
(1933) 12 BOM CK 0003
In the Bombay High Court
Case No : First Appeal No. 522 of 1928

Hanmantappa Ramappa Ilagar	Vs	APPELLANT
Dundappa Bin Fakirappa Huilgol		RESPONDENT

Date of Decision : 19-12-1933

Acts Referred:

Transfer of Property Act, 1882 — Section 6

Citation : AIR 1934 Bom 234 : (1934) 36 BOMLR 474

Hon'ble Judges : N.J. Wadia, J;Broomfield, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Broomfield, J.—This is an appeal from a decree dismissing the plaintiff's suit for a half share in two fields at Gadag, which were sold on June 24, 1913, by Dharmappa, defendant No. 10 in the suit, to defendant No. 1. The consideration for the sale was Rs. 5,000. These two fields formed part of the estate of Bhimappa (father of Dharmappa and of Ramaswami defendant No. 9), who died at the end of 1912 or early in 1913. On his death Dharmappa became the manager of the joint family, and between that time and the end of 1916 he disposed of all the family properties, so that now there is none left. Ramaswami the younger brother was a minor. He appears to have come of age in 1919, and on November 13, 1922, he sold his undivided half share in the two fields to the plaintiff, who filed the suit, from which this appeal arises, on June 9, 1925. The plaint was presented first in the Court of the Second Class Subordinate Judge but was returned on November 3, 1925, on the ground that the value of the suit exceeded the pecuniary jurisdiction of the Court and was re-presented in the First Class Subordinate Judge's Court on November 4, 1925.

2. The trial Court dismissed the suit holding that Bhimappa was heavily indebted at the time of his death and the suit lands were alienated for legal necessity. On that issue, which was the only one to which any importance was attached at the trial, the arguments of the learned advocate for plaintiff-appellant have derived

some adventitious support from the manner in which the learned trial Judge approached the case. He framed the issue correctly as follows: Do defendants Nos. 1 to 8 prove that the alienation of the suit properties evidenced by the sale-deed, Exh. 32, dated June 24, 1913, was either for legal necessity or for the benefit of the joint family of defendants Nos. 9 and 10. But in dealing with it he apparently overlooked the fact that the burden of proof was on the alienee. He has discussed the plaintiff's evidence first. He criticises him for not having produced better evidence as to the property and resources of Bhimappa and for not having shown that the subsequent alienations by Dharmappa were not justified. He even says that the plaintiff ought to have examined both Ramaswami and Dharmappa and allowed them to be cross-examined and he considers the failure to do this a great weakness in his case. But Ramaswami was a minor at the material time and Dharmappa the manager of the family ought obviously to have been examined on behalf of the alienee on whom the onus is to prove necessity for the sale. One might rather say that the defendants' omission to examine Dharmappa would have told against them had it not been for the fact that they appear to have done their best to procure his evidence. Dharmappa was summoned as a witness and was asked to produce certain documents to which I shall refer later. But it appears from the roznama that he was unable to attend on the date fixed because he had been injured in a motor accident. Another summons was asked for and granted, but Dharmappa was still suffering from the effects of the accident and further time of fifteen days was applied for. Why Dharmappa did not appear after that the record does not show, but at any rate defendant No. 1 had taken the trouble to have two summonses served upon him.

3. Apart from the question of the burden of proof, the effect of the evidence has not in some respects been quite fairly stated. The learned Judge says that the plaintiff has told "desperate untruths" about Bhimappa having property in Belgaum. But among Dharmappa's alienations, which have been proved by the production of the sale-deeds, six relate to various properties in Belgaum: see Exhs. 146, 148, 149, 150, 153 and 154 and although some of these appear to have been devised to Dharmappa under the will of San Tammappa, his grandfather's brother, the others apparently formed part of the joint family estate.

4. Then the plaintiff has alleged inter alia that Dharmappa was addicted to wine and women and that he kept a mistress and spent a lot of money on her. He has produced a photograph of Dharmappa posing with this woman. There is a small boy in the picture, the woman's brother Maruti, who is now grown up and has been examined as a witness, as has also an elder brother Shidram. They are Exhs. 184 and 163, and they depose that their sister who was a murli or deva dasi was kept by Dharmappa who used to stay in her house. The learned Judge, for what seem to me quite inadequate reasons, has taken the view that the photo is a fake and the witnesses worthless and he says that that being so "the main plank in the plaintiff's case is gone." Now it would not be necessary for

plaintiff to prove anything until defendant No. 1 has made out a good prima facie case to justify the alienation. It would not matter very much if this part of the plaintiff's case had failed. But in fact I do not agree that it has. I think the evidence is probably reliable enough, and though it may not prove much, and possibly relates to a period later than the alienation in suit, it does appear to show that Dharmappa was the sort of person who might be likely to squander the family property irrespective of there being any real necessity for it.

5. However, after making allowance for all this and looking at the case in a proper perspective, there is enough evidence, in my opinion, to warrant the finding that there was legal necessity for this sale. I think the learned Judge's remarks as to Bhimappa's financial status on the whole justified. It seems that in February, 1908, he had borrowed Rs. 1,000 from a Poona saokar and in March of that year he borrowed a further sum of Rs. 1,200 from the same man. This creditor filed a suit in 1909 and got a decree in December, 1910, for Rs. 1,492: see Exh. 88. In February, 1911, the move-able property belonging to the family was attached including the ornaments worn by Bhimappa's two wives. To satisfy this decree a sum of Rs. 1,800 was borrowed from one Shambhat on a promissory note, Exh. 92. This promissory note was executed by Dharmappa on behalf of his father and the family. It seems that at that time Bhimappa was in a weak state of mind and unable to manage his affairs. Moneys had also been borrowed from Waman Naik, a Belgaum money-lender, in the years 1906-08. The interest payable on this money was eighteen per cent, The creditor filed a suit in 1911 which was still pending at the time of the alienation of the suit property. The decree in the suit was not passed till afterwards, November, 1914, the amount being Rs. 9,000 plus Rs. 695 for costs. There were also other creditors. On January 8, 1912, Dharmappa sold certain property by the sale-deed, Exh. 146, to satisfy debts of Rs. 1,400 due to Chenmallappa, Rs. 520 to Ramchandra, and Rs. 2,080 to Shambhat. The property alienated to pay these debts appears to have been Dharmappa's self-acquired property. There were other debts amounting to Rs. 1,550 which were satisfied by the sale of other property by Exh. 136 dated January 31, 1912. It is true that these debts were satisfied and no longer outstanding at the material time. But the transactions are important as showing the position of the family and its lack of resources. These transactions, which have not been in any way impugned, negative the plaintiff's contention that the family was sufficiently well-to-do to pay its debts without the alienation of any property.

6. The suit sale-deed is Exh. 32 and, according to the recitals therein, the consideration money was required "for paying off the amount relating to toddy contract and for our family necessity". Defendant No. 2, who is the brother of defendant No. 1 and the manager of the joint family to which defendants Nos. 1 to 8 belong, has explained in his deposition what is meant by the reference to the toddy contract. He says that the business of the defendant's family is to farm liquor shops. They are in the business for many generations and that is the source of their livelihood. In 1913, according to him, Dharmappa purchased the

contract for the toddy shop at Gokak. The amount to be paid to Government was Rs. 8,000 in all. This was payable by instalments and at the date of the suit sale the first instalment of Rs. 2,300 was in arrears and had to be paid. As pointed out by Sir Dinshah Mulla, in paragraph 246 of his Principles of Hindu Law, the power of a manager to carry on a family business necessarily implies a power to mortgage or sell the family property for a legitimate and proper purpose of the business and the manager has authority to raise money not only to discharge debts arising out of the family business, but also money needed to carry it on. It is a matter for his decision whether the money necessary should be raised by mortgage or by a sale, and who there it is better to raise money to continue a business which latterly had not been profitable, or to close it down; it would be unreasonable to expect a lender or purchaser to investigate questions of that kind. Among the authorities referred to in this connection are AIR 1931 136 (Privy Council); 2 CWN 729 (Privy Council) and Niamat Rai v. Din Dayal (1927) L.R. 54 IndAp 211 : 29 Bom. L.R. 886 The learned trial Judge is mistaken in speaking about a loss in the toddy business. As the money was required to pay the amount of the first instalment, there could be no question of a loss at that time. In the previous year apparently, 1912, no contract had been taken at all. But the need to raise this money for payments of the instalments may properly be regarded as legal necessity justifying the sale of these fields, if there was no other means of raising it. On the evidence I think it is reasonable to hold that there was no other means. It may be said that the absence of any vouchers for the payment of this instalment of Rs. 2,300 or of the other instalments and the absence of any accounts of the business in that year is a weakness in the defendants' case. But, as I have said already, they appear to have done their best to procure the evidence. Dharmappa was summoned to produce the vouchers.

7. The oral evidence to show that Dharmappa did take up the contract in respect of the Gokak shop in that year, Exhs. 80, 105, 122 and 127, is quite clear and definite, and I think there is no sufficient reason for disbelieving it. In addition to the amount that was required in connection with this contract, it appears that the debt due to Shambhat on the promissory note, Exh. 92, was also outstanding. The learned advocate for the appellant has contended that this debt had already been discharged by Exh. 146. But that, it seems, was not the case. Shambhat has deposed, Exh. 122, that he lent the following amounts to Dharmappa; first, Rs. 1,500 on a bond, then Rs. 500 on a promissory note, then Rs. 1,800 on a promissory note for which a bond was afterwards substituted. For some reasons the recitals in Exh. 146 were not brought to the notice of this witness, but, in view of what he says as to previous debts totalling Rs. 2,000 and the absence of cross-examination on the point, it cannot be said that the sum of Rs. 2,080 mentioned in Exh. 146 represented the amount due under Exh. 92. That means that so far as about Rs. 4,500 out of the consideration for the sale-deed, Exh. 32, is concerned, legal necessity is satisfactorily proved and that is enough to justify the trial Court's finding. The appeal, therefore, fails on the merits.

8. The learned advocate for the respondents has also supported the decree on certain technical grounds which were not considered by the trial Court. The first point is that the plaintiff being an alienee from a coparcener, whose interest has been already alienated by the manager of the family, is not entitled to maintain this suit. He relied on *Narsingacharya Gopalacharya Shurpali Vs. Tulsabai Rambhat Dandavati*, and *Jhaverbhai Hathibhai Patel Vs. Kabhai Becher Patel*, . In the former case the facts were these. A guardian appointed by the Court sold the property of his ward without the sanction of the Court. Subsequently, the property was sold at a Court sale in execution of a maintenance decree obtained against the minor's father. The vendee from the guardian brought a suit to recover possession of the property from the auction purchaser, and it was held that the sale by the guardian continued to be a valid sale till it was set aside at the instance of the minor, that the right of the minor to sue to get the unauthorised sale set aside could neither be attached nor sold in execution of a decree and that, therefore, the auction purchaser could not oust the vendee from the guardian. The judgment of Macleod C.J. is a short one and the passage upon which Mr. Desai relies is this (p. 484):

The sale by Raghunath (i.e., the guardian) in 1913 to the second defendant without the permission of the District Court was voidable at the instance of any other person affected thereby. The only person affected at the time of the unauthorised sale was the minor, and when she came of age, she would be entitled to file a suit to get the unauthorised sale set aside, and as long as she did not do that, and as long as no one obtained a better title to the property, then the sale by the guardian continued to be a valid sale. There was nothing left, therefore, at the time of the execution sale of the property which the minor had inherited from her father, which could be conveyed to the auction-purchaser. The right of the minor to sue to get the unauthorised sale set aside could neither be attached nor sold, and consequently the purchaser at the auction sale could not oust the purchaser from Raghunath....

9. There is no reference in the judgment to Section 6 of the Transfer of Property Act, but Mr. Desai contends that the effect of the decision is that the minor in that case had nothing left but a bare right to sue which could not be transferred.

10. In *Jhaverbhai v. Kabhai* property belonging to a minor was sold by his father as his natural guardian in 1912. The minor attained majority in 1923, and sold the property to the plaintiff in 1925. The plaintiff and his vendor filed a suit in April, 1926, for a declaration that the sale effected by the guardian was not for necessity, and for recovering possession of the property. In August, 1926, before the decision of the suit, the vendor withdrew from the suit with the permission of the Court and without any objection from the plaintiff. The question was raised whether the plaintiff's suit under these circumstances was maintainable. It was held that after the withdrawal from the suit by the vendor, who thereby had elected not to set aside the sale of the property by the guardian, the plaintiff had no right to continue the suit. In the judgments in that case there is much

discussion of the provisions of Article 44 of the Indian Limitation Act, but, as Mr. Justice Patkar points out at page 1516, the real question there was not whether the suit was barred by limitation, but whether the plaintiff had a right to continue the suit. He says :

After the minor had withdrawn from the suit he has virtually elected to acquiesce in the sale by his guardian, and the interest of the minor in the property has been extinguished under Article 44 read with Section 28 of the Indian Limitation Act. The plaintiff, therefore, in my opinion, has no right to continue the suit.

11. Reliance has been placed on the observations of the learned Judge at page 1515 where he says :

Apart from authority, it appears that when a transfer is made by the guardian of the minor, the property ceases to belong to the minor. If the sale is voidable it has to be set aside by the minor within three years from his attaining majority. It is contended on behalf of the respondent that the right of the minor who has attained majority in such cases is not capable of being transferred u/s 6(e) of the Transfer of Property Act, as it would appear to be merely a right to sue to set aside the transfer made by the guardian. If Section 6(e) of the Transfer of Property Act applies, the transferee acquires no title and the right to sue to set aside the sale by the guardian resides solely in the minor who has attained majority, and he must bring a suit within three years for that purpose under Article 44 of the Indian Limitation Act.

12. It is not altogether clear from the judgment whether the learned Judge accepted that contention or not. As I say, what principally influenced the Court was the fact that the minor had elected to acquiesce in the sale and had practically ratified it.

12. On the basis of these cases Mr. Desai contends that the sale of Ramaswami's interest by Dharmappa was not void but only voidable. It was good unless and until Ramaswami himself took steps to set it aside and to recover his share of the property in spite of it, and, therefore, he had no right of property remaining but only a right to sue which he could not transfer. I must confess that this point has caused me a certain amount of difficulty. It is easy to say that the cases relied upon did not deal with the position of coparceners. But the same reasoning must apply, it would seem, unless it can be shown that a coparcener, whose share in property has been sold by the manager of the joint family ostensibly for legal necessity, retains an interest in the property which a minor whose property has been sold by his guardian does not retain. The question is whether under such circumstances a coparcener retains an interest in the particular property alienated by the manager more extensive than a mere right to bring a suit to liberate his share from the operation of the conveyance. We have not been referred to any case which bears directly upon the particular point we are considering.

13. Mr. Jahagirdar's argument is that, though the transaction is voidable in the

sense that it will be perfectly good if the coparcener whose interest is affected ratifies it or takes no steps to question it, it is void as against the coparcener in the sense that it need not actually be set aside. If the coparcener chooses to bring a suit to recover his share in the property, he may ignore the alienation. In that connection he referred us to a decision of Mr. Justice Ramesam in *In re Appavu Naichen* AIR [1931] ad.377 The learned Judge was dealing with a case of a gift of property by a widow, but his observations as to the meaning of the words "void and voidable" in connection with alienations by a limited owner would apply also to the case of a manager. He says (p. 379) :

The words "void" and "voidable" have to be carefully used in connection with the rights of the reversioners as against a Hindu widow's alienations. A Hindu widow's gift or alienation without necessity is void as against the reversioner in the sense that he need not set it aside. A mere disaffirmation is enough. But such a transaction is also voidable in the sense that only a reversioner can treat it as a nullity and if he chooses to remain silent nobody else can question it and it therefore remains valid. The transaction has the character of a transaction which is not void as against the rest of the world. It has the character of a void transaction only as against the reversioner. It is unsafe to apply the word "voidable" to such a transaction in the usual sense of the term.

14. Numerous authorities have been referred to including the Privy Council" judgment in *Bijoy Gopal Mukerji v. Krishna Mahishi Debi* (1906) L.R. 34 IndAp 87 : 9 Bom. L.R. 602 The conclusion Mr. Jahagirdar asks us to draw is that, as the coparcener may recover his share in the property without getting the sale-deed set aside, he must retain an interest in the property which is capable of being transferred, something more than a bare right of suit. The only case I have been able to discover in which the present point might have been taken is *Iburamsa Rowthan and Others Vs. Thiruvenkatasami Naick (died) and Others*, The facts there were that defendants Nos. 1 and 2 were members of a joint family owning several items of property in common. Some of the items had been sold to defendant No. 3 by the first. The plaintiff had purchased defendant No. 3's interest in the said items and brought a suit for partition. The plaintiff, therefore, was an alienee from a coparcener whose property or interest in property had been alienated by another coparcener without authority as it was alleged. That is, the position was essentially the same as in the present case. The only point discussed in the judgment was whether it was necessary for the plaintiff to institute a general suit for partition of the entire family property or whether he could maintain an action for the partition of his share in the actual property transferred. It appears to have been assumed that he had a right to bring a suit for one relief or the other, and if so that would imply that defendant No. 2 had some interest in the property to transfer to the plaintiff other than a mere right to sue. I am not sure that all the relevant authorities have been brought to our notice, but on the materials placed before us I take the view that Ramaswami had an interest in the property which he was capable of transferring and that the alienee from him, the plaintiff, is entitled to sue.

15. I may mention that the case of Jhaverbhai v. Kabhai can in any case be distinguished on the facts. There is no question of acquiescence or ratification here. The person whose interest is affected by the unauthorized alienation is on the record. He is a defendant and not a plaintiff, but that may not always be material, as pointed out by Mr. Justice Patkar at p. 1517, where he refers to Raja Ramaswami v. Govindammal (1928) 56 M.L.J. 332

16. Mr. Desai's other point is that the suit is barred by limitation under Article 44. For this proposition he relies on the cases already referred to and Fakir appa Limanna v. Lumanna bin Mahadu ILR (1919) Bom. 742 : 22 Bom. L.R. 680 But in this respect at any rate the fact that we are dealing with a coparcener's interest in a joint family is a sufficient answer to these authorities. In Fakirappa Limanna v. Lumanna bin Mahadu the Court was careful to confine its finding to the actual facts in the particular case, viz., the alienation of the property of a minor by his mother acting as his natural guardian. Macleod C.J. says (p. 759):

In order to answer the question before us we must confine ourselves strictly to the case of a transfer of property by a Hindu mother acting as natural guardian of her minor son and not be led away by false analogies. The position of the natural guardian is not the same as that of the Hindu widow, or the manager of a joint family, or an unauthorized guardian.

17. Subsequently to this full bench decision, it was held in Dnyanu Yesu Jagdale Vs. Vishnu Parsharam Chitnis, by Macleod C.J. and Coyajee J. that the manager of a joint Hindu family consisting of himself and his minor brothers is not to be deemed their guardian within the meaning of that term in Article 44, and Mr. Jahagirdar has cited other authorities to the same effect. It is not necessary in fact for the coparcener to set aside the alienation at all. It is perfectly good. as between the parties to it and in respect of Dharmappa's interest in the property. All that Ramaswami had to do was to bring a suit to recover his share which, if legal necessity had not been proved, would have been unaffected by the sale. This he could have done within twelve years so that the suit would be in time. In this connection I may refer again to Bijoy Gopal Mukerji v. Krishna Mahishi Debi, to Hanamgowda Shidgowda v. hgowda Shivgowda ILR (1924) Bom.654 : 26 Bom. L.R. 829 and also to (1881) ILR 6 843 (P.C.) (Privy Council) where it is explained that the position of the manager of a joint family is analogous to that of a widow in respect of alienations. However, as I have held that on the merits the trial Court's finding is right, the appeal fails and must be dismissed with costs.

N.J. Wadia, J.

18. I agree.

19. The contention of the respondent that the plaintiff could not bring the suit, because the minor Ramaswami had only a right to sue and this right could not be transferred to the plaintiff, is, in my opinion, not tenable. The question is, what right Ramaswami had after the alienation of the suit property by defendant No.

10 in June 1913 and what his remedy was ; whether he had only a right to sue for the setting aside of the alienation, or whether he had a right in the property itself which he could enforce by asking for possession. The test to be applied in such a case was laid down in *Anandappa v. Totappa* (1911) 17 Bom. L.R. 1137

Whether a plaintiff must sue for cancellation of a document under which the defendant in possession claims, depends, we think, upon whether the onus of proving circumstances establishing its invalidity lies upon him or whether it lies upon the defendant to prove circumstances establishing its validity. For example, where a plaintiff sues to recover possession of property which the defendant has obtained under a document executed by the plaintiff or one under whom he claims, the plaintiff would have to establish facts entitling him to have the instrument cancelled or set aside and would have to sue within three years of those facts becoming known to him as provided by Article 91 of the Indian Limitation Act. On the other hand, where the defendant has acquired possession under a deed executed not by the real owner of the property but by some one having a power of disposal under certain circumstances on behalf of the real owner, the onus lies on the defendant to prove the existence of those circumstances, and the plaintiff may ignore the deed in bringing his suit for possession.

20. The judgment went on to say (p. 1139):

It is argued, however, that the existence of Article 44 of the Indian Limitation Act implies that wherever a guardian has effected a sale of his ward's property the sale is valid until it is set aside by suit.

We are not prepared to hold that the existence of this Article involves any qualification of the principles expressed in the judgment of Mr. Justice Woodroffe already referred to. The Article possibly refers to cases in which a ward might sue to set aside a sale effected by his guardian with the authority of the Court which would prima facie be valid but which, on proof of certain circumstances such as misrepresentation or fraud with regard to the guardian, might be set aside.

21. Applying this test in the present case it is clear that it would not have been necessary for Ramaswami to sue to have the alienation set aside. The burden would have been on the defendants to show that the alienation to them had been for legal necessity and Ramaswami himself would have had a right to a share in the property which he could have enforced by asking for, possession. His right was not one merely to bring a suit to have the alienation set aside, but a right to a share in the property, and this right he could validly alienate to the plaintiff.

22. We are dealing in this case with an alienation made by the manager of a joint family acting for himself and his minor brother defendant No. 9, and the cases relied on by the learned advocate for the respondent Narsingacharya Gopalacharya Shurpali Vs. Tulsabai Rambhat Dandavati, and Jhaverbhai Hathibhai Patel Vs. Kabhai Becher Patel, , both of which deal with alienations by

the guardians of minors, do not apply. Dnyanu Yesu Jagdale Vs. Vishnu Parsharam Chitnis, is sufficient authority for holding that the manager of a joint Hindu family consisting of himself and his minor brothers is not to be deemed their guardian within the meaning of that term in Article 44 of the Indian Limitation Act. It was not, therefore, necessary for Ramaswami himself to have brought a suit within three years to set aside the alienation made by his brother, nor was there any legal objection to his alienating the right to a share in the property which he possessed.

23. On the merits of the case I agree entirely with the view taken by my learned brother that the sale by Dharmappa (Exh. 32) was for legal necessity. There is ample evidence, both oral and documentary, to show that Bhimappa was heavily in debt for some years before the sale. His debts amounted to Rs. 16,000 to Rs. 17,000, and, though most of the property was self-acquired, it appears to have been considerable, and the whole of the property had to be alienated for the payment of the debts between the years 1912 and 1916. It has been sufficiently proved by the evidence that the toddy business had been the family business of Bhimappa and his ancestors and that defendant No. 10 had himself taken the form of a toddy shop in 1913. There is also no reason for doubting the statement of the witnesses that defendant No. 10 had to pay the sum of Rs. 2,300 about the time when the sale-deed in suit was passed. The payment of this debt is rightly treated by the lower Court as a legal necessity. The only other question is whether there was legal necessity for the alienation of the whole property amounting to Rs. 5,000. It has been proved by the evidence of Shambhat that besides the debt of Rs. 2,080 due to him, which was satisfied by the sale of the property referred to in Exh. 146, there was another debt of Rs. 1,800 due to him on a promissory note dated February 18, 1911, and that this debt was still outstanding at the time of the sale-deed. This being so, I consider that legal necessity for the alienation has been sufficiently established. I agree, therefore, that the appeal must be dismissed with costs.