

(1967) 02 AP CK 0001

In the Andhra Pradesh High Court

Case No : Second Appeal No's. 521 of 1963 and 1047 of 1964

Sri Venugopalaswamy Varu Temple

APPELLANT

Vs

Visweswara Prasad and Another

RESPONDENT

Date of Decision : 13-02-1967

Acts Referred:

Limitation Act, 1908 — Article 126, 6

Citation : AIR 1969 AP 24

Hon'ble Judges : Gopalrao Ekbote, J

Bench : Single Bench

Advocate : I. Balaiah and A. Satyanarayana Rao, for the Appellant; Y. Suryanarayana, A. Subba Rao and C. Venkata Subba Rao, for the Respondent

Judgement

1. These two appeals arise out of O. S. No. 220 of 1959. These appeals are filed against the judgment of the First Additional Subordinate judge, Vijayawada, given on 19th July, 1962.

2. The necessary facts in order to appreciate the contentions raised before me may be briefly stated. Late Sri Velagaloti Dasaradharamayya was an eminent advocate and Public Prosecutor at Vijayawada. He acquired considerable immovable as well as movable properties from the earning of his practice as an advocate. He executed a will on 24-11-1933 which was subsequently amended by a codicil dated 14-9-1934 whereby he disposed of his personal as well as ancestral properties. In so far as his self-acquired property was concerned, he gave life interest to his three sons and the remainder was given to the grandsons. In the ancestral property the three sons, since they were coparceners, they got the property in entirety after the death of the said Dasaradharamayya. Kodandaramayya was one of the three sons. This Kodandaramayya had taken to bad ways. He was addicted to drink and debauchery. The property which fell to the share of Kodandaramayya consisted of about 50 acres of land as well as some cash and jewellery. within one year of his father's death which occurred on 3-5-1935, Kodandaramayya found himself in

need of money. He, therefore, started selling the property. Under Exhibit A-43, dated 11-5-1938, he sold 4 acres and 4 cents of land situated in Demarcation No. 382/2 of Velagaleru village in favour of Sri Venugopalaswami Temple of Velagaleru of which Kodandaramayya himself was the sole trustee, D. W. 18 being the present trustee. The first plaintiff, who is the son of Kodandaramayya, was born on 13th May 1938. The second plaintiff was born subsequently on 23rd August 1954. Kodandaramayya died on 31-12-1958. Dasaradharamayya had already died on 3-5-1935.

3. The plaintiff, who are the sons of Kodandaramayya, instituted the present suit for a declaration that the alienation made by their father in favour of the temple under Exhibit A-43 was for an avyavaharika debt and therefore the sale deed is voidable. It was alleged that Kodandaramayya who was trustee for the temple had misappropriated the temple's monies which he used for his illegal and immoral purposes and in consideration of this misappropriated amount, he executed the sale deed, Exhibit A-43. It is on those facts that the plaintiffs contended that the sale is not binding upon them. They, therefore, wanted two-thirds share of their from the property conveyed to the temple under Exhibit A-43.

4. The defendants denied that the sale is voidable. They further alleged that the suit is time-barred in so far as the second plaintiff was concerned. They further claimed that the consideration for the sale was not avyavaharika debt. The sale is binding upon the plaintiffs.

5. Upon these pleadings, the trial Court framed several issues. Along with the present suit, these very plaintiffs instituted another two suits, O. S. Nos. 218 and 219 of 1959, to avoid the other alienations made by their father. These three suits were tried together by the Second Additional District Munsif, Vijayawada. Although issues were separately framed, with the consent of the separately framed, with the consent of the parties, evidence was recorded in one suit, O. S. No. 218 and 1949 and was agreed to be treated as evidence in the other two suits also.

6. Upon this material, the trial Court held that the sale is not binding on the plaintiffs because in consideration of the misappropriated amount the father of the plaintiffs had executed Exhibit A-43. The trial Court also found that the suit, in so far as the first plaintiff is concerned, is within time, but it is barred in so far as the second plaintiff is concerned. In view of the finding in regard to the limitation, the trial Court dismissed the suit as against the second plaintiff but gave a decree in favour of the first plaintiff to the extent of his one their share.

7. The defendants aggrieved by that decision preferred A. S. No. 21 of 1962. The plaintiffs, who were also not satisfied with the judgment, preferred A. S. No. 22 of 1962 to the Additional Subordinate Judge, Vijayawada. The learned Subordinate judge held that the suit is not time-barred even in regard to the second plaintiff. He further found that alienation made under Exhibit A-43 was

made for avyavaharika, i.e., illegal and immoral purposes, and hence it is not valid and binding on the plaintiffs. The learned Subordinate Judge, therefore, decreed the plaintiff's suit in its entirety. It is this view which is now assailed in the second appeal.

8. Two contentions are advanced before me by Mr. I. Balaiah, the learned counsel for the appellants. It was firstly contended that the suit is time barred as against the second plaintiff and the learned Subordinate Judge has erroneously held that the second plaintiff's suit also is within time. The second contention was that since the sale deed was executed in lieu of the amount which Kodandaramayya as a trustee had misappropriated, it cannot be said that the money which came into the hands of Kodandaramayya was tainted with criminality at the inception. His subsequent misappropriation does not alter the nature of amount which he had received and if in lieu of the amount which he had subsequently misappropriated which came into his hands legally he executed Exhibit A-43, the sale deed, does not become voidable at the instance of the sons because it was not an avyavaharika debt for which the transfer was effected.

9. That an after-born son can, under certain circumstances sue to set aside his father's alienation of ancestral property is not disputed. The law seems to be now fairly settled that son born in a joint Hindu family acquires by birth interest in ancestral property, but does not acquire any interest in any right to sue. The cause of action accrues only on an alienation and only when the purchaser takes possession under the alienation. See Article 126, now 109, of the Limitation Act. It would be a mistake to think that a new cause of action mistake to think that a new cause of action occurs upon the subsequent birth of a son in the family. The after-born son does not acquire a fresh cause of action and consequently a fresh period of limitation does not start from the date of his birth. In his case, the time from which the period of limitation is to be reckoned is the date of transfer and taking of possession under the transfer and taking of possession under it by the purchaser. When he was not born on the day of the transfer, he could not be said to be suffering from any disability on that date and eventually cannot take any advantage of Section 6, Limitation Act. It will thus be clear that a subsequently born son has the same cause of action which accrued to another coparcener apart from the father who made the alienation and who was living at the time of alienation.

10. The question, however, which arises in this case is whether the after-born son can take advantage of the extended time u/s 6 which was available to the first plaintiff who was in existence at the time of the alienation and was minor at that time. In other words, can the second plaintiff, an after-born son, file the suit to challenge the father's alienation within the period of same limitation as was available to the minor son who was in existence at the time of alienation, in this case the first plaintiff.

11. In considering this question it should be remembered that on the basis of the cause of action which had accrued to the first plaintiff on the date of alienation,

he could have instituted the suit taking advantage of Section 6 of the Limitation Act because he was minor at that time. Such a suit instituted by him would undoubtedly be a representative suit and any relief which he claims on avoiding alienation would go to the benefit of not only himself but to the other members of the coparcenary who were either in existence or came into existence subsequently. Such a suit would in other words, be a representative suit. If he succeeds, the property goes back to the family and ensures for the benefit of all existing as well as future members of coparcenary excluding the father who has alienated the property. It may be that the alienated the property. It may be that the right of a coparcener who is born subsequently is not based on an independent cause of action but is based on the same cause of action which had immediately accrued the day when the possession was taken under the transfer. It may also be true that such a subsequently born son is not entitled to a fresh starting point of limitation on his birth but when the first plaintiff can sue for the benefit of his family. I fail to see why the second plaintiff should be deprived of his right to sue within the limitation which is available to the first plaintiff u/s 6 of the Limitation Act.

12. That this view is correct is supported by several decisions. The first case to be noticed is the Privy Council decision in *Ramkishore Kedarnath v. Jainarayan Ramrachhpal*, (1913) 40 I A 213 (PC). It appears that the suit out of which the appeal had arisen related to a joint Hindu family governed by the Law Mitakshara. The suit was filed in 1907 by the four sons on one Kedar Nath to set aside a so-called alienation of ancestral property made by him in 1889 in consenting to an adoption by his brother's widow. The defendant resisted it principally on the ground of limitation. One of the plaintiff was born on 20th December 1896, and the other three in 1890, 1892 and 1894. Holding that the suit was barred, the District Judge dismissed it. On appeal, the Additional Judicial Commissioner held that the claim of those plaintiffs who were born subsequent to the alienation was barred by limitation, but the claim of the plaintiff who came into existence in 1886 was saved by the provisions of Section 7, Limitation Act, now corresponding to Section 6 of the Act 9 of 1908. His suit was, however, dismissed as it was held that he was bound by his father's acquiescence. All the plaintiffs therefore appealed against that decision. It was contended before their Lordships of the Privy Council that if the claim of the elder son was maintained, the other appellants would not be barred but would be entitled to the relief. Their Lordships on this aspect of the case observed;

" It was, however, conceded before this Board, and, as their Lordships think, rightly conceded, that if the first plaintiff succeeds in the suit, his younger brothers born before a partition of the estate will be entitled to share in the relief."

13. *Ranodip Singh v. Rameshwar Prasad* AIR 1923 Oudh 52, is the next case which takes the view that the benefit of extended limitation, if one of the sons happens to be minor and was living at the time of alienation, can be taken by a

subsequently born son and he can institute the suit within the same extended limitation which was available to the minor son who was living at the time of alienation.

14. The Allahabad High Court in the following cases took the same view; Dhanraj Rai and Another Vs. Ram Naresh Rai and Others, at p. 914 and Sikandar Singh and Another Vs. Bachchu Pande and Another, at p. 55.

15. Jowala Singh v. Sant High AIR 1932 Lah 605 can be said to be the leading case in so far as the Lahore High Court was concerned. In the same train of thought it decides;

"Where in the Punjab the father has made certain alienations without necessity and where on the date of the sale only one minor son is alive, while a second son is born after the date of sale, limitation will run from the date of the cessation of the elder son's minority and both the sons can sue to set aside that alienation so long as the cause of action is subsisting. This is so because the second son has no independent right to sue. His right is derived from his elder brothers' right to sue, he being alive on the date of the alienation."

This view was subsequently followed in Govind v. Ram Lal AIR 1937 Lah 420 and Harnam Singh v. Aziz AIR 1938 Lah 1.

16. This question again came up before a Full Bench of the Lahore High Court in Dharu Indar Pal v. Firm Badri Das Sohan Lal AIR 1943 Lah 281 (FB) and the view expressed in the abovesaid decisions has been upheld.

17. Somyya, J., in Srinivasalu Chetti and Another Vs. Munisami Chetti and Others, decided on similar lines.

18. It will thus be clear that the Privy Council and the several High Courts have taken the view that a subsequently born son can take advantage of the cause of action which had accrued to the son who was living and who was minor at the time of the alienation and he can bring the suit within the existing same limitation as was available to the son who was existing at the time of alienation. This right to sue is obviously based upon what is known as doctrine of overlapping. Since the subsequently born son takes advantage of the cause of action accrued to the coparcener surviving he is given the same limitation as is available to the coparcener then living and who is minor.

A discordant note, however, was struck by Viswanadham Sastry, J. in Seshamma v. Venkayya 1956 A WR 1067 : (AIR 1957 A P 386) In that case, the learned Judge referred to the two prevailing views on this question. The learned Judge observed:

"One view is that so long as the cause of action subsists, the after-born son can take advantage of the period of limitation, not because he derives his right from existing coparceners whose right to sue is not barred by limitation but because the existence of that right to sue unbarred by limitation makes the cause of

action still subsisting and the after-born son can, therefore, sue within the longest period of limitation which the coparcener existing at the time of the alienation has. If the existence of a coparcener clothes an after-born son cannot claim the benefit of Section 6 of the Limitation Act in his own right, he cannot be deprived of benefit of the extended period claimable by the coparcener in existence at the time of alienation. The other view is that the right of the after-born son is not derived from the existence of the coparcener at the time of the alienation. An after-born son has an independent right to sue on the cause of action which arose when the alienee took possession under the father's invalid alienation and his suit must be brought within 12 years under Art. 126, unaffected by any extended period of limitation available u/s 6 of the Limitation Act to a coparcener existing at the time of the alienation."

The learned Judge referred to two decisions; AIR 1943 Lah 281 and Srinivasalu Chetti and Another Vs. Munisami Chetti and Others, . It is evident that both these decisions support the earlier view referred to by the learned Judge. In support of the other view, no decision has been referred to in the judgment. I however, find from different commentators that there were only two decisions which seem to take the latter view referred to by the learned Judge. They view referred to by the learned Judge. They were Lachman Das v. Sunder Das AIR 1920 Lah 39 and Ber Singh v. Hazara Singh AIR 1922 Lah 275. Although these decisions are not referred to in the judgment of the learned Judge, the reference obviously was only to those two decisions because no other decision could be brought to my notice which is said to take the latter view.

19. It must, however, be noted that both these decisions were considered by a Bench of the same High Court in AIR 1937 Lah 420.

20. It appears from the decision in AIR 1920 Lah 39 that four sons of a Hindu contested the sale by him of his occupancy right more than 12 years after the alienation. At the time of the alienation only one of them was in existence and was about 9 years of age. At the time of the suit, however, he was thus clearly barred by time. It is on this ground that the Division Bench of the Lahore High Court dismissed the case against all the four of them obviously because if the suit is time-barred against one son who alone was in existence at the time of alienation and if the suit is dismissed as against him, the other sons could not have taken advantage of their minority because they were subsequently born. That case, therefore, cannot be taken to decide that the subsequently born son cannot take advantage of the extended period of limitation if the son who was existing at the time of alienation was himself a minor. Air 1937, Lah 420, therefore, rightly ignored this decision by impliedly holding that it is no authority on the proposition under consideration.

21. The learned Judges in the same judgment considered AIR 1922 Lah 275. Since the judgment in that case was not clear, their Lordships sent for the original record and after going through the record, their Lordships found that the remarks made in AIR 1922 Lah 275 related to a certain aspect of the case. In

view of the elaborate consideration of the facts of that case, their Lordships did not seem to have taken this case to be holding anything contrary to what is stated in AIR 1932 Lah 605.

22. These two cases came again for consideration before the Full Bench in AIR 1943 Lah 281 . These cases were considered on similar lines. It can, therefore, be safely taken that AIR 1920 Lah 39 and AIR 1922 Lah 275 do not, in view of subsequent decisions, represent the contract position of law if they decide anything contrary to what subsequent decision decided.

23. Viswanath Sastry, J., preferred to uphold the view that the subsequently born son cannot take advantage of the extended period of limitation, firstly on the ground that the subsequently born son has an in-dependent right to sue and he does not derive his right to sue from the minor son who was existing at the time of the alienation and secondly, because the subsequently born son cannot take advantage of Section 6 because he was not born when the cause of action had accrued.

24. It need not be disputed that the subsequently born son cannot take advantage of Section 6, if he happens himself to be minor in view of the fact that he was born subsequent to the accrual of the cause action, it need not also be doubted that the privilege which Section 6 confers on a minor, who happens to be suffering from that disability at the time the cause of action arose, is a personal privilege and not attached to the cause of action and, therefore, it cannot, however, be ignored that a suit by the existing copracener in such a case is a suit not only on his behalf but on behalf of all other members existing as well as those who come into existence in future. It would thus be a representative suit. Even if the suit is taken if the suit is taken to he time-barred as against a subsequently born son, it does not get time-barred in so far as the coparcener who was living at the time when the cause of action had accrued and when the son present succeeds, the benefit goes to all the members of the family. When that is so, I fail to see why the subsequently born son should be denied the facility of instituting a suit with-in the same limitation as is available to the coparcener who was minor and was living at the time of the accrual of cause of action. I have, therefore, no hesitation in falling a line with the view expressed by the decisions of the Privy Council, the several High Courts and by Somayya, J. It must be remembered that it was not necessary for Viswanatha Sastri, J. to decide this question expressly in that suit. His Lordship observed that, whichever view was adopted, the rights of defendants 3 to 5 became barred when the plaintiffs brought the suit. The said decision, therefore, cannot be taken as deciding anything contrary to what was held by Somayya, J.

25. Since the view of Somayya, J. is consistent with the view of the Privy Council as well as several High Courts with due respect, I echo the same view. I do not, therefore, find any difficulty in agreeing with the conclusion of the lower appellate Court that the suit of the plaintiffs is within time.

26. The second contention was regarding the nature of the debt. The recitals of Exhibit A-43 denote that Kodandaramayya, who was the sole trustee of the temple, had collected the amounts due to the temple. When the amount reached his hand, it can hardly be doubted that it was lawful. If Kodandaramayya subsequently misappropriated it the claim of the temple as against Kodandaramayya cannot be said to be on the basis of misappropriation. It would have been a claim for the refund of the money which had lawfully gone into the hands of its trustee. His subsequent misappropriation of the amount does not alter the position. The amount when it reached the hands Kodandaramayya was not tainted with criminally or illegality. If, for the purpose of paying the amount of the temple which was misappropriated subsequently by Kodabdaramayya, a sale deed, Exhibit A-43, was executed, I fail to see how it can be said that the sale deed suffers from an infirmity because it was executed for an avyavaharika debt. There might have been conflict at some time on this question. But now the law seems to be firmly settled that such a debt would not be an avyavaharika debt and the sale to satisfy such a debt would not suffer from any infirmity. See Sri Venkateswara and Channakeswaraswami Temple Upputur and Another Vs. Bendapudi Radhakrishna and Others, . That this is so is not disputed by the learned counsel for the respondents.

27. Since no other argument was advanced, the result is that both these appeals are allowed and the plaintiff's suit dismissed. I leave the parties to bear their own costs throughout. No leave.

28. Appeals allowed.