:

Limitation Act, 1963 — Section 109, 60

Citation : AIR 1985 Kar 143 : (1985) ILR (Kar) 1115 : (1985) 2 KarLJ 104

Hon'ble Judges : M.P. Chandrakantaraj Urs, J;K. Jagannatha Shetty, J

Bench : Division Bench

Advocate : D.B. Desai, in RFA. 87 of 1975, A.V. Albal and Yashoda Rao, for the Appellant; P. Krishnappa and A.B. Patil, for the Respondent

Judgement

Chandrakantaraj Urs, J.—These two appeals are directed against the judgment and decree dated March 27, 1975 of the Prl. Civil Judge, Bijapur, in O.S. No. 75/1972 on his file.

2. RFA No. 87/75 has been preferred by defendants 5 and 6 and RFA No. 90/1975 has been preferred by defendant-4.

3. The facts leading to the present appeals may be briefly stated as follows: -

Plaint was presented by respondent- I before us, who was the plaintiff in the court below, claiming partition of plaint schedule "A, "B" and "C" properties and separate possession of his share as well as for declaration that alienation of properties in favour of appellants, and others, who had purchased the same from defendants 1 to 3, to be not binding on him. Plaint schedule "A" properties consisted of three survey numbers, i.e., Sy. Nos. 933, 934 and 699 of Torvi village in Bijapur Taluka measuring 22 acres 32 guntas, 18 acres 30 guntas and 17 acres 06 guntas respectively. The first of the lands mentioned was valued at Rs. 40, 000/-, the second at Rs.30, 000/- and the third at Rs.50, 000/-. Plaint "B" schedule property consisted of a house situated at Bijapur in Ward No. 1 measuring 110 sq. yards bearing CTS. No. 1728 and it was valued at Rs.20,

000/-. Similarly a house situated at Torvi village bearing VPC. No. 100 was also part of the property in plaint "B" schedule and valued at Rs.6, 000/-. Plaint "C" schedule properties consisted of land situated in two villages, i.e., Navaraspur and Torvi having Sy. Nos. 78. 891/1, 694/2B, 694/2A, 693/1 and 891/3 measuring in all about 52 or 53 acres.

4. Defendants 1 to 3 are none other than the brothers and mother of the plaintiff. It was alleged by the plaintiff that his father died in the year 1949 when he was still a baby and that his brothers were aged 9 and 6 respectively; that defendant-3, the mother was looking after the properties on behalf of the minor children; that the mother sold certain properties in or about the year 1956 after they had obtained possession of the lands from the tenants and thereafter defendants 1 and 2 who had attained majority between 1961 and 1964 sold the remaining properties; that the alienations made by them were not for legal necessity or for the benefit of the estate. The income from the lands and the income from the family business started by his brothers in 1961-62 was more than sufficient to meet the needs of the family and, therefore, the alienations were made not for any legal necessity and therefore not binding on the plaintiff. He therefore asked for his 1/4th share in the joint family properties and for a declaration that the said alienations were not binding on him.

Defendants 1 to 3 remained ex parte.

Defendants 7 and 8 are not before us.

5. As already noticed, only defendants 4, 5 and 6 have preferred these appeals. In the course of this judgment we will refer to the parties by the ranks assigned to them in the trial court.

6. Defendants resisted, by their separate statements, the claim of the plaintiff on the ground that they were bona fide purchasers for valuable consideration and that the alienations were made for legal necessity of the family and that the plaintiff, in the circumstances, was bound by the alienations. They, however, did not dispute the relationship of the plaintiff to defendants 1 to 3 and the nature of the properties alienated being joint Hindu family properties.

7. The defendants also resisted the suit claim as being barred by limitation.

8. On such pleadings, the trial court framed as many as 12 issues and we are only concerned with issues Nos. 1, 2, 6, 7, 10 and 11 in these appeals and they are as follows: -

(1) Whether defendant-4 proves that defendants 1 and 2 mortgaged the suit house property (property A shown in Schedule B) on 18-9-1961, on 10-5-1963 and on 18-5-1964 and finally defendants 1, 2 and 3 sold the said property to his mother for legal necessity and for the benefit of the estate?

(2) Whether defendant-4 proves that his mother made bona fide enquiry as regards the existence of family necessity and benefit of the estate when

defendants 1, 2 and 3 mortgaged and finally sold the said property.

(6) Whether defendants 5 and 6 prove that defendants 1 and 2 sold S.No. 934 on 13-8-1963 to defendant-5 and S.No. 933 on 21-6-1962 to defendant-6 for legal necessity and for the benefit of the family?

(7) Whether defendants 5 and 6 prove that they made bona fide enquiry as regards the existence of legal necessity for the benefit of family when defendants 1 and 2 sold the lands to them?

(10) Whether the suit is not tenable without a prayer to set aside the alienations?

(11) Whether the suit is barred by limitation?

9. The parties in the trial court led evidence oral and documentary in respect of their respective stands. Plaintiff examined himself as P. W. 1 and closed his case. Plaintiff got as many as 12 documents marked at Exs. P.1 to P. 12. The appellants who are before us have examined defendant-6 as D. W. 3 and an independent witness in support of the case of defendants 5 and 6 while defendant-4 examined himself in support of his case. Defendant-4 got marked as many as 4 documents Exs. D1 to D4, which were three deeds of mortgage and a final sale deed in respect of the same mortgaged property executed by defendants 1 to 3 in his favour between 1961 and 1964 while defendants 5 and 6 got marked as many as 17 documents, i.e., Exs. D. 5 to D. 21.

10 The evidence before the trial court which fell for its consideration may be stated briefly as follows:

Plaintiff as P. W. 1 spoke of his relationship to defendants 1 to 3; of the death of his father in 1949 and all the properties he left behind him. He also spoke of his having two sisters elder than himself. He spoke of the marriage performed in 1956 of his first sister and also of the second sister in 1963. He has spoken that his mother had alienated some properties after having obtained possession of the same from tenants in or about 1956 and onwards. He has spoken to the fact of his elder brothers alienating certain other properties between 1961 and 1964 without there being any legal necessity or compulsion for the benefit of the family. He has spoken about the approximate income that the family was deriving from the agricultural lands, which were under their own management. He has spoken about the business started by his brothers in running a stationary shop at Bijapur in 1961 or 1962. He has also spoken about the education of himself and his elder brother. He has produced one important document, i.e., the cumulative school record. That cumulative record of the school was marked as Ex. P. 5. It is from that document the age of the plaintiff has been determined as having been born on June 1, 1949. Plaintiff also spoke about the marriage of his second sister by name Pushpa. He, however, asserted that the expenses of the marriage were incurred by his other sister's husband and the marriage expenses could not have exceeded Rs.400/- or Rs.500/-. In the cross-examination he, however, admitted that in their community of Brahmins the practice was always

to give gift or dowry of Rs.3, 000/to Rs.4,000/-. Though the plaintiff was severely cross-examined, no serious contradictions or useful material has been elicited to destroy the plaint averments.

11. Now we need refer only to the evidence of D.W. 2, who was none other than defendant-6. He has spoken to the fact of defendant-5 being his younger brother. He has spoken to the purchase of S. No. 933 in 1962 for Rs.4,000/- under a registered sale deed, which was marked as Ex. D. 5 and it is dated June 21, 1962. He has also spoken about the adjoining land S. No. 934, the land that belonged to the family of the plaintiff which was purchased by his younger brother for Rs.2,000/- under a registered sale deed dated Aug. 13, 1963 as per Ex. D. 6. He has spoken to the fact that the land was sold for the education of the plaintiff and defendant-2. He has spoken to the death of plaintiff's father about 24 or 25 years back. He has spoken to the obsequies performed after the death of plaintiff's father at a place other than Bijapur and estimated the expenses at Rs. 1,000/-. He has spoken about the sale of the land at Navaraspur having been effected in order to meet the expenses of the family as well as the expenses of the obsequies. He has spoken about the business conducted by the defendants 1 and 2 at Bijapur. It is said that the shop was being managed by plaintiff's uncle by name Jagirdar. He has also stated that by the time he and his brothers purchased the lands mentioned, the family of the plaintiff had sold away all other lands which belonged to them. In cross-examination, information is elicited about the marriage performed of the first daughter in or about 1966. It is further elicited that the house at Bijapur was in the occupation of Subba Rao. Beyond that no other useful information was elicited in the cross-examination.

12. D.W. 3 was one Modinsab. He was examined by defendants 5 and 6 and he has spoken about the family of the plaintiff, which he knew well. He has spoken about his having known the plaintiff's father and that he died about 25 years prior to the date of his deposition before court, which was on Dec. 2, 1974. He has admitted that he was a tenant of certain lands under Subba Rao and was paying 4-5 bags of jowar as rent per year. He also stated that Subba Rao was getting about 20-25 bags of jowar per year from all his 7 lands. He has also stated that about 4 or 5 days prior to the sale of land in favour of defendant-6, defendants 1 to 3 had sent for him and offered the said land for sale, as they had no money to maintain themselves and for the education of the plaintiff and defendant-2. But he replied that he was not willing to purchase the same and he knew of a friend who would purchase the land. He also spoke of the sale of land to perform the marriage of the first daughter in the plaintiff's family. He has further spoken to the types of crops grown in the lands of Subba Rao, which included wheat on 4 acres, soja on 7 acres and cotton, etc. He also produced a copy of the wedding invitation, which was marked as Ex. D. 21 relating to the marriage of the first daughter of the plaintiff's family. He has asserted that at the time of the sale of lands in favour of defendants 5 and 6 there was no income from any of the lands to the family of the plaintiff when it was under their personal cultivation.

13. On the appreciation of the above evidence, the trial Court recorded a finding on all issues in favour of the plaintiff and held that the alienations in question in favour of defendants 4 to 6 of the building and the adjacent lands respectively were not for legal necessity or for the benefit of the estate and, therefore, not binding on the plaintiff. The court below also, on the undisputed facts, held that the plaintiff was entitled to 1/4th share in the joint family properties enumerated in the plaint schedules "A" and "B".

14. Aggrieved by the said judgment and decree defendants 5, 6 and 4 have preferred these appeals separately to the extent of their grievances.

15. The question, therefore, which falls for determination by us is whether the alienations in question is binding on the plaintiff.

16. Mr. Desai, learned counsel appearing for defendants 5 and 6 (appellants in RFA. 87/75), has contended before us that the court below erred- (i) in not rejecting the suit as barred by time (issue No. 11); (ii) in not dismissing the plaintiff's case as plaintiff could not maintain the suit unless he asked for setting aside of the sales in question and (iii) the suit ought to have been dismissed in so far as defendants 5 and 6 were concerned, as the sales were for legal necessity of the family and for the benefit of the estate.

17. We do not find merit in contentions (i) and (ii). Mr. Desai strenuously contended that Art. 60 of the Limitation Act was the Article which was attracted to the case of the plaintiff and that sale having been made by the de facto guardian of the minor's interest as (karta) and sale being for legal necessity the same could be challenged only within three years from the date of attaining majority by the minor and not thereafter. The suit having been admittedly filed on Nov. 28, 1972, the plaintiff was more than 21 years old as proved by himself and the suit was barred as provided under Art. 60 of the Limitation Act. The date of birth of the plaintiff and the presentation of the suit is not in dispute. What is in dispute is whether the sale is by a guardian of the property of a minor.

18. Mr. Krishnappa appearing for the plaintiff has, on the other hand, contended that the sales in favour of defendants 5 and 6 were sales of joint family property and the same being treated as minor's property would not arise and therefore question of applying the period of limitation prescribed under Art. 60 of the Limitation Act would also not arise. However, Sri Desai relied upon a decision of this Court in the case of Dodda Thimma Naika Vs. V. Lakshmaiah and Others, in which it was held that a de facto guardian is as much a guardian as a natural guardian and the powers of the de facto guardian also include the power to sell a minor's property for legal necessity and therefore Art. 44 (corresponding to Art. 60 of the present Limitation Act) 1908 would apply to set aside the sale by a de facto guardian. Undoubtedly, that decision was rendered by a learned single Judge of this Court following the decision of the Andhra Pradesh High Court, in the case of Kasturi Lakshmi Bayamma Vs. Sabnivi Venkoba Rao and Others, . The decision of the Andhra Pradesh High Court was approved by the learned

single Judge in preference to the decision per contra, rendered by the Travancore-Cochin High Court in the case of Thomman Parakkal v. Madhavan Arakaparambal AIR 1955 Trav Co 197. We have been taken through both the decisions rendered by this Court as well as the decision rendered by the Andhra Pradesh High Court. As a proposition of law we do not find anything strange in "the view taken by the learned single Judge" of this Court and the High Court of Andhra Pradesh. It is well settled law that guardian has power to make an alienation for the benefit of the minor or minor's estate but when guardian so alienates he is not alienating his property but the property which has vested in the minor. If that fact is borne in mind the alienation by karta or a guardian or a de facto guardian as claimed by the learned counsel will not be an alienation, of property belonging to minor but alienation, of joint family property in which the ward who is a minor has only an interest. There is, therefore, a difference in the alienation of joint family property by karta and alienation by guardian. If this distinction is borne in mind then on facts of the case the decision of the Andhra Pradesh High Court or this Court in Dodda Thimma Naika's case is not of any assistance to the case of defendants 5 and 6. The trial court has correctly held that the suit was within time having regard to the specific provision made, Art. 109 of the Limitation Act which concerns the alienations made of joint Hindu family properties. Therefore, we have necessarily to reject the first contention advanced for defendants 5 and 6.

19. The second contention that the suit should have failed for lack of specific relief in regard to the setting aside of the sales is also devoid of merit. It is now well settled that in a suit for partition by Hindu coparcener it is not necessary for him to seek the setting aside of the sale. It is sufficient if he asks for his share in the joint family properties and he be put in possession thereof and for a declaration that he is not bound by any alienations or interest of others created in such properties which, fall to his share:

20. The other aspect of the argument support of the second contention was that as the sale was by guardian of minor's interest there was need to seek a specific relief of having the sale set aside. We do not think that would be the correct understanding of the position in law. On the facts of this case, it is no doubt true, as evidenced by Exs. D. 5 and D. 6 that defendants 1 and 2 had represented themselves as guardians of the plaintiff and sold the properties. But in fact they were not the guardians under the Hindu Minority and Guardianship Act, 1956. Defendant-3 was alive and still is. She was not a party to the said transaction. She was the only natural guardian and she was not a party to the sale deeds and therefore Exs. D. 5 and D. 6 cannot be considered to have been the acts of a guardian. S. 6(A) of the said Act provides in the case of a boy or an unmarried girl the father and after him the mother is the guardian. Therefore, defendants 1 and 2 could not have represented themselves as guardians of the plaintiff as their mother was still alive and therefore sales under Exs. D. 5 and D. 6 cannot be construed by us as sales effected by the guardian of the minor. Therefore, we have no hesitation to reject the second contention also.

21. The third contention of legal necessity must Succeed on the evidence adduced by the alienees and not otherwise. It is now well settled that the burden of discharging the existence of a legal necessity found by the alienee after due and proper enquiry is on the alienee himself. The recital in the sale deeds when it is proximate in point of time to the matters in issue will not be of such assistance to the alienee. In the instant case what is provided as provocation for the sale is the education of plaintiff and defendant-2. That bare recital is not supported by any independent evidence by defendants 5 and 6. Defendant 6 has, in any way, not made any enquiries in regard to the expenses that were to be incurred for the education of the plaintiff. On the other hand plaintiff has spoken about his education having been free in Government Schools, and having stayed in a room at Bijapur; his having taken food in a lawyer's house for one time in a day while he had food from his relatives for the other time in the day. His cumulative records in the form of SSLC book clearly indicates that he went solely to government school and there was hardly any expenditure incurred for his education. In any event, what rightly convinced the trial court to reject the case of defendants 5 and 6 was the fact that the plaintiff had ceased to be a student having failed in the SSLC examination by the time Exs. D. 5 and D. 6 came into being. If this burden heavily cast by courts on the alienee is not duly and properly discharged then we cannot say defendants 5 and 6 are entitled to any relief in this Court. There is, in our opinion, a total failure to discharge this burden on the part of defendants 5 and 6. They have not discharged this initial burden or shown any pressure put on the estate. Therefore, we reject the third contention also.

22. This takes us to the contention urged in RFA No. 90/75. The contention of Mr. Albal persuasively relates to the pressure on the estate, i.e., the house at Bijapur bearing CTS. 1728. Learned counsel urged that the property was subjected to three successive mortgages. All of them were for the family necessity, and finally when the family was not in a position to redeem those mortgages found it prudent to sell the same for an adequate consideration. In our opinion, this contention is well founded, and must be accepted as correct.

23. The house property was first mortgaged to the mother of defendant-4 by defendants 1 to 3. Ex. D. 1 dated Sept. 18, 1961 was a mortgage deed for Rs. 2,000/-. Ex. D. 2 was the second mortgage of the same property, dated May 10, 1963 for Rs. 3,500/ and Ex. D. 3 the third mortgage in respect of the same property for Rs. 2,500/- was dated May 18, 1964. Under Ex. D. 1 the recitals are to the effect that the family needed money for the purpose of family business in stationery. Plaintiff has admitted that defendants 1 and 2 were running a stationery shop in 1962 and the income from the shop was utilised for the family necessity. It appears to us that the family did not progress well in the business and the business ultimately came to be closed.

24. Mr. Krishnappa, however, urged that it was not necessary for the family to mortgage the house property under Ex. D. I for Rs. 2,000/- when six months

earlier they had realised Rs.7,000/- on March 15, 1961 by alienating Sy. No. 699 in favour of defendant 7. It is true that Sy. No. 699 was alienated in favour of defendant 7 for Rs. 7,000/- in 1961 but there is no evidence to show that amount was sufficient to start and continue the stationery business commenced for the benefit of the family. It is relevant to remember that the family does not belong to business class. They were Kulkarnis. They took a venture in agriculture and business and appear to have failed in both. In the absence of any evidence regarding the capital utilised we are not in a position to accept the contention of Mr. Krishnappa that it was not necessary for the family to mortgage the house under Ex. D. 1. The recitals in Ex. D. 2 are to the effect that amount was required for the purpose of marriage of Pushpa, the second daughter in the family. It is not in dispute and in fact plaintiff has admitted that the second daughter's marriage was performed in the year 1963, Mortgage amount there under was just Rs. 3,500/-. Even according to the plaintiff there has been a custom in their community to give a gift or dowry of the value of Rs. 3,000/to Rs. 4,000/7, in addition to other necessary expenditures, which are incidental to any marriage. The mortgage for Rs. 3,500/-, in our opinion, cannot therefore be said to be unnecessary or unwarranted. It is the duty and responsibility of the manager of the family to perform the marriage of girls in the family.

25. The recitals under Ex. D. 3 indicate that the third mortgage was necessary for the family needs. This mortgage was perhaps found necessitated since by then the family had lost all the agricultural lands and also the only business in stationery.

26. It must be noted that all the three mortgages were executed in favour of the mother of defendant-4 who was in possession of the house in question. The mother of defendant-4 was in close contact with the family of plaintiff and therefore she had made adequate enquiry regarding the need for the successive mortgages. The house in question finally came to be sold under Ex. D. 4 dated Oct. 17, 1964 for Rs.9,000/- including the previous three mortgages amount of Rs.8,000. The balance amount of Rs.1,000/- was paid in cash on the date of registration. Plaintiff has admitted in his evidence that defendants 1 to 3 are good people and they have no vices and they could not repay the three mortgage loans raised under Exs. D. 1 to D. 3. Since admittedly defendants 1 to 3 could not redeem the mortgages they could not but sell the mortgaged property under Ex. D. 4 in view of the pressure on the estate and lack of any other source. The alienation under Ex. D. 4, therefore, cannot be considered as unjustified or for want of legal necessity. The trial court in our opinion was in error in this regard.

27. In the result, R.F.A. No. 87, of 1975 fails and is dismissed. R. F. A. No. 90 of 1975 is allowed. The judgment and decree of the court below in regard to item No. 1 of Schedule "B" of the plaint is reversed and the suit in regard to the said item stands dismissed. In all other respects the decree of the court below is kept undisturbed.

28. The parties to bear their own costs throughout.

29. Order accordingly.