

(1972) 09 KAR CK 0001
In the Karnataka High Court
Case No : Second Appeal No. 704 of 1968

Patel Adirajashetty

APPELLANT

Vs

Koragappa Man Sa and Others

RESPONDENT

Date of Decision : 28-09-1972

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 12
Madras Aliyasanthana Act, 1949 — Section 29 (1)

Citation : AIR 1973 Kar 268 : AIR 1972 Kar 268 : (1973) 1 MysLJ 154

Hon'ble Judges : A. Narayana Pai, C.J

Bench : Single Bench

Advocate : B.P. Holla, for the Appellant; M. Gopal Krishna Shetty, for the Respondent

Judgement

A. Narayana Pai, C.J.—This second appeal is by a representative of an alienee of a property belonging to a family governed by Aliyasantana Law.

2, In Original Suit No. 97 of 1963 on the file of the Munsiff at Puttur, out of which this second appeal arises, the plaintiff and defendants 1 to 7 are members of "aliyasantana family who claim to be the owners of the property in suit. The alienation impeached is the sale thereof dated the 14th of August 1950 by defendants 1 and 2, for themselves and as representing the other members, in favour of the eighth defendant who died pending the suit. Defendants 11 to 13 who are his wife and children now represent his estate. This second appeal is by the thirteenth defendant.

3. The concurrent findings recorded by both the Courts below are :--

1. That the property in suit is the family property of plaintiff and defendants 1 to 7;

2. that out of the consideration of Rs. 8,000/- for the sale deed, only a sum of Rs. 3267-25 p. was for purposes of family necessity; and

3. that the alienee had effected improvements in the property of estimated value of Rs. 3940-50 p.

The decree made by the lower appellate Court is that the plaintiff, on behalf of his family, is entitled to recover possession of the suit property alienated to the 8th defendant, together with the mesne profits at the rate determined by him from the 19th of November, 1962 (the date of notice by the plaintiff repudiating the sale) with the further direction that the above-mentioned sums of Rs. 3267-25 p. and Rs. 3940-50 p. be adjusted against mesne profits payable by the alienee.

4. On the first question as to the nature of title in respect of the property, certain facts are undisputed. The bulk of the property were originally purchased under a sale deed, Ext. B-1 dated the 27th of August, 1907, by three sisters, Akku, Korappalu and Channamma. Some of the items included in the suit property were purchased by Santhamma, daughter of Akku under Exhibit B-2 on the 1st of December, 1915. Akku died first and thereafter Korappalu. The original purchase by the three sisters under Exhibit B-1, is not shown to have been made otherwise than with the assistance of their own funds or for the benefit of anyone except the three purchasers. There could also be no doubt, as a matter of law, that on the death of Akku, her interest in the property devolved, according to the customary Aliyasanthan Law, on her own Tavazhi consisting of only her daughter; when Korappalu died later without leaving any children, her interest devolved on her branch which in the absence of her children consists of her mother's descendants, viz., Akkn's daughter Santhamma and her surviving sister Channamma; it is also the rule of the said customary law that upon such descent, the heirs hold the property as Kavaru or family property.

5. There were previous alienations of this property followed by litigation, by other members to get rid of the alienations. The result of one of those, at the appellate stage, was that an alienation in favour of one Ismail Beary was declared to be not binding on the family to the extent of two-thirds and in execution of the decree for mesne profits one-third remaining with Ismail Beary was also purchased by the decree-holder's family.

6. The result was that the entire property, on account of the devolutions and litigation, became family property of the descendants of Kakru, the mother of Akku, Korapalu and Channamma.

7. That is also the averment or recital contained in the suit sale deed Ext. B-5 dated the 14th of August, 1950.

8. Mr. Holla, learned Counsel for the appellant, has however contended that in another suit a slightly different view was taken as to extent of the interest of the property which became the property of the family and that according to the decision of the Munsiff in that litigation, Channamma was held to have possessed, in her own right, interest to the extent of 4/9 of the property. But any argument which could be constructed on the basis of the said view, has become

unavailable by the subsequent death of Channamma resulting in a devolution by the rule of law which converts the property into joint family property.

9. The finding of the lower appellate Court, therefore, on the first question is not vitiated by any error of law.

10. The finding that only Rs. 3267-25 p. out of the consideration for the sale represented real family necessity, is a finding of fact. Likewise, the finding that the alienee had effected improvements in the property of the value of Rs. 3940-50 p. is also a finding of fact. Neither of them can be interfered with in second appeal because they are not shown to be vitiated by any error of law.

11. The only point that remains is whether the direction by the lower appellate Court for payment of mesne profits from the date of notice repudiating the alienation and for adjustment of mesne profits as against Rs. 3267-25 p. and Rs. 3940-50 p. mentioned above, is sustainable in law.

12. One of the ways in which the direction is sought to be sustained by Mr. Gopal Krishnashetty, Learned Counsel for plaintiff-respondent, is that by virtue of the express provisions of Section 29 (1) of the Madras Aliyasantana Act, 1949 (hereinafter referred to as the Act) which governs the family, the alienation must be regarded as totally void from its very inception and that, therefore, both law and equity require that the alienee should pay mesne profits to the family from the date of repudiation. Alternatively, he says that even if one should regard the alienation as merely invalid the same legal position would follow :

13. The relevant portion of Section 29 (1) of the Act reads as follows:--

"No sale or mortgage of any immovable property of kutumba shall be valid, unless it is executed by the yajaman, for consideration, for kutumba necessity or benefit, and with the written consent of the majority of the major members of the kutumba."

14. As pointed out in the judgment of the lower appellate Court, there is no doubt that the document is executed by the yajaman, for consideration, with the written consent of the majority of the major members of the kutumba. Regarding necessity, the finding is that part of the consideration represents binding family necessity and the rest of it does not.

15. Now one thing that is clear from the language of the Section is that it is not possible to impute to the legislature any intention of totally nullifying the transactions of this nature. The reason for making this observation is that the provisions of Section 29 (1) of the Act are intended for protection of not any public interest but private proprietary interest of a family or some of the members of a family. Secondly, it is open to other members of the family not to question an alienation at all which would mean that even if one or more of the conditions enumerated in Section 29 (1) of the Act for validity of a sale of a family property, is broken, the breach or the consequences of the breach may either be repaired or waived. Thirdly, it is not open to any particular individual

whether an alienor or alienee or non-alienating members of the family to say finally that a particular transaction contravenes any of the conditions enumerated in Section 29 (1) of the Act. The ultimate decision must be left to the Court.

16. Hence when the choice is left With members of the family whether or not to question the alienation and the determination of the validity or otherwise of the transaction is a matter exclusively for the Courts, it is opposed to known principles of law and jurisprudence to say that the invalidity or possible invalidity following upon the contraventions of Section 29 (1) of the Act, is equivalent to total nullification of the transaction. The correct view to take is that the causes for invalidity, if any, are permitted by law to be removed by subsequent consent, conduct or waiver.

17. When such is the position, it is not in my opinion, possible for a person questioning the alienation to insist that mesne profits be given to him from the very date of the alienation or from the very date of the repudiation, irrespective of or without regard to the actual circumstances of the case and equities suggested by them.

18. Indeed in the case of alienations set aside under the ordinary Hindu Law subject to conditions imposed by the Court, it has been held by the Privy Council in ILR All 63 : AIR 1918 PC 118 (Banwari Lal v. Mahesh) that when an alienation is set aside only upon payment of certain sums the alienees must be deemed to be lawfully in possession until they are set aside and therefore not accountable for mesne profits till then.

19. Neither the tests of Hindu Law nor Section 29 (1) of the Act, which prohibit alienation of family property except for necessity or benefit of the family, indicate or enumerate any rules or considerations to be observed when an alienation is supported partly by necessity and partly not so supported. The proper order to pass and the conditions to impose in those circumstances, are left entirely to the Court having regard to the special facts and circumstances of the case and the equities suggested by them. The case of Banwari Lal mentioned above is one such instance.

20. In the present case, the special circumstances are that the alienee has taken the property not merely on the representation that it is family property but upon the representation that the consideration thereof is of such a character as to support a valid alienation of family property. The Court has held upon evidence that at least Rupees 3267-25 p. is made up to debts binding upon the family. As to the rest, it is not the finding of the Court that the plaintiff or other members of the family have shown that those sums are not binding on the family at all, but that the alienee has not been able to place before the Court sufficient materials to make out that original recital in the sale deed as to their necessity is correct. The Court has also held that in the bona fide belief that he acquired full title, the alienee has improved the property and has spent Rs. 3940-50 p.

21. In all these circumstances, it appears to me proper and equitable that the

decree entitling the plaintiff to recover possession of the property on behalf of his family, must be subjected to the condition that he should first pay to the alienee or deposit in Court for payment out to defendants 11 to 18, the sum of Rs. 3267-25 p. plus 3949-50 p. and that the plaintiff will be entitled to mesne profits only from the date of actual payment to defendants 11 to 18 or from the date of notice to them of a deposit made in Court.

22. The determination of the quantum of mesne profits now made by the lower appellate Court is set aside. Mesne profits will be determined when occasion arises in a separate application under Rule 12 of Order 20 of the Code of Civil Procedure.

23. The decree of the lower appellate Court will be modified accordingly.

24. The parties will bear their own costs in this Court and in the lower appellate Court.