

(1959) 09 KAR CK 0002
In the Karnataka High Court
Case No : Second Appeal No. 445 of 1953

Helava

APPELLANT

Vs

Sesigowda and Another

RESPONDENT

Date of Decision : 23-09-1959

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 31, 100, 103

Citation : AIR 1960 Kar 231

Hon'ble Judges : B.M. Kalagate, J;A.R. Somnath Iyer, J

Bench : Division Bench

Judgement

Kalagate, J.

(1) This is a plaintiff's appeal against the decree made by the Subordinate Judge, Mandya, in Regular Appeal No. 46 of 1952-53.

(2) The plaintiff has filed the suit on the 14th of May 1951 to have it declared that the alienation made by his father under Ext. 1, dated 13-2-1941, in favour of defendant 1 is not binding on his half share and claiming possession of the same after partition.

(3) The allegations in the plaint are that during his minority, his father, the deceased Helavegowda sold the schedule properties to the 1st defendant for a consideration of Rs. 280/- which is inadequate and that there was no legal necessity for the sale of the properties nor was there any family benefit.

(4) The properties are three in number viz., two lands measuring 2 acres and 10 1/2 guntas, assessed at Rs. 2-13-6, and item No. 3 which is a house. These three properties have been alienated for Rs. 280/-. Defendant No. 1 has subsequently sold the suit item No. 3 to defendant No. 2 and that is why he has been impleaded in this suit. On these allegations, the plaintiff claimed that it should be declared that the sale deed in favour of defendant 1 is not binding on his half share in the suit properties and that he (plaintiff) should be awarded his half share, after equitable partition. He also claimed that there should be a

direction for enquiry into mesne profits from the date of suit till the date of delivery of possession, and he also prayed for costs of the suit.

(5) Defendant 1, by his written statement, contended that the plaintiff is not the son of deceased Helavegowda. That it is true that the suit properties at present are worth Rs. 1,500/-. He further contended that the lands which have been conveyed to him under Ext. 1 were fallow lands and the house was in a dilapidated condition and that the plaintiff's father intended to purchase a land and a house at the place of his father-in-law, out of the consideration of the sale deed. He also contended that the price paid was adequate and the sale was made for legal necessity and for the benefit of the family. He further contended that he had improved the land by spending over Rs. 600/- and brought the suit lands to a good condition. Therefore, if the plaintiff's suit is to be decreed, then the amount which he has spent by way of improvement, the plaintiff be asked to pay.

(6) Defendant No. 2 by his written statement contended that he is a bona fide purchaser for value from defendant No. 1. He has paid the full consideration knowing that the sale effected by plaintiff's father in favour of defendant No. 1 was lawful and, therefore, the sale in his favour should be upheld.

(7) The learned Munsiff raised four issues. Issues Nos. 1 and 2 related to the status of the plaintiff, namely, whether the plaintiff is the son of the deceased Helavegowda and whether he was born or was in existence on the date of alienation by Helavegowda in favour of defendant No. 1. On these two issues he held in favour of the plaintiff, that the plaintiff was born before the date of alienation and that he is the son of Helavegowda. On issue No. 4, he held that defendant 1 failed to prove that he has spent any amount over the improvement of the suit lands. On issue No. 3, though he held that defendant 1 has failed to prove that the sale deed was impelled by any legal necessity, yet he gave a half-hearted finding that the family was to some extent benefited by the sale.

In the result, he passed the decree in favour of the plaintiff and gave him the necessary declaration and directed that the plaintiff should recover his half share after partitioning the same but he further directed that since he has come to the conclusion that there was some benefit to the family, the plaintiff should pay Rs. 140/- to defendant 1 before he recovers his half share in the suit properties.

(8) Against this decree, defendants 1 and 2 preferred an appeal in the Court of the Subordinate Judge, Mandya, being R. A. 46/52-53. Plaintiff also filed a cross-objection against that part of the decree which directed him that he should pay Rs. 140/- before he realises his half share in the suit properties.

(9) The learned Subordinate Judges has not raised a specific point for determination as required under Order XLI, Rule 31 C.P.C. The question as to whether there was or was not legal necessity was not agitated before him. It was fairly conceded by the counsel for the defendants that they did not want to contest the finding on that issue but they would justify their appeal on the

ground that the sale was beneficial to the estate. He, therefore, proceeded to consider only one point as to whether the sale was justified on the ground that it was beneficial to the estate.

(10) Obviously, whether the sale is or is not justified on that account would be a question of fact and this Court would have no jurisdiction to interfere with that finding of fact u/s 100 C.P.C. But Mr. E. S. Venkataramaiah the learned counsel for the appellant, contends that this Court would be justified in interfering in the second appeal as the lower appellate Court has not followed the procedure laid down by the C.P.C., in that it has not considered the evidence on record before it recorded its finding on the point argued. He further contends that if, on account of its failure to consider the evidence, the finding is vitiated, then this Court would be justified in interfering u/s 100(1)(c) of the C.P.C.

The question then arises whether this Court should sent down this appeal to the lower Court for considering the evidence and to record its finding on that issue or it should itself determine it. The learned counsel for the appellant has requested us that this Court should exercise its powers u/s 103 C.P.C., especially this being a very old matter. We consider it reasonable to accede to his request and proceed to consider ourselves the point whether the sale in question is justifiable on the ground that it was beneficial to the estate.

(11) The words "the benefit of the estate" which occur in the judgment of the Judicial Committee in *Hanooman Persuade Pandey v. Mt. Babooee Munraj Koonweree* 6 Moo Ind App 393 (PC), have given rise to a conflict of opinion as to what is the meaning to be attached to the words "for the benefit of the estate". One view is that the transaction cannot be said to be for the benefit of the estate unless it is of a defensive character calculated to protect the estate from some threatened danger or destruction. Another view is that for a transaction to be for the benefit of the estate, it is sufficient, if it is such as a prudent owner, or rather a trustee, would have carried out with the knowledge that was available to him at the time of the transaction. In between these two opinions, it appears to us that consensus of judicial opinion is in favour of the latter view, namely, that the transaction would be for the benefit of the family if it is such as a prudent-owner would carry out with the knowledge available to him at the time of the transaction.

(12) This Court has accepted the latter view in a case reported in *Subbaraya v. Manave Soorappa Gowda* 52 Mys HCR 301. This is what the Court has said:

"An alienation of property of a joint Hindu family by a manager can be justified on the ground to benefit to the estate apart from necessity, if he in the interest of the family having regard to its circumstances existing at the date of the alienation considers it advantageous to do so and the object or purpose for which the alienation is made is not likely to involve the family in loss or diminish its resources."

"The alienation must be judged from the stand-point that the manager was not

the sole owner of the property but others have an interest therein and that the degree of prudence required of him would be greater as in the case of a trustee than if he were the sole owner, whether it is a case of necessity or benefit."

(13) Then, while considering whether there was compelling cause for the sale of the estate, the Court proceeded to consider the various cases on the question, and, at p. 319, observed that in *sahu Ram Chandra v. "Bhup Singh* ILR 39 All 437 : AIR 1917 PC 61, "Lord Shaw enunciated the doctrine of alienation on a much wider basis." AT ILR All 443 : (at p. 62 of AIR), the learned Lord explained the power of alienation thus:

The general principle... is that he is at liberty to effect or to dispose of the joint property in respect of purposes denominated necessary purpose... In all of the cases where it can be established that the estate itself that is under administration demanded, or the family interest justified, the expenditure, then those entitled to the estate are bound by transaction. It is not accurate to describe this as either inconsistent with or an exception to the fundamental rule of the Mitakshara. For where estate or family necessity exists, that necessity rests upon the coparceners as a whole, and it is proper to imply a consent of all of them to the act of the one which such necessity has demanded." It is clear from this passage that an alienation could be justified where the estate under administration demands it or the family interest justifies it.

(14) Then after considering the evidence in the case, their Lordships said at p. 323:

"The lands were the main source of income for the support of the family and they were not yielding a proper return for some years past and were not likely to do so unless a fairly good amount was expended on them as was shown by the evidence that the even though they spent money it would not be advantageous for them to keep the said lands having regard to the difficulty of cultivation and procuring labour for them in a place which is not healthy to live in."

This view has been confirmed by this Court in a subsequent appeal i.e., Letters Patent Appeal (M) No. 4/57 decided by the Chief Justice and Somnath Iyer J. The judgment was delivered by Somnath Iyer J., and this is what he observed in the courts of his judgment:

"The next question is whether such a sale is binding on the plaintiffs in the case. It is now well settled that a manager can validity alienate joint family property of which he is not the sole owner for a legitimate purpose if having regard to the circumstances of the family at the time of the alienation, he considers it advantageous to do so, and the alienation does not involve the family in any loss or diminution of its resources. It is equally clear that while making such alienation of property of which he is not the sole owner, he should exercise a measure of prudence higher, as in the case of a trustee, than if he were its sole owner even if he was making the alienation for family necessity or benefit. If however the alienation is unreasonably excessive in the sense that more

property has been sold than was necessary to relieve the existing necessity or for a grossly inadequate price, it could hardly be suggested that he exercised the required degree of prudence or did not unnecessarily sacrifice family property."

(15) Mr. Tarakanath, learned counsel for the respondent, has drawn our attention to certain passages appearing in 52 Mys HCR 301. In particular, he has drawn our attention to a passage appearing at p. 309. He relies on the observation made by Sir Dinshah Mulla, delivering the judgment of the Privy Council in AIR 1932 182 (Privy Council) :

"The power of the manager of a joint family governed by the Mitakshara law to alienate immovable property belonging to the family is defined in verses 27 to 29, Ch. 1 of the Mitakshara. The judgment of the Board in 6 Ind App. 393(PC), relied on by the Bank, was founded apparently on those verses."

"Verse 27 of the said chapter of the Mitakshara enunciates the general rule that the father cannot dispose of the immovable property of the family without the consent of his sons. In verse 28 of the text of Vrahaspati was cited as an exception to the rule thus:

* * * * *

"28. An exception to it follows:

"Even a single individual may conclude a donation, mortgage or sale, of immovable property, during a season of distress, for the sake of the family, and especially for pious purposes.""

Vijnaneswara comments on this in verse 29 thus:

* * * * *

"29. The meaning of that text is this:

While the sons and grandsons are minors, and incapable of giving their consent to a gift and the like; or while brothers are so and continue unseparated; even one person, who is capable, may conclude a gift, hypothecation, or sale, of Immovable property, if a calamity affecting the whole family require it, or the support of the family render it necessary, or indispensable duties, such as the obsequies of the father or the like, make it unavoidable."

"In 6 Ind App 393(PC), Lord Justice Knight Bruce stated the powers of the manager thus:

"The power of the manager for an infant heir to charge an estate not his own, is, under the Hindu Law, a limited and qualified power. It can only be exercised rightly in a case of need, or for the benefit of the estate. But where, in the particular instance, the charge is one that a prudent owner would make in order to benefit the estate, the bona fide lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it, in the particular instance, is

the thing to be regarded." (423)

"As pointed out by Mayne in his Hindu Law:

"Ever since the judgment in Hanoomanper saud"s case 6 Ind App 393(PC), the terms "necessity" and "benefit to the estate" have been used side by side, and the Courts are not agreed as to the meaning to be given to the expression "benefit to the estate," " (473).

He thus asks to accept the first view. But, as has been said earlier, in between these two conflict of opinions this Court has preferred to take the latter view, namely, that a transfer to be for the benefit of the estate, it is sufficient if it is such, as a prudent owner or rather a trustee would have carried out with the knowledge that was available to him at the time of the transaction. We feel that the view taken by this Court is a correct view to take. Therefore, if that is the position of law so far as the words occurring in the judgment namely, "the benefit of the estate" are concerned, then we will proceed to consider in the light of the proposition of law enunciated above--Whether the lower appellate Court was justified in holding that the sale was for the benefit of the estate.

(16) In this case, there is no doubt that the onus lies on the alienee to justify the alienation and to prove the same, he has examined a, many as nine witnesses, he has also produced the sale deed and some documents to which I will presently refer. As I have said earlier, we would consider the evidence in this case because the Court below did not determine the issue taking into consideration the evidence on the record.. What it considered was, if the price paid was adequate, then it is not for the alienee to consider the subsequent application of the money. What he meant is that if the sale is justified on account of the adequacy of the price, then the subsequent application of the funds is not the factor to be taken into consideration in determining the validity of the sale. On that score, the lower Court may be right in not giving importance to the subsequent events if the sale itself is justified on the ground that it was for the benefit of the estate.

He should have determined this issue after considering the entire evidence on record, namely, with reference to the depositions made by the various witnesses and the sale deed. But, since he has omitted to determine this issue taking into consideration the evidence on record, we are called upon to determine that issue ourselves u/s 103 of the C.P.C. The reason given in the sale deed is "on account of the necessity, that is to purchase wet land elsewhere. I have sold the property described herein for Rs. 280/- ". In the written statement, what he contended was that since the lands were fallow and the house was in a dilapidated condition, he sold away those properties and after selling those properties he intended-in-law. This contention is contrary to the reason given in the sale deed.

(After discussion of evidence His Lordship proceeded:)

Analysing the evidence of these witnesses, it comes to this--that these witnesses

have given evidence inconsistent with the recitals of the sale deed and have made out an altogether new case to justify the sale in favour of defendant No. 1. The 1st defendant, as is stated, was compelled to leave his own village and stay with his father-in-law, because his wife was unwilling to stay with him. The questions whether the defendant 1 would be justified in alienating the entire family properties simply because his wife was not willing to come and stay with him. We consider that this conduct of the father is not one which can be said to be the conduct of a prudent man in alienating the entire property belonging to the family.

(17) The learned Judge, while considering the question as to the adequacy of the price, has come to the conclusion that the price paid for the sale of the land of Rs. 280/- was an adequate price. While considering this he has taken into consideration, the sale deed Ex. A dated 14-10-1940, sale of land of 23 guntas for Rs. 25/- in favour of Mariswamygowda who was a relation of the plaintiff reconveyed the property which was purchased by him to plaintiff. It has been stated in the sale deed itself that

"Seeing that your father had been wasting all the property capriciously without worldly knowledge, with an idea of reconveying it.... for the aforesaid amount, the sale deed came into existence."

This shows that he purchased that property for a nominal price. If that be so, it cannot be said that the consideration of Rs. 25/- for 23 guntas in Ex. D would be the correct basis for arriving at the conclusion that the price paid for the sale of the suit land is an adequate price. He did not consider the evidence of D.W. 1 when he has said "the land sold was worth Rs. 15/- per acre." If we believe the evidence of this witness as we do believe then the price paid for the sale of the suit land is an inadequate price, and if so it cannot be said that the sale would be justified on that ground.

(18) He has also made reference to Ex. D to which I have referred above. It was the reconveyance by Mariswamygowda in favour of the plaintiff. He relies upon certain statements made in that sale deed, and infers that these recitals in the sale deed were deliberately introduced for the purpose of supporting the plaintiff's case to file the present suit. In effect, what he means is that this is a fabricated document. We do not consider that the inference is justified by the recitals made in that document. He further says that the sale of the land is justified on account of the fact that the lands were unproductive and the house was in a dilapidated condition. We have already held that that is not so. There is no evidence to justify this finding and he has recorded this finding without considering the evidence.

(19) Therefore, we consider that the decision of the Subordinate Judge is vitiated on account of his omission to consider the legal evidence on record. Then, on the question whether the defendant 1 has made any improvements on the suit land, he has not produced any evidence on that point. He says, that he has not

maintained any account pertaining to the improvements of the lands. "I have maintained accounts, but the same is lost." Therefore there is no evidence to justify the finding that the first defendant has effected any improvements on the suit land.

(20) As to whether plaintiff is entitled to any mesne profits, we do not think it reasonable to allow mesne profits to the plaintiff from the date of the suit. But he will be entitled to mesne profits from the date of the decree of this Court and there will be an enquiry under Order XX Rule 12 C.P.C., as to future mesne profits.

(21) On considering the entire evidence in the case, we record a finding that the price paid for the sale is inadequate and that the sale effected by the plaintiff's father in favour of defendant 1 is not justified on the ground that it was beneficial to the family estate. If that be so, then the sale deed would not be binding on the plaintiff to the extent of his half share in the suit properties. Therefore, we reverse the decree passed by the Subordinate Judge and restore that of the trial Court, but with this modification that the direction of the trial Court asking the plaintiff to pay Rs. 140/- before he takes possession of his half share, is deleted. With this modification and with the modification as to mesne profits, we restore the decree of the trial Court.

(22) The result is the appeal succeeds and must be allowed. In the circumstances of this case, we direct that each party will bear its own costs.

(23) Appeal allowed.