

(1950) 08 BOM CK 0008
In the Bombay High Court
Case No : First Appeal No. 375 of 1947

Sakarchand Satidas and Others

APPELLANT

Vs

Narayan Savla Vani and Others

RESPONDENT

Date of Decision : 22-08-1950

Acts Referred:

Citation : AIR 1951 Bom 10 : (1950) 52 BOMLR 888 : (1951) ILR (Bom) 217

Hon'ble Judges : Chagla, C.J.;Tendolkar, J;Gajendragadkar, J

Bench : Full Bench

Advocate : S.A. Merchant, for the Appellant; G.M. Joshi, for Respondents 1 to 4, for the Respondent

Judgement

Chagla C.J.

1. In the suit from which this appeal arises, an alienation made by defendant 6, who is the father of plaintiffs 1, 2 and 3 and the husband of plaintiff 4, was challenged. The alienation was a mortgage dated 6-6-1932, and the alienation was in favour of defendants 1 to 5. The trial Court upheld the challenge and declared that the mortgage was not binding upon the plaintiffs' share which he assessed at four-fifths.

2. In this appeal Mr. Merchant on behalf of the alienees has first contended that there is no evidence which would justify a finding that the property alienated was joint family property. The plaintiffs came to Court on the allegation in their plaint that the property was joint family property and that allegation was met by defendants 1 to 5 by the assertion that the property was alienated by defendant 6 for legal necessity. Defendants 1 to 5 in their written statement did not controvert the allegation of the plaintiffs that the property was joint family property. In view of that state of the pleadings, in our opinion, it was unnecessary for the plaintiffs to prove at the trial that the property was joint family property. That allegation must be deemed to have been admitted and on that admission the Court was entitled to proceed on the basis that the property it

was considering was joint family property.

3. On the merits of the allegation very little can be said. The mortgage deed recites that the sum of Rs. 7000 was borrowed by defendant 6, on the mortgage of the property because he had taken over the havala of Rs. 7000 due from the shop of one Dhondu to the mortgagee. Dhondu has given evidence in the case and he has pointed out that defendant 6 did not receive any benefit whatsoever either to himself or to the family by taking over this havala. He says that the shop could not pay the sum of Rs. 7000 to the mortgagee, and thereupon defendant 6, like a good Samaritan stepped in and took over the havala and passed a mortgage in favour of the mortgagee. This alienation, therefore, cannot be justified either by legal necessity or benefit to the joint family property.

4. The third point urged by Mr. Merchant is that the suit is barred by limitation. Mr. Merchant's contention is that the suit falls under Article 120. In this case the plaintiffs are not merely asking for a declaration, but are also asking for possession. But even assuming that the suit fell under Article 120, the cause of action would only accrue when there was an invasion of the plaintiffs' right or unequivocal threat to their rights. The learned trial Judge has rightly pointed out that the mortgage was a simple mortgage, that the mortgagee never went into possession, and that a danger to the interest of the plaintiffs only arose when defendants 1 to 5, sued to enforce the mortgage. It is from that date that limitation began to run, and if that is the correct starting point of limitation, then the suit is clearly in time.

5. The final contention urged by Mr. Merchant is that the trial Court was in error in deciding that the only share of the property which defendant 6 was entitled to alienate was one-fifth and that the four-fifths share was protected. This contention raises a very interesting question. There are two clear views on this question and I will briefly state these two views. The one view for which Mr. Merchant contends is that in order to determine the alienee's share the material date is the date of alienation, and in order to determine that share you have to consider what would be the father's share if there had been a partition on that date. In this case plaintiffs 1 and 2 were in existence at the date of the alienation. Plaintiff 3 was subsequently born. Therefore, if a partition had taken place at the date of the alienation, the two sons would have one-fourth share each, the wife would have one-fourth share, and the father would have one-fourth share. The father would not be entitled to alienate the share of his two sons who were then in existence, viz., plaintiffs 1 and 2. Therefore, the only relief to which the plaintiffs are entitled is to recover half the share of the property, the other half share having been validly alienated by the father at the date of the alienation. Now, this view proceeds on the basis that an alienation is voidable, and till avoided by a challenge made by the coparceners the transaction is valid and binding. It also proceeds on the basis that at the date of the alienation the share of the alienee is determined and whatever the father could alienate at that date validly passes to the alienee. The alienee's share being determined, any

subsequent change in the joint family cannot affect the share of the alienee. This view is supported by two decisions of this Court-- Naro Gopal Kulkarni Vs. Paragowda Basagowda, and Shantaya v. Mallappa 40 Bom.L.R. 1029: AIR 1938 Bom. 500. In Shantaya v. Mallappa 40 Bom. L.R. 1029 : AIR 1938 Bom 500. Broom-field J. observed at page 1039 that the law in Bombay as settled in this Presidency by Naro Gopal Kulkarni Vs. Paragowda Basagowda, is that the alienee gets the share which the alienor would have got if a partition had taken place at the date of the alienation. Broomfield J. considers this as settled law and in coming to that decision he follows the earlier decision of this Court in Mahomed Haji Essack Elias Vs. Abdul Rahiman Shaik Abdul Aziz and Others, . I shall presently refer to the earlier decision of this Court.

6. The other view is that an alienation does not bring about the pastition of the joint Hindu family; that according to well-established rules of Hindu law the interest of the alienor always remains fluctuating till a partition is brought about. His share may increase by the death of a coparcener ; his share may decrease by the birth of a coparcener ; and his specific share can only be ascertained when a partition takes place. If the alienor's share is capable of fluctuation, there is no reason why the alienee, who stands in his shoes, can have a better right than the alienor, and the alienee could only get the alienor's share which would be ascertained on partition. The alienee has an equitable right to ask for partition, and when he does ask for partition, then the share which he is to get would be ascertained by ascertaining the share of the alienee which he has at the date of the partition. There is authority for this proposition also and that is to be found in Gurlingapa v. Nandapa 21 Bom. 797. A Division Bench consisting of Sir Charles Farran, C. J., and Candy J., laid down certain principles of Hindu law, and one of the principles which they laid down was that the purchaser like his alienor is liable to have his share diminished upon partition by the birth of other coparceners if he stands by and does not insist on an immediate partition. This is a clear and categoric principle and is opposed to the other principle to which we made reference earlier.

7. Now, when this Divisional Bench decision came to be considered by another Division Bench in Naro Gopal Kulkarni Vs. Paragowda Basagowda, . Sir Basil Scott C. J. and Heaton J., refused to follow the earlier Divisional Bench decision on the ground that the Privy Council in a subsequent case had taken a view which was inconsistent with the conclusion arrived at by the Division Bench of this Court, and the Privy Council case they relied on was a case reported in Jogeswar Narain, Deo v. Ram Chund Dutt 23 I. A. 37 : 23 cal. 670 . When we turn to that decision we find, with great respect to Sir Basil Scott and Heaton J., that it does not lay down the proposition which those two learned Judges thought it did lay down. As a matter of fact they were not considering the question of alienation by a member of the joint Hindu family at all. The only question that their Lordships of the Privy Council were considering was whether the principles of joint tenancy applied to a case where a man had bequeathed certain property to his wife and his son, and it was argued at the bar that the wife and son

constituted joint tenants as understood in English law, and their Lordships rejected that contention pointing out that it was not right to import into the construction of a Hindu will an extremely technical rule of English conveyancing. They further point out that the principle of joint tenancy appeared to be unknown to Hindu law, except in the case of coparcenary between the members of an undivided Hindu family.

8. Therefore, we have this position as far as this Court is concerned that we have the decision in *Gurlingapa v. Nandapa* 21 Bom. 797, which takes the view that the share of the alienee would fluctuate along with the share of the alienor, and we have the decision, of two Division Benches of this Court, one reported in *Mahomed Haji Essack Elias Vs. Abdul Rahiman Shaik Abdul Aziz and Others*, and the other reported in *Shantaya's* case 40 Bom. L. R. 1029 : A. I. R. 1938 Bom. 500, which have taken the view that the share of the alienee is fixed and it is fixed by reference to the date of the alienation and by the determination of the share of the alienor which he would have if a partition took place at the date of the alienation. Our attention has also been drawn to decisions of the Nagpur High Court and the Madras High Court, but it is unnecessary to consider those at this stage. In view of this uncertainty of this law which is further accentuated by the fact that so learned a commentator as Sir Dinshah Mulla in his books, *Principles of Hindu Law*, at p. 332, points out that the decisions of this Court are not correctly decided, it is necessary that a Full Bench should be constituted to set this matter at rest.

9. We, therefore, refer to the Full Bench the question arising in this appeal, as to what is the share in the property to which the plaintiffs are entitled. Appeal to stand over till the decision of the Full Bench.

OPINION

Chagla C.J.

10. The question that has been referred to this Full Bench is as to what is the share in the property to which the plaintiffs in the suit are entitled. The facts are sufficiently set out in the referring judgment which was delivered by my brother Gajendragadkar and myself and we have also pointed out in that judgment the two conflicting views which have been taken and which can be taken on the question that we have to determine. Our attention has now been drawn to two earlier decisions of this Court reported in *Pandurang Anandrav v. Bhaskar Shadaskiv* 11 Bom. C.R. 72 and *Mahabalaya v. Timaya* 12 Bom. C. R. 138. In the first case there was a mortgage by a member of an undivided Hindu family in 1848. The mortgagee obtained a decree in 1856 on his mortgage, and in 1871 there was a court-sale in which the mortgagor's right, title and interest was sold and the question which arose for determination was, what was the right, title and interest that passed to the purchaser, and West J. took the view that the alienee's interest was to be determined in accordance with the share that the alienor had in 1848 in the joint family at the date of the mortgage. This is a clear

decision which supports the view taken in *Naro Gopal Kulkarni Vs. Paragowda Basagowda*, and *Shantaya v. Mallappa* 40 Bom. L. R. 1029: A. I. R. 1938 Bom. 500. The same learned Judge in *Mahabalaya v. Timaya* 12 Bom. C. R. 138 reiterated the view taken by him in the earlier decision. Now, when we turn to the only case of this Court which has taken the contrary view, *Gurlingapa v. Nandapa* 21 Bom. 797, we find that at p. 805 Farran C. J. refers to the two decisions in *Pandurang Anandrav's* case 11 Bom. C. R. 72 and *Mahabalaya's* case 12 Bom. C. R. 138 without, with respect, attempting to distinguish those decisions. Then the learned Chief Justice relies on the judgment of the Madras High Court in *Rangasami v. Krishnayyan* 14 Mad. 408 ; 1 M. L. J. 603 . We may point out that the Madras High Court has taken the contrary view in a Subsequent Full Bench decision in *Chinnu Pillai v. Kalimuttu Chetti* 35 Mad. 47 : 9 I. C. 596 . As Mayno points out, with respect to the Madras Court, the position in law in Madras is rather uncertain because in a subsequent decision *Muthu Kumara Sathapathiar v. Sivanarayana Pillai* 56 Mad. 534:A. I. R. 1933 Mad. 158 a Divisional Bench has preferred to follow the decision in the earlier Full Bench case of *Bangasami v. Krishnayyan* 14 Mad. 408 : 1 M. L. J. 60 rather than the subsequent decision in *Chinu Pillai v. Katimuthu Chetti* 35 Mad. 47 : 9 I. C. 596 and there have been subsequent decisions of the Madras High Court after *Sathapathiar's* case 56 Mad. 534 : A. I. R. 1933 Mad. 158 which have preferred to take the view taken by the Full Bench in *Chinu Pillai's* case 35 Mad. 47:9 I. C. 596 . Therefore, for the purpose of this Full Bench it would be more advisable to consider the decisions of our own High Court, and the position as far as this Court is concerned is clear. Ever since *Pandurang Anandrav v. Bhaskar Sadashiv* 11 Bom. C. R. 72 consistently, with one solitary exception in *Gurlingapa v. Nandapa* 21 Bom. 797 this Court has taken the view that the share of the alienee is to be determined at the date of the alienation. Mr. Joshi says that this is not a logical approach to the question. Possibly he is right. But we must not overlook the fact that as it is we have departed from the strict principle of Hindu law by which a father cannot alienate except for legal necessity any portion of the joint Hindu family property including his own undivided share. Once we depart from that principle, then some workable principle has got to be accepted by which the share of the alienee has to be determined, and this Court has accepted a workable principle, namely, that the share of the alienee is to be determined at the date of the alienation and not at the time when the alienee asks for an equitable partition. We are impressed by the fact that in taking a contrary view, even if the contrary view be more logical,, we would be upsetting a series of decisions spread over a considerably long period, and in doing so we would be offending against the doctrine of stare decisis which is always more important and more to be respected than any logical doctrine resulting from a particular view as to the strict law. Therefore, we are of the opinion that *Gurlingapa v. Nandapa* 21 Bom. 797 to the extent that it laid down that the share of the alienee is to be determined not at the date of the alienation but at the moment when the alienee seeks for a partition, was wrongly decided and the other Bombay decisions to which reference has been made were rightly decided.

11. In our referring judgment we have pointed out that Scott C. J. who delivered the principal judgment in the case of Naro Gopal Kulkarni Vs. Paragowda Basagowda, had assumed that the decision in Guv-lingapa's case 21 Bom. 797 was inconsistent with the view expressed by the Privy Council in Jogeswar Narain Deo v. Ram Chund Dutt 23 I. A. 37 : 23 Cal. 670 . We have also indicated that the decision of the Privy Council in the said case dealt with a different point altogether and the assumption made by Scott C. J. that the said decision was inconsistent with Gurlingapa's case 21 Bom. 797 was strictly not accurate. We must, however, in fairness add that that is not the only ground on which Scott C. J. refused to follow the decision in Gurlingapa's case 21 Bom. 797. He has also referred to the earlier decisions of the Bombay High Court in Pandurang Anandrav v. Bhaskar Sadashiv 11 Bom. C. R. 72 and Mahabalaya v. Timaya 12 Bom. C. R. 138 and has besides added that the Madras view expressed in Rangasami v. Krishnayyan 14 Mad. 408 : 1 M. L.J. 603 which was preferred by the learned Judges who decided Gurlingapa's case 21 Bom. 797 had been later dissented from by the Madras High Court itself in Chinnu Pallai v. Kalimuthu Chetti 35 Mad. 47 : 9 I. c. 596 . Therefore we must hold that the decision in Naro Gopal Kulkarni Vs. Paragowda Basagowda, was on the whole justified and correct and as we have already pointed out the view there expressed has been consistently followed by this Court ever since.

12. We, therefore, answer the question submitted to us that the share in the property to which the plaintiffs are entitled is one-half.