
(2008) 11 KAR CK 0049

In the Karnataka High Court

Case No : Regular Second Appeal No. 238 of 2004

Smt. Bhagyamma and Others

APPELLANT

Vs

Smt. Ningarama and Others

RESPONDENT

Date of Decision : 24-11-2008

Acts Referred:

Hindu Minority and Guardianship Act, 1956 — Section 12, 6, 8
Limitation Act, 1963 — Section 7

Citation : (2009) ILR (Kar) 118 : (2009) 4 KarLJ 404 : (2009) 1 KCCR 410

Hon'ble Judges : Anand Byrareddy, J

Bench : Single Bench

Advocate : G.S. Bhat and Associates, for the Appellant; T.N. Raghupathy, for Respondent No. 1C, for the Respondent

Final Decision : Dismissed

Judgement

Anand Byrareddy, J.—Heard the counsel for the parties.

2. The facts as are necessary for the disposal of the present appeal are as follows:

The appellants herein were the plaintiffs before the trial court and the respondents were the defendants. They are referred to as plaintiffs and defendants, respectively, herein, for convenience. The suit was for partition and separate possession of the plaintiffs' 4/5th share in the suit schedule properties and consequential reliefs. The plaintiffs claimed that their father, Sannappa, died about 13 years prior to the suit, leaving behind the first defendant, their mother, and the plaintiffs to succeed to his estate, as he had no male issues. It is the case of the plaintiffs that they were each entitled to an equal share, along with the first defendant to the same. It was alleged that the first defendant had sold item No. 1 of the suit schedule properties in favour of the second defendant, which was not in the interest of the plaintiffs and it was therefore contended that the said alienation would not affect their original share in the suit properties. And as there was a threat of the first defendant proceeding to alienate the other suit

properties, at the instigation of defendant No. 2, the suit came to be filed.

The first defendant admitted the relationship but, pleaded ignorance of the sale transaction. It was contended that she had parted with the title deeds to item No. 1 of the suit properties in order to create a mortgage in respect of the property as she was in dire need of funds for the family and had sought the assistance of the second defendant in this regard. It was only upon the institution of the suit and upon the second defendant filing his Written Statement in the suit, that the fraud played on her by the second defendant has dawned on her. In that, it was only then that she became aware that instead of the intended mortgage she had executed a sale deed in favour of the second defendant. She contended that she would therefore have no objection if the suit was decreed as prayed for.

The second defendant contended that he was unaware of the suit properties being the ancestral properties of the plaintiffs and claimed to be a bona-fide purchaser for value, of item No. 1 of the suit properties. That he had no notice of the alleged interest of the plaintiffs' interest, as he was assured by the first defendant that she had absolute authority to alienate the property, which he had purchased under a registered sale deed executed by the first defendant on 20-8-1982. That the first defendant was feigning ignorance of the sale and was acting in active collusion with the plaintiffs in the suit. He further claimed that the sale required to be protected in equity. It was contended that, in any event, the suit was barred by time as the suit was instituted on 13-1-1989.

Defendant No. 1 died on 14-10-1992, during the pendency of the suit.

Defendants 3 and 4 were minors at the time of institution of the suit and were represented by their elder sister, Plaintiff No. 2 as their guardian.

3. The trial court in framing issues as to whether the suit properties were the ancestral properties of the plaintiffs and whether they were entitled to 4/5th share in the same, cast the burden on the plaintiffs. The trial court cast the burden on the second defendant to establish that the sale transaction relating to item No. 1 of the suit schedule properties, was for the legal necessity of the family of the first defendant and that he had been put in possession by defendant No. 1 pursuant thereto and whether the sale is binding on the plaintiffs.

4. The trial court decreed the suit in part, holding that the plaintiffs were entitled to separate possession of 1/4 share each, in the suit schedule items 2 & 3 and dismissed their claim in respect of suit schedule item No. 1.

5. The plaintiffs having challenged the judgement of the trial court before the first appellate court, the points on which the appeal was addressed were as to whether the widow of Sannappa, the mother of the plaintiffs, had the legal capacity to alienate the shares of her daughters, as their natural guardian and whether the suit was barred by limitation.

6. The first appellate court held that there was legal necessity in defendant No. 1 having alienated item No. 1 of the suit schedule properties. The court also found that even if it could be construed that the sale by defendant No. 1 was a voidable transaction, the first plaintiff was a major at the time of the sale transaction and had failed to question the same within 3 years from the date of sale. Similarly the second plaintiff had failed to bring the suit within the period of limitation, on attaining majority. Insofar as plaintiffs No. 3 & 4 are concerned, the first appellate court held that though the said plaintiffs were minors at the time of institution of the suit, plaintiffs No. 1 & 2 who had brought the suit also on behalf of plaintiffs No. 3 & 4 and whose right stood extinguished as barred by limitation, there was a "discharge" which would operate against plaintiffs No. 3 & 4 as well, in terms of Section 7 of the Limitation Act, 1963. The court has placed reliance on the decision in *Narayan Ramchandra Kalkar v. Arjun Bhimrao Gore and Ors.* AIR 1986 Bom 122 to conclude as above.

It is this which is challenged in the present appeal. The appeal coming on for admission, this Court, by its order dated 27-9-2004, had framed the following questions of law:

- i) Whether in a suit for partition in respect of properties which has been inherited by the minor daughters of a Hindu male dying intestate leaving only daughters and the widow and in a case where the widow the mother of the minor daughters alienates the property left behind by the father of minors whether the minors could seek the partition of the alienated property alongwith other properties and adjust the same towards the share of the mother who alienated the property?
- ii) Whether in the facts and circumstances of the case limitation would arise in questioning the alienation made by the mother of the plaintiff who are all minor daughters when their father died as held by the Division Bench of this Court in *Ganapati Santaram Bhosale and Another Vs. Ramachandra Subbarao Kulkarni and Others*, ?

7. The counsel for the appellant would contend that the alienation made by the first defendant of item No. 1 of the suit schedule property, which was the property of the father of the plaintiffs, was clearly not binding on the plaintiffs as it was opposed to the equitable rights of partition which the courts below have failed to appreciate.

That in the absence of any recital in Ex.P-1, the sale deed in respect of the above property, to the effect that the sale was for a legal necessity of the family and in the face of an express recital that the same was the ancestral property of the father of the plaintiffs, the courts below have cardinaly erred in overlooking the same and in holding that defendant No. 2 had discharged the burden of establishing that the sale was for the legal necessity of the family.

That it could not have been accepted that defendant No. 2 was a bona-fide purchaser for value in the absence of any assertion that the sale was preceded by an examination of the rights and interest of the plaintiffs. The sale deed was

not executed for and on behalf of the plaintiffs by their mother as their natural guardian.

That the plaintiffs were seeking partition of their respective share in the suit properties including item No. 1 of the schedule, as the sale was not binding on their shares - the courts below have erred in proceeding on the footing that the plaintiffs were obliged to challenge the sale deed within a period of three years from the date of attaining majority and further that plaintiffs 3 & 4 also were to be non-suited by virtue of a "discharge of liability" as according to the courts below this was the effect of the suit being barred by limitation in so far as plaintiffs 1 & 2 were concerned. The suit being one for partition, the period of limitation of three years prescribed for annulment of the sale deed was inapplicable.

The application of Section 7 of the Limitation Act, 1963 was inappropriate and irrelevant.

The counsel places reliance on the following authorities:

AIR 1986 Bom 122

Bhikarchand Devidas Vs. Lachhamandas Bansilal,

Nidhi Padhan Vs. Bhainra Khadia and Others,

The Electricity Board, U.P. State Vs. Sheo Nath Singh and Another,

The above are cited to support the contention that even if Section 7 of the Limitation Act is held to be applicable, there could be no discharge by virtue of the finding that the suit as brought by plaintiffs 1 & 2 was purportedly barred by limitation.

And on the following:

AIR 1994 Kar 276

AIR 1998 Kar 325

1998 (1) Kar.LJ 552

To support the proposition that the ancestral property of the plaintiffs could not be alienated by their widowed mother, so as to bind their interest. Further that as the plaintiffs were neither parties to the sale deed and in the absence of any indication that the same was made for a family necessity or for and on their behalf the same is not binding. And that concurrent findings as to the presence of legal necessity could be tested if the same was opposed to law.

8. Per contra the counsel for the respondent would contend that the appeal is preferred against concurrent findings of the court below. It is hence incumbent on the plaintiffs to demonstrate the alleged infirmity on any question of law or fact. It is not in dispute that the suit is filed in the year 1989 to question a sale

transaction of the year 1982, it is found that the first plaintiff was a major as on the date of sale. Further the second plaintiff had also attained majority soon thereafter. It was hence open to the plaintiffs to have instituted a suit to challenge the same and claim their rightful share within the period of limitation prescribed for setting aside a transfer of the property made by their natural guardian, their widowed mother. That in so far as plaintiffs 3 & 4 are concerned even though were minors at the time of institution of the suit, u/s 8 of the Hindu Minority and Guardianship Act, 1956, the alienation was at best voidable and not void, and since plaintiffs 1 & 2 had brought the suit on their behalf as well and the suit having been dismissed in so far as item No. 1 of the schedule is concerned on the ground of limitation, the liability of the defendant purchaser to answer the challenge stood discharged u/s 7 of the Limitation Act, 1963. Hence, it is prayed that the appeal be dismissed.

9. In addressing this appeal, in addition to the questions of law framed by this Court, at the time of admission, the following questions are also considered:

- (a) the male head of the family having died leaving behind his widow and four daughters, whether the family would continue to constitute a joint Hindu family?
- (b) Whether the widowed mother would have a right to alienate any ancestral property left behind by her deceased husband during the minority of her daughters without seeking the permission of a competent court?
- (c) Whether Section 7 of the Limitation Act, 1963 was a bar to the suit in respect of the plaintiffs 3 and 4, who were minors at the time of institution of the suit and the suit having been brought on their behalf by their major sister as next friend and guardian?

10. These additional questions of law are framed since both the courts below have answered these legal issues in variance with the law as expressed by authorities, which are referred to hereinbelow:

Insofar as the status of the family is concerned, the first appellate court has relied upon a Division Bench judgment of this Court in Smt. Mangala v. Smt. Jayabai AIR 1994 Kar 276, for the proposition that in the absence of atleast one male member, the family property in the hands of the widow and her female children cannot be characterised as joint Hindu family property with a view to enjoin the widow to act as either manager or as natural guardian to meddle with the family property with a view to bind the interest of the minor daughters who would have succeeded to the estate of their father by virtue of succession under the provisions of Hindu Succession Act, dehors the provisions of Section 8(3) of the Hindu Minority and Guardianship Act, 1956.

In this regard, the decision of the Privy Council in the case of AIR 1943 196 (Privy Council) while referring with approval to AIR 1942 19 (Nagpur) , has extracted the following passages from those decisions:

We regard it as clear that a Hindu family cannot be finally brought to an end

while it is possible, in nature or law, to add a male member to it. The family cannot be at an end while there is still a potential mother if that mother in the way of nature or in the way of law brings in a new male member.

Again it is to be remembered that the adopted son is the continuator of his adoptive father's line exactly as an aurasa son, and that an adoption, so far as the continuity of the line is concerned has a retrospective effect: whenever the adoption may be made there is no hiatus in the continuity of the line. In fact, as West & Buhler point out in their learned treatise on Hindu Law (3rd Edition p.996, Note (a)) the Hindu lawyers do not regard the male line to be extinct or a Hindu to have died without male issue until the death of the widow renders the continuation of the line by adoption impossible.

There is unanimity of opinion, on the above proposition, amongst several authorities.

The Commentary on Hindu Law by N.R. Raghavachariar may be usefully referred to. At Page 202, Volume -I, 8th Edition, it is stated as follows:

A Hindu joint family consists of male members descended lineally from a common male ancestor, together with their mothers, wives or widows, and unmarried daughters bound together by the fundamental principle of sapindaship or family relationship which is the essence and distinguishing feature of the institution. This body is purely a creature of law and cannot be created by act of parties, save in so far that by adoption or marriage a stranger may be affiliated as a member thereof...." "... a joint family may consist of a single male member and widows of deceased male members and the property of the family does not cease to belong to the joint family merely because the family is represented by a single coparcener who possesses rights which an absolute owner of property may possess. The joint family cannot be said to come to end even when the last surviving male member thereof dies, leaving only some widows. The reason is that it is possible even then for any of the widows to make an adoption and refloat a joint family consisting of male members as before, and it is held so long as this possibility is there it cannot be said that there is no joint family.

(emphasis supplied)

Similar is the view expressed in Mulla's Hindu Law 17th Edition Volume-I page 314 which reads as follows:

A joint or undivided Hindu family may consist of a single male member and widows of deceased male members. The property of a joint family does not cease to be joint family property belonging to any such family merely because the family is represented by a single male member who possesses rights which an absolute owner of a property may possess. Thus, for instance, a joint Hindu family may consist of a male Hindu, his wife, and his unmarried daughter. It may similarly consist of a male Hindu and the widow of his deceased brother. It may consist of a male Hindu and his wife. It may even consist of two female members.

(emphasis supplied).

Same is the view expressed in Mayne's Hindu Law and Usage, 12th Edition, Page 534 wherein, it is stated as follows:

There can be a joint family with a single male member and his wife or where there are widows of deceased coparceners. There can also be a joint family where there are widows only or a widow and an unmarried daughter. For, on the death of a sole surviving coparcener, a Hindu joint family is not finally terminated so long as it is possible in nature or law to add a male member to it... The family cannot be at an end while there is still a potential mother, if that mother in the way of nature or in the way of law brings in a new male member. The existence of a coparcenary is not essential for the existence of a joint family.

A Hindu Coparcenary, however, is a narrower body than a joint family and consists of only those persons who have taken by birth an interest in the property of the holder for the time being and who can enforce a partition whenever they like. It commences with a common ancestor and includes a holder of joint property and only those males in his male line who are not removed from him by more than three degrees.

11. The second question that follows is whether the widowed mother had the authority to alienate item No. 1 of the suit schedule properties. To address this question, it would be useful to examine the tenor of Section 6, 8 and 12 of the Hindu Minority and Guardianship Act, 1956.

Section 6 above provides that the natural guardians of a Hindu minor, in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property), are in the case of a boy or an unmarried girl, the father, and after him, the mother.

Section 8 provides that the natural guardian of a Hindu minor has power, subject to the provisions of this Section, to do all acts which are necessary or reasonable and proper for the benefit of the minor or for the realisation, protection, or benefit of the minor's estate. Furthermore, the natural guardian shall not, without the previous permission of the Court, mortgage or charge, or transfer by sale, gift, exchange or otherwise, any part of the Immovable property of the minor, or lease any part of such property for a term exceeding five years or for a term extending more than one year beyond the date on which the minor will attain majority. Any disposal of immovable property by a natural guardian, in contravention of Sub-section (1) or Sub-section (2), is voidable at the instance of the minor or any person claiming under him.

Section 12 provides that where a minor has an undivided interest in joint family property and the property is under the management of an adult member of the family, no guardian shall be appointed for the minor in respect of such undivided interest:

Provided nothing in this section shall be deemed to affect the jurisdiction of a

High Court to appoint a guardian in respect of such interest.

12. The Supreme Court, in the case of Sri Narayan Bal and others Vs. Sridhar Sutar and others, , while considering the scope and effect of Sections 6, 8 and 12 has held as follows:

With regard to the undivided interest of the Hindu minor in joint family property, the provisions afore culled are beads of the same string and need to be viewed in a single glimpse, simultaneously in conjunction with each other. Each provision, and in particular Section 8, cannot be viewed in isolation. If read together, the intent of the legislature in this beneficial legislation becomes manifest. Ordinarily the law does not envisage a natural guardian of the undivided interest of a Hindu minor in joint family property. The natural guardian of the property of a Hindu minor, other than the undivided interest in joint family property, is alone contemplated u/s 8, whereunder his powers and duties are defined. Section 12 carves out an exception to the rule that should there be no adult member of the joint family in management of the joint family property, in which the minor has an undivided interest, a guardian may be appointed; but ordinarily no guardian shall be appointed for such undivided interest of the minor. The adult member of the family in the management of the joint Hindu family property may be a male or a female, not necessarily the karta. The power of the High Court otherwise to appoint a guardian, in situations justifying, has been preserved. This is the legislative scheme on the subject. u/s 8 a natural guardian of the property of the Hindu minor, before he disposes of any Immovable property of the minor, must seek permission of the Court. But since there need be no natural guardian for the minor's undivided interest, in the joint family property, as provided under Sections 6 and 12 of the Act, the previous permission of the court u/s 8 for disposing of the undivided interest of the minor in the joint family property is not required.

(emphasis supplied)

Further, in the case of Gangoji Rao v. H.K. Channappa AIR 1983 Kar 222, this Court has laid down as follows: while drawing reference to Sections 6, 8 & 12 of the Hindu Minority and Guardianship Act:

12. Thus, reading the above section carefully, it becomes clear that this section excludes the undivided interest of the minor - his or her undivided interest in the joint family property. The Legislature, in its wisdom, has used the words "his or her undivided interest". If the words "Joint Family" were used in the sense of coparcenary as used in the common (Hindu) Law, it is obvious that there would be no share of a female in the Hindu coparcenary because a female member is not given any status in the coparcenary. It consists of three generations of male descendants i.e. sons, grandsons and great-grandsons of the holder of the joint property. Since the Legislature has used "his or her undivided interest in the joint family property" and excludes it from the purview of Section 6 of the Act, it becomes clear that the term joint family property" is used in its wider sense

including the shares of those female members who have a share in the joint family property e.g., the mother's share, the daughter's share etc. A joint Hindu family consists of all persons directly descended from a common ancestor, and includes their wives and unmarried daughters. This is made further clear by Section 12 of the Act, which reads:

Guardian not to be appointed for minors" undivided interest in joint family property: Where a minor has an undivided interest in joint family property and the property is under the management of an adult member of the family, no guardian shall be appointed for the minor in respect of such undivided interest:

Provided that nothing in this section shall be deemed to affect the jurisdiction of a High Court to appoint a guardian in respect of such interest.

Thus, in this section, the Legislature has, in its wisdom, stated "the property is under the management of an adult member of the family" and not "an adult male member of the coparcenary, implying thereby that in the joint family, in the wider sense in which it is used under the Act, a female adult member can also become the manager of the family and, in that case, the Court is not competent to appoint a guardian. In fact this is different from the common (Hindu) Law concept in a coparcenary.

The view expressed by this Court in AIR 1994 Kar 276 will necessarily have to be viewed in the light of the above authorities. Incidentally, though AIR 1983 Kar 222 was referred to in the above judgement, it is neither discussed nor expressly overruled.

13. Insofar as Section 7 of the Limitation Act, 1963 being applicable to the suit brought by the plaintiffs and to hold that the suit was barred by time even as against plaintiffs 3 and 4 who were minors as on the date of the suit would necessarily have to be considered with reference to the tenor of Section 7 of the said Act. The section is extracted for ready reference:

7. Disability of one several persons Where one of several persons jointly entitled to institute a suit or make an application for the execution of a decree is under any such disability, and a discharge can be given without the concurrence of such person, time will run against them all; but, where no such discharge can be given, time will not run as against any of them until one of them becomes capable of giving such discharge without the concurrence of the others or until the disability has ceased.

Explanation I. - This section applies to a discharge from every kind of liability, including a liability in respect of any immovable property.

Explanation II. - For the purposes of this section, the manager of a Hindu undivided family governed by the Mitakshara law shall be deemed to be capable of giving a discharge without the concurrence of the other members of the family only if he is in management of the joint family property.

It is clear that by virtue of Explanations -I and II, the liberal interpretation given by courts to include all kinds of discharge and not merely the discharge of money claims are given effect to. The question then arises whether plaintiffs 1 and 2 could have brought the suit on behalf of plaintiffs 3 and 4, as well. The reported judgments relied upon by the first appellate court, namely AIR 1986 Bom 122, is cited out of context. That was a suit by one of the coparceners of a joint family and being in the position of a manager was capable of giving discharge on behalf of the other minors and therefore, Explanation -II added to the present Act of 1963 would make it clear that, for purposes of this section, the manager of a Hindu undivided family governed by the Mitakshara Law shall be deemed capable of giving a discharge, without the concurrence of the other members of the family only if he is in management of the joint family property.

14. In the instant case, in the light of the authorities cited hereinabove, the widowed mother could be deemed to have been the manager of the joint family property, as on the date of the suit. The plaintiffs 1 and 2 though majors, were not acting in the capacity of a manager. Hence, the suit having been brought by plaintiffs 1 and 2, on behalf of plaintiffs 3 and 4, who would have had an independent right to challenge the alienation on attaining majority, it cannot be said that the suit was covered u/s 7 and therefore, the finding that the bar of limitation applied to plaintiffs 3 and 4 as well, since the suit was brought beyond the period of three years after attaining majority by the plaintiffs 1 and 2 and therefore, the period of limitation did not stand extended insofar as plaintiffs 3 and 4 are concerned is an erroneous finding. However, it is to be noticed that though the trial court has recorded that during the pendency of the suit, plaintiff 3 on attaining majority had filed LA. No. III dated 8.1.1993, and had elected to proceed with the suit in her own name and had prayed to discharge her next friend, plaintiff 2, who had represented the said plaintiff 3 as her guardian, and the same having been allowed on 16.3.1993, and similarly, the court also having recorded that plaintiff 4 on attaining majority had filed I.A. No. XII, dated 28.10.1994 and had elected to proceed with the suit in her own name and had prayed to discharge her next friend and the said Interlocutory Application having being allowed on 28.10.1994, neither the trial court nor the first appellate court nor even the counsel appearing for the parties before this Court, choose to highlight this circumstance. The effect of the plaintiffs 3 and 4 having attained majority during the pendency of the suit and having chosen to proceed with the suit in their own name, the question as regards limitation was no longer relevant. The plaintiffs 3 and 4 have chosen to stand or fall on the basis of the findings arrived at by the trial court, in the suit as brought by plaintiffs 1 and 2. Hence, the question was redundant. The question of law on this point however, required consideration in view of the first appellate court having incorrectly applied the scope of Section 7 of the Limitation Act, 1963.

Insofar as the question whether the widowed mother had the authority to alienate item No. 1 of the schedule property stands answered hereinabove.

15. The next aspect would be whether such alienation was for a legal necessity. On this, the trial court as well as the first appellate court having arrived at an affirmative finding, and from an examination of the pleadings and the evidence on record, except for minor inconsistencies in the manner in which the mother has sought to claim the legal necessity, an over-all examination of the facts and circumstances would not warrant interference by this Court on this concurrent finding.

16. Therefore, in the above light of the matter, the answers to the question of law raised in this appeal are as follows:

(i) The alienation by the widowed mother of the minor daughters can be questioned in a suit for partition. Though her authority to alienate the same, is present, the alienation can however be questioned on the ground of whether or not there was a legal necessity.

(ii) Though the suit was not barred by limitation, insofar as plaintiffs 3 and 4 are concerned, in the light of the discussion hereinabove, the minor daughters having attained majority during the pendency of the suit and having chosen to prosecute the suit in their own right, this question is rendered otiose.

(iii) The sole male head of the Hindu joint family having died, leaving behind his widow and four daughters, the family would continue to constitute a joint Hindu family. The widowed mother would not have to seek permission of a competent Court to alienate the joint family property is concerned, during the minority of her daughters.

(iv) Section 7 of the Limitation Act, 1963 was not a bar to the suit in respect of plaintiffs 3 and 4, who were minors at the time of institution of the suit when the suit was not brought by their major sisters in the capacity of managers of the joint family property.

In the result, though not for the reasons stated by the first appellate Court, except on the question of legal necessity, the appeal fails and is dismissed.