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Court : Karnataka

Decided On : Mar-10-1955

Reported in : AIR1955Kant88; AIR1955Mys88

Judge : Venkataramaiya and ;Vasudevamurthy, JJ.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Sections 11; Hindu Law

Appeal No. : Second Appeal No. 349 of 1952-53

Appellant : Madappa

Respondent : Basaviah and ors.

Advocate for Def. : M.A. Gopalaswamy Iyengar, Adv.

Advocate for Pet/Ap. : Nittur Sreenivasa Rao, Adv.

Judgement :

Vasudevamurthy, J.

1. The plaintiff has brought a suit for partition by metes and bounds of the plaint schedule properties, which consist of three items with a view to ascertain the share therein of defendant 1 and to allot suit item 1 which is a house,, to the share of defendant 1, so that the plaintiff who has purchased the same from defendant 1 by a sale deed dated 6-7-1943 might get it. After that sale defendants 2 to 4 who

were all then minors sued the plaintiff in O.S. No. 110/ 44-45 for a declaration that that alienation by defendant 1 their father was not binding on their three-fourths share in that item. That suit was decreed in their favour and then they filed a second suit O.S. No. 182-/47-48 for separation and delivery of possession of their share which had been so declared unaffected by the alienation. The plaintiff subsequently filed the present suit O.S. No. 72/48-49 for a general partition with a prayer as above. The Munsiff who heard the suit held that, the suit was not maintainable and was barred by the earlier. suit O.S. No. 182 of 47-48 on the principles of 'res judicata'. On appeal the Subordinate Judge confirmed that judgment and the plaintiff has come up in second appeal.

2. The plaintiff's suit was filed during the pendency of O.S. No. 182/47-48. The plaintiff made 'an application for the two suits being tried together. His request was not granted and the suit O.S. No. 182/47-48 was decreed without reference to the present suit. It is urged before us by Mr. Ramdas, learned counsel for the Appellant, that the Courts below were in error in dismissing the plaintiff's suit altogether and that his case is fully covered by the decision of this Court in -- 'Narasimhaiah v. Chikkathimmaiah', AIR 1954 Mys 115 (A). In that suit on similar facts it was held that the alienee's subsequent suit for general partition was not barred by 'res judicata' by reason of an earlier suit for partial partition brought by the sons of the alienor. It was pointed out in that case, that an alienee could not insist that a suit for partial partition, to recover his own share by a coparcener, which he is entitled to bring, should be converted into one for general partition, the remedy of the alienee in such a case being to bring a suit for general partition and to ask that if the circumstances of the case permit the property sold to him may be allotted to his vendor's share and -consequently to himself.

3. Mr. Gopalaswamy Iyengar, learned Counsel for the Respondents, has sought however to distinguish that case. He urges that in the present case the rights of the sons to hold the share which they had won through declaration in. O.S. No. 110/ 44-45 had been finally allotted to their share in O.S. No. 182 of 47-48, that that share in item 1 had become their separate property and that the effect of that decision could not be whittled down or negatived by making a decree in the present suit Reallotting that share to the plaintiff. He has also urged that the

plaintiff should have got the two suits tried together or at least got a direction made in O.S. No. 182/47-48 that the re-allotment therein would be subject to the decision, is the present suit, and that having failed to do so he cannot be heard to complain. He has in this connection referred to such a direction made in -- 'Sowrimuthu v. Pachia Pillai', AIR 1926 Mad 241 (R) and -- 'Kandaswami Udayan v. Velayutha-Udayan', AIR 1926 Mad 774 (C). For the argument that the share allotted in the above circumstances becomes the separate property of the sons he has referred to a passage in Mulla's Hindu Law, 1952 Edn., page 320. That passage is based upon the decision in AIR 1926 Mad 241 (B). And it is followed by a passage that such a share would continue as joint if the relief granted to the non-alienating coparceners is made conditional on their assenting to the results of a suit for general partition which the alienee may offer to bring, and reliance is placed on -- 'Ramkishore Kedarnath v. Jainarayan Ramrachhpal', 40 Cal 966 (PC) (D) and -- 'Hanmandas Ramdayal v. Valabhdas Shankar-das', AIR 1918 Rom 101 (E). The share allotted to a non-alienating coparcener is, according to that text, his separate, property as between him and the alienating coparcener, but not as between him and his male issue. On the same page the equitable-right of a purchaser on partition has been described thus:

'The alienee of a specific property or of the undivided interest of a coparcener in such property has on a general partition an equitable right to have that property, or his alienor's share in that property, as the case may be, assigned to him if it could be done without injustice to the other coparceners. But there may be equities between the coparceners or liabilities attaching to the alienor's share which may render it inequitable or impracticable to do so. In such a case the alienee is entitled to recover from his alienor property of an equivalent value out of the properties allotted to the alienor for his share in substitution of the property alienated.'

4. It cannot be properly contended that a sub* sequent suit for general 'partition by the alienee would be barred by 'res judicata'. If the non-alienating coparcener is permitted to bring a suit for partial partition in respect of a particular item as against an alienee, and the alienee cannot compel him to convert it into a suit for general partition it cannot be said that he was bound to have raised a plea by

which he could claim that equities should be worked out in that suit itself, as if it was a suit for general partition, and that it is a matter which might and ought to have been decided in the earlier suit. That is the only argument by which a bar of constructive 'res judicata' can be put forward. In AIR 1954 Mys 115 (A), reference has been made to cases of this Court reported in -- 'Lemaji Mylarappa v. N. Siddoji Rao', 9 Mys CCR 43 (F), 22 Mys CCR 293 (G) and -- 'Ramiah v. Siddalingappa', 21 Mys LJ 206 (H) and to cases reported in -- 'Aiyagari Ven-kataramayya v. Ramayya', 25 Mad 690 (FB) (I), -- 'Peramnnayakam Pillai v. Sivaraman', : AIR1952 Mad419 (FB) (J) and AIR 1926 Mad 774 (C).

5. AIR 1926 Mad 241 (B), which was decided by Phillips and Ramesam JJ. is no doubt in favour of the respondents' contention. In that case Ramesam J. has observed that so long as a suit for partial partition is permissible, and the decree directs division of the property by metes and bounds the result of the decree must be that the coparcener gets his share as separate property and if there is no condition or reservation attached to the former decree, that decree would be final and cannot be reopened in another suit, which would be barred by 'res judicata'. In AIR 1926 Mad 774 (C) decided by Devadoss and Wallace JJ, their Lordships did not agree with that view. They observed that when a coparcener brings a suit for declaration that an alienation is not binding on him and on his share of the property alienated, the Court gives him a decree for his share if it finds that the alienation is not binding on the plaintiff; but his share does not thereby become absolutely his, for the alienating coparcener still continues a member of the joint family, and on a suit for partition by him the property alienated may fall to his share in which case the alienee would be entitled to get it.

The matter would not be different when the alienee himself brings a suit for general partition and prays to be allowed to retain the property which was sold to him, An alienation by a coparcener of an item of joint family property or his share in it would not operate as effecting a division in status of the family or of the alienating member. When the non-alienating coparcener sues to set aside an alienation made by another coparcener that suit is not for partition and does not involve necessarily the status of division between him and the other members of the joint family. It was further pointed out in that case that if both the suits, viz., the

suit for partial partition and the suit for general partition, are tried together there would be no difficulty at all as the possible plea of 'res judicata' can then be obviated; and they referred to a case in AIR 1918 Bom 101 (E), wherein the execution of the decree of the suit for partial partition was stayed for three months and the alienor was directed to bring his suit for general partition within that time. They made a similar direction in the case before them, to avoid a possible plea of res judicata. In AIR 1918 Bom 101 (E) it was also held that when a coparcener was suing an auction purchaser it was not a valid objection to the suit that the coparcener claimed only a partial partition and that the auction purchaser should be allowed to file a suit against the plaintiff for general partition of the entire family properties. In 'Ramasubbaraya Sastri v. Appala-narasimharaju', AIR 1940 Mad 217 (K), it was decided by Venkataramana Rao and Abdur Rah-man JJ. that:

'The strict theory of Hindu law does not recognize alienation as a mode of severance of a joint family. An alienation by a member of his share in whole of the joint family property or in any part thereof would not sever his status from the family and make him a divided member in respect of the property alienated: He continues to be an undivided member of the family with rights of survivorship between himself and the remaining members in respect of all the joint family property other than what he has transferred.'

In that case their Lordships found that there was nothing in the plaint before them to indicate that in the plaint of non-alienating coparcener there was an intention to hold his share of the property in severally that by the litigation in the prior suit the alienating father and his son did not become divided in status and that the father after the death of the son was competent to alienate the reversion in the lands. All the decisions of the Madras High Court and other High Courts bearing on this matter have been fully considered in : AIR1952 Mad419 (FB) (J) and the view of Hindu Law in this matter taken in AIR 1926 Mad 774 (C) and AIR 1940 Mad 217 (K) has been affirmed.

6. Some of the results of these decisions may be summarised as follows: A mere alienation by a coparcener of his share in the joint family property or a suit by a non-alienating coparcener to have it declared that his share is not bound by the

alienation or even a suit for partial partition by such a non-alienating coparcener to recover his share from the alienee would not by itself effect a division in status between himself and the other coparceners. He cannot be compelled to change his suit into one for general partition. An alienee can bring a suit for general partition, and such a suit would not be barred by 'res judicata' by reason of the decree in the earlier suit. It is, however, advisable that the two such suits should be tried together to avoid a possible plea of 'res judicata'. In the suit for general partition it is open to the Court, notwithstanding the judgment or decree in the earlier suit, to make some equitable arrangement by which, if possible, while the non-alienating coparcener will not be put to any inconvenience or loss the alienee may also not suffer. The alienee cannot of course insist or claim as of right upon the entirety of the property he has purchased being allotted to his alienor's share.

7. The coparcener has his share or a right to share in every item of family property and until there is a division none of them can predicate either his share or his right in any specific item of joint family property. See -- 'Appovier v. Rama Subba Aiyan', 11 Moo Ind App 75 at p. 89 (PC) (L), -- 'Sudarsanam Maistri v. Narasimhulu Maistri', 25 Mad 149 (M), Mulla's Hindu Law 11th Edn. 843. In a suit for partition, ordinarily, properties are divided by metes and bounds, and it is only in cases where there cannot be such division conveniently or profitably to the family that items are separately valued -and divided on that basis.

8. In adjusting equities in a suit for general partition the Court would have to see that the alienating coparcener or the alienee from him does not get an unfair advantage over the family. It must also see that the alienating coparcener and the other coparceners do not combine so as to defeat an alienee who may often times have acquired rights 'bona fide' and for consideration. Such a suit for general partition must obviously be brought as early as possible in order to avoid uncertainty in or confusion of titles and a scramble among the members of the coparcenary to obtain unfair advantage over each, other or against the alienee. The object of granting a conditional decree as was made in AIR 1918 Bom 101 (E) and AIR 1926 Mad 774 (C) was to avoid such a contingency. It is not quite clear how such a direction can override a plea of 'res judicata' if such a plea could be legally available; and if such a plea is not available the making of such a direction

can merely be a step in the direction of doing equities between the parties.

9. In the present case the two suits were tried together and we are informed that the alienee is still in possession of the property sold to him and has not yet been dispossessed as a result of the decree in O.S. No. 182 of 1947-48 a situation referred to and relied upon in AIR 1918 Bom 101 (E). In the present suit the alienee made every effort to see that the two suits were tried together. He was resisted by the defendants and the earlier suit has been decided, only recently during the pendency of the present suit. There does not appear to be any difference in principle between the present case and the case in AIR 1926 Mad 774 (C) or AIR 1918 Bom 101 (E) for the purpose of attempting to apply the equitable principles referred to above though the procedure adopted in those cases may well be followed in such cases.

10. For the foregoing reasons this appeal is allowed, the judgments and decrees of the Courts below are set aside and the suit is remanded to the Munsiff who will receive any further evidence that may be let in by both the parties and dispose of the suit afresh on the lines indicated above. The parties will bear their own costs in this Court and in the lower appellate Court. The costs of the trial Court will abide and follow the result of the suit.

11. Appeal allowed.