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**(1996) 05 SC CK 0089**

**In the Supreme Court Of India**

**Case No :** Civil Appeal No. 1197 of 1974

Narayana Prabhu and another — APPELLANT

Vs

Janardhana Mallan and others — RESPONDENT

**Date of Decision :** 10-05-1996

**Acts Referred:**

**Citation :** (1996) 5 AD 62 : AIR 1996 SC 3276 : (1996) 5 JT 617 : (1997) 1 MLJ 19 : (1996) 4 SCALE 437 : (1996) 8 SCC 661 : (1996) 2 UJ 173

**Hon'ble Judges :** A. M. Ahmadii, C.J;Sujata V. Manohar, J;K. Venkataswami, J

**Bench :** Full Bench

**Final Decision :** Disposed Of

## Judgement

K. Venkataswami, J.—The appeal being of the year 1974, though we are naturally anxious to finally dispose it of, we are forced to remit the matter to the High Court as we are convinced after hearing the learned Sr. Counsel on both sides that the matter requires remittance. We propose to give only bare minimum facts necessary for making this remand order.

2. Defendant 1 & 2 in O.S. No. 35/63 on the file of the court of Subordinate Judge, Irinjalakuda (Kerala) are the appellants in this appeal. Respondents Nos. 1-6 were the plaintiffs in the said suit. Respondent No. 5 has since expired and respondent Nos. 8-12 are substituted as his LRs. in his place. Respondent Nos. 7 and 13 were defendant Nos. 4 & 3 respectively in the said suit.

3. For the sake of convenience, we will refer the parties by their ranks in the original suit. The plaintiffs (respondent Nos. 1-6) filed the said suit challenging the sale deed dated 24.3.55 executed by their father and also the father of the 4th defendant who is none other than the elder brother of the plaintiffs.

4. According to the plaintiffs, the property sold under the said sale deed (Ext.P2) was a joint family property. The plaintiffs had equal interest in the suit property and at the time of sale they were minors and there was no immediate necessity for alienating the property nor was the alienation for the benefit of the estate.

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The property sold under Exbt. P2 was much more valuable than the amount shown as consideration in the sale deed. Further the amount shown as consideration namely. Rs. 21,000/- was not received but the entire amount was reserved with the 1st defendant/ purchaser to discharge by payment the future 'kuri' installments in a 'kuri' subscribed by their deceased father. It was the further case of plaintiffs that such installments could have been made from out of the income of the property sold and also from the properties which were in the possession of the family. The plaintiffs also alternatively prayed for partition of the suit property and for separate 6/8 share and for other consequential reliefs.

5. The main defence taken by the first defendant (appellant No. 1) was that the property never belonged to the joint family but it was the separate property of the father. The 4th defendant joined in the execution of the document by way of abundant caution even though he had no right or interest. It was also contended on behalf of the contesting defendants that Venkiteswara Mallan, father of the plaintiffs was heavily indebted on the date of execution of Ext. p2 and that liquidation of the said debts was an urgent necessity and for which purpose he had to sell some properties of the joint family. The deceased father could not do so as all the items of joint family properties were secured for the payment of future subscriptions of their 'kuri' under Ext P7. In order to release the family property from Ext. p7 'kuri' mortgage, the deceased father was compelled to execute Ext. p2 in favour of the first defendant. As a result of p2 sale, factually other items of properties were realised and certain items were sold for discharge of the family debts.

6. After trial, the trial court found that the suit property was joint family property; that there was no pressing necessity to execute p2 sale deed; that payment of future 'kuri' installments would not be a debt and therefore, it could not be contended that Ext.p2 was executed by the father for discharge of his antecedent debts. Be it noted that there was no plea by the plaintiffs that the debt was tainted by immorality or illegality. Consequent to the finding that the sale was not for the discharge of antecedent debts, the trial court further found that the sale was not binding on the family. The trial court also found that there was no necessity for execution of Ext.p2 on the relevant date. The trial court also found that the price fixed under execution p2 could not be said to be adequate.

7. On appeal by the defendant Nos. 1 & 2 the High Court concurred with the view taken by the trial court that Ext.p 2 sale deed executed for payment of future installments of 'kuri' subscription cannot be supported as one executed for discharge of antecedent debts by a Hindu father.

8. So far as the question of necessity to execute such a sale deed notwithstanding the fact that trial court elaborately dealt with this aspect and rendered an adverse finding against the purchaser/first defendant (first appellant) did not go into that question on a mistaken impression that there was no pleading on that aspect in the written statement. The High Court observed as follows:

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If the suit properties were ancestral then of course, the consideration and necessity for the sale under Ext. p2 has to be shown by the alienee of the sale. That the consideration recited in Ext. p2 us real cannot admit of any. doubt. But whether that is a consideration binding on the family and if it be. so far as the family is concerned, whether there was any pressing necessity to execute such a sale deed is a question on which the first defendant should, as we would presently show, lose in this appeal. The first defendant wants to rely on the recitals in the sale deed to indicate that the debts of Venkiteswara Mallan including the kuri debt were not his personal debts but were joint family debts and it is further contended that the business run by Venkiteswara Mallan which was the cause for incurring such heavy debts by him was a joint family business. We are afraid we cannot consider such a case so long as the pleadings in the case do not justify this plea. As we have pointed our earlier, categorically the first defendant asserts that the was competent to deal with the property as his own and apparently he did not set up a case that the debts of Venkiteswara Mallan including the kuri debts were joint family debts.

x x x x x x x x x x x x x x We are only stating here that there is no pleading that the business of Venkiteswara Mallan was that of joint family so much so that we cannot go into this question, nor is there any evidence to show that the business admittedly run by Venkiteswara Mallan belonged not to him but to his joint family or that the debts which were incurred by him by way of execution of execution of promotes subsequent to Ext, p2 were debts of the family.

9. The above observations of the High Court are factually not correct and contrary to the material available on record. Learned Sr. Counsel appearing for the plaintiffs (respondents) fairly admitted this position. In fact, the trial court has dealt with this aspect in paragraph 12-14 by referring to pleadings in the written statement. In fact, the trial court while rendering a finding on this aspect against the first defendant (first appellant) observed as follows :

The question as to whether there are family debts binding on the co-parceners is the main question. Many documents have been filed on the side of the 1st defendant. So far as Exs, XI and D1 are concerned they are promotes and receipts and it is not possible for us to go into the question as to whether those documents evidence genuine debts of either the family or Venkiteswara Mallan. The plaintiff is not called upon to enter into any evidence so far as the assignments Exs.XI and D1 are concerned. The supporting documents are Exs. D11 to D33. These documents relate to either Ex.XI or Ex. 1. According to me it is unnecessary to go into those documents because that assignment is not challenged in that suit. The assignees are not on record. There is no issue framed with reference to that and the plaintiff is not called upon to answer those documents. Unless these things are present in this case, there is no justification to consider the so-called scheme referred to by the learned Counsel for the 1st defendant. Over and above that it is the definite case of the 1st defendant that the debts referred to in Exs. XI and D1 are debts of Venkiteswara Mallan. There

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is no case that these are binding debts to be cleared by the entire estate. therefore, there is no necessity in this suit to go into the question of a scheme put up by the 1st defendant.

10 Whether the trial court was justified in taking the above view should have been considered by the High Court. Instead the High Court wrongly declined to go into this question on the footing that there was no pleadings to enable the court to go into that question. The question whether there was necessity for execution of the sale deed by a Hindu father as 'karta' of the joint family property and its binding nature depends upon various factors and circumstances and answer to that would decide the result of the case one way or the other. therefore, that cannot be ignored. In the circumstances, we set aside the judgment of the High Court and remit the matter back for disposal in accordance with law. Having regard to the fact that the matter relates to the suit of the year 1963, we hope and trust the High Court would dispose of the same at the earliest. There is no order as to costs.

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