

A. Basavaraj and Another Vs. Kushal Chand and Another

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Court : Karnataka

Decided On : Jan-09-1992

Reported in : AIR1992Kant393; ILR1992KAR1401; 1992(2)KarLJ232

Judge : K.A. Swami and ;L. Sreenivasa Reddy, JJ.

Acts : Hindu Law

Appeal No. : R.F.A.No. 423/1983

Appellant : A. Basavaraj and Another

Respondent : Kushal Chand and Another

Advocate for Def. : Sri B.P. Holla, Adv.

Advocate for Pet/Ap. : Sri V. Tarakaram, Adv.

Judgement :

ORDER

K. A. Swami, J.

1. This appeal by the plaintiffs is preferred against the judgment and decree dated 31-8-1983 passed by the learned Civil Judge, Bellary, in O. S. No. 33/1979. The respondents were the defendants in the trial court. The defendant-2 died during the pendency of the suit. Therefore, his legal representatives viz., the widow and two

daughters of defendant-2 were brought on record as legal representatives of deceased 2nd defendant.

2. The appellants filed the aforesaid suit for partition and separate possession of their 2/3rd share in the plaint 'A' Schedule properties. 'A' Schedule consisted of the following two items of properties:

Properties situated in Bellary City within the sub-registration district of Bellary:

1. Door No. XI (III), (IV), (V), Ward XI Flower Street, Bellary value Rs. 1,00,000/-
2. Door No. XX(A) to (F) in Ward XI, Flower Street, Brucepet, Bellary value Rs. 75,000/-

2.1 The case of the plaintiffs was that the 2nd defendant was their father; that the plaintiffs and the 2nd defendant constituted the members of the joint family; that the suit properties were the joint family properties; that the family was prosperous and the 2nd defendant was receiving rent of more than Rs. 500/- per month from the joint family properties; that the cloth business was the family business; that the 2nd defendant started a new business in Beedi; that for the purpose of the new business he sold the suit schedule properties to the 1st defendant; that item No. 1 of 'A' Schedule properties to the 1st defendant; that item No. 1 of 'A' Schedule was sold for a sum of Rs. 15,000/- on 29-1-1973 and item No. 2 was sold for a sum of Rs. 12,000/- on 20-8-1973; that both the sale deeds were neither supported by legal necessity nor there was pressure for alienating the suit properties; that the sales were also not for the benefit of the family; that the 2nd defendant colluded with the 1st defendant in effecting the sales; that item No. 1 of 'A' schedule was worth Rs. one lakh and item No. 2 was worth Rs. 75,000/- as on the date of sales and as such the suit properties were sold for a nominal sum. Hence the transactions were not prudent transactions and were not for the benefit of the estate of the joint family. Therefore, the plaintiffs contended that they were not bound by the two sales effected by the 2nd defendant and as such they were entitled to have their 2/3rd share in the suit schedule properties.

3. The 2nd defendant remained ex parte. He did not contest the suit. It was only the 1st defendant (alienee) who contested the suit. In his written statement he, inter alia, contended that the sale dated 29-1-1973 alienating item No. 1 of 'A' schedule was effected for legal necessity in that it was effected for discharging the antecedent debts and also for depositing money to obtain Bharath Beedi Agency; that the sale was for the benefit of the joint family and it was for proper consideration. It was also contended that the second sale also was supported by legal necessity and it was for the purpose of maintaining the family and also for educating the children. Thus it was contended by the 1st defendant that as the two sales in question were effected for legal necessity and for the benefit of the family, the plaintiffs were not entitled to have their share in the suit schedule 'A' properties.

4. On the basis of the pleadings of the parties, the trial court framed the following issues :

1. Whether the suit properties are ancestral properties of the plaintiff and the 2nd defendant?

2. Whether the sale deed dated 29-1-1973 is not for discharging the mortgage debt under mortgage deed dated 15-12-1971 and for family business; whether the mortgage deed is false as contended by the plaintiffs?

3. Whether the sale deed dated 20-8-73 was for legal necessity and benefit of the family?

4. Whether the plaintiffs are not bound by the sale deeds dated 29-1-1973 and 20-8-73 executed by the 2nd defendant?

5. Whether the eviction orders on H. R. C. 108/76 and H. R. C. No. 109/76 are not binding on the plaintiffs?

6. What are the family properties liable for partition?

5. In support of their case the plaintiffs examined the 1st plaintiff as P. W. 1 and also examined one more witness as P. W. 2. The 1st defendant gave evidence as

D. W. I. The plaintiffs also produced 7 documents which were marked as Exs. P.1 to P. 7. The 1st defendant produced 7 documents which were marked as Exs. D. 1 to D. 7.

5.1 We may also point out that Exs. P. 1 and P. 2 are the certified copies of the two sale deeds dated 29-1-1973 and 20-8-1973 respectively. These two sale deeds are also produced as Exs. D. 1 and D. 2 by the 1st defendant. Ex. P. 3 is a certified copy of the sale certificate dated 10-2-1969 in respect of another property. It has been produced by the plaintiffs to prove that the sale evidenced by Ex. P. 1 was not prudent because similar type of property was sold in a court auction about 4 years prior to the sale deed Ex. P. 1 for a higher sum. Ex. P. 4 is a certified copy of another sale deed dated 10-3-1969 which is produced by the plaintiffs to show that the 2nd item of property was sold for a lesser sum. Ex. P. 5 is a partition deed dated 30-8-1971 between the 2nd defendant and his brother under which the suit schedule 'A' properties fell to the share of the 2nd defendant. Ex. P. 6 is a plan and Ex. P. 7 is a partition deed in original and a certified copy of it is also marked as Ex. P. 5.

5.2 Ex. D. 3 is a mortgage deed dated 15-12-1971 mortgaging suit item No. 1 of 'A' Schedule property by the 2nd defendant in favour of one Ramkumari Bai. This has been produced to show that the sale evidenced by Ex. D. 1 was for discharging the antecedent debt. This has also been mentioned in the sale deed Ex. D. 1. Ex. D. 3(a) is an endorsement made on Ex. D. 3 to the effect that the mortgage deed is discharged. Ex. D. 4 is a certified copy of the plaint in O. S. No. 89/80 filed by the 2nd defendant for reconveyance of item No. 2 of 'A' Schedule. The suit was filed against the 1st defendant. Ex. D.5 is a certified copy of the judgment in O. S. No. 102/76 filed by the 1st defendant for recovery of arrears of rent. Ex. D. 7 is a certified copy of the decree passed in the said suit (O. S. 102/76). Ex. D. 6 is acetified copy of the decree passed in O. S. No. 511/76. This suit was filed by the 1st defendant for recoveryof arrears of rent.

5.3. This is all the oral and documentary evidence adduced by the parties in the suit.

6. The learned trial Judge, on consideration of the evidence on record, has held that the suit schedule properties were the ancestral properties of the plaintiff and the 2nd defendant; that the two sale deeds in question dated 29-1-1973 and 20-8-1973 were supported by . legal necessity; that the properties covered by the sale deeds Exs. P. 3 and P. 4 were not shown to be similar to the properties sold under Exs. P.1 and P.2. Therefore, the learned trial Judge was of the view that the plaintiffs failed to prove that the sales in question were not prudent transactions and were effected by the 2nd defendant for nominal consideration. Accordingly, he dismissed the suit.

7. In the light of the contentions urged by both sides, the following points arise for consideration :

1) Whether the trial court is justified in law and on facts in holding that the sale of item No. 1 suit schedule 'A' was supported by legal necessity and it was a prudent transaction?

2) Whether the trial court is justified in law and on facts in holding that the sale of item No. 2 of 'A' Schedule evidenced by the sale deed dated 20-8-1973 marked as Ex. D. 2 was for legal necessity and it was a prudent sale?

3) IncasepointsNos. 1 and 2 are answered in the negative, whether the plaintiffs are entitled to have their 2/3rd share in the suit schedule properties without any condition and whether the 1 st defendant is liable to pay mesne profits to the plaintiffs?

8. Before we take up the points for consideration, we may also make it clear that there is no dispute that item Nos. 1 and 2 of suit schedule 'A' properties were the ancestral properties of the plaintiffs and the 2nd defendant. In fact, there was no such dispute raised before the trial court also. Therefore, it was not necessary for the learned trial Judge to go into that aspect of the case. Therefore, we proceed on the basis that the suit schedule 'A' Properties were the ancestral properties of the plaintiffs and the 2nd defendant.

POINT NO. 1

9. Item No. 1 of suit schedule 'A' Property was sold by the 2nd defendant in favour of the 1st defendant on 29-1-1973 under a registered sale deed marked as Ex. D. 1. (certified copy of which was marked as Ex. P. 1) for a sum of Rs. 15,000/-. We may point out at this stage that the learned trial Judge proceeded on the basis that the burden was upon the plaintiffs to prove that the sales effected by the 2nd defendant of the joint family properties was not supported by legal necessity and they were not prudent sales. The learned Judge failed to see that it was for the alienee to prove that the sales were effected for legal necessity and they were prudent transactions. However, as the parties have adduced evidence in the suit, it does not make any difference in the appeal. Therefore, we proceed to appreciate the evidence on record which has a bearing on this point.

10. According to the evidence of Defendant No. 1 Malkajappa(defendant-2) sold the suit item No. 1 of 'A' Schedule for discharging the mortgage debt evidenced by Ex. D. 3 and also for payment of the deposit amount for Obtaining Beedi Agency; that by that time, defendant-2 had stopped his business in cloth and wanted to start beedi business and for that purpose he was required to deposit a sum of Rs. 10,000/-. In this connection he (D. W. 1) has deposed as follows :

'I do not remember as to how much amount was paid to Ramakumari. I do not know how much he has deposited for Beedi Agency. He had received a letter to deposit the amount in respect of Beedi agency. Malkajappa was telling that he has to deposit Rs. 10,000/- in respect of Beedi agency. The balance sale consideration after discharging the mortgage debt is received by Maljappa. I do not know whether Malkajappa deposited the amount or not.'

This evidence of the 1st defendant has to be appreciated in the light of the recitals contained in Ex. D. 1 and also the evidence of P.W. 1 (1st plaintiff).

11. In Ex. D. 1 it has been stated that the sale was effected for discharging the mortgage debt due to Sri Badarinarayan and also for depositing with Bharath Beedi Works, Mangalore, for the business. These recitals in the sale deed are spoken to by the 1st defendant.

If we come to the evidence of P. W. 1, it is relevant to notice that according to the case of the plaintiffs, the family business was cloth business and the 2nd defendant - father of the plaintiffs -- was maintaining the family with the income he received by way of rent and also the income he received from the cloth business. In his examination in chief he has stated thus :

'Cloth business was closed in 1971 or 72. After the closure of the cloth business my father was not doing any business.'

He has also stated that to his knowledge, his father was not doing any other business except the cloth business. In the cross-examination he has deposed that his father was maintaining the family with the rents of the house and also the income from the business. In the plaint it has been specifically averred that the rental income was more than Rs. 500/- per month. The evidence of P.W. 1 that his father did not do any business after he closed the cloth business cannot be accepted because of the averment made in para 7(1) of the plaint. Para 7(A) of the plaint came to be introduced by way of specific amendment. In para 7(A) of the plaint, it has been specifically stated that the cloth business was the kulachara of the family and that the 2nd defendant started a new business and incurred debt for the purpose of the said business. The 2nd defendant is said to have incurred debts for beedi business said to have been started by him. Therefore, the plaintiffs have averred that the debt incurred by the 2nd defendant was for new business and not for ancestral business of the family. There is also the evidence that after the 2nd defendant closed his cloth shop in the Bazaar, he was carrying on business in cloth in his house as per the evidence of P.W. 2. Thus from the averments made in the plaint, it is dear that beedi business was started by the 2nd defendant after he closed the cloth business in the year 1971 or 1972. It appears to us that it must have been started in or about the year 1973 because in the sale deed Ex.D-1 it has been specifically stated that he required the amount for depositing with Mangalore Bharath Beedi Works for beedi business.

12. The contention of the plaintiffs is that they were not liable to the liability incurred by the 2nd defendant for the purpose of carrying on new business viz., Beedi business abandoning the ancestral business i.e., cloth business of the

family, therefore the sale of item No. 1 of Schedule A for that purpose was not for legal necessity. It is not possible to accept this contention. It is not as though the family was not a business family. Trade was the kulachara of the family and it was carrying on the business in cloth. In the case of a trading family, it is open to the members of the family and more so in the case of the kartha of the family to switch over to some other trade as long as such a trade is not speculative.

12.1. In Mulla's Hindu Law, Fifteenth Edition para 234(2) on page 310 it has been stated thus:

'If the family is a trading family and the extended business is not more hazardous or speculative than the one previously existing, it may not be regarded as a new business.'

By any standard, it is not possible to hold that the beedi business is a hazardous or speculative or more hazardous than the cloth business which was being carried on as a family business. Further Beedi business was a commission business. It was neither unlawful nor immoral to carry on beedi business.

12.2. In Vishwanath Malakappa v. Vishwanatha, 1967 (1) Mys LJ 557, a Division Bench of this Court has held that in the case of a debt incurred by the father so long as it is not for any illegal or immoral purposes, the son's share in the joint family property would be liable. It has also been further held that where trade was the kulachara of the family, debts incurred by the father for his business would be binding on the sons. So long as trade is the kulachara of the family, it does not matter what type of business is carried on if it is not speculative. Therefore, we are of the view that as Malkajappa had closed the cloth business even according to the evidence of P.W. 1 in the year 1971 or 1972 and as he was maintaining the family with the rental income and also from the income of the business, it was necessary to carry on another trade after he closed the cloth business in order to maintain the family. Therefore, the liability incurred for the purpose and the sale of item No. 1 of 'A' schedule for that purpose cannot be held to be either for illegal or immoral purpose. Therefore, the alienation of item No. 1 of 'A' schedule was for legal necessity, viz., for discharging the mortgage debt evidenced by Ex. D-3 and also for starting a new business in Beedi.

13. The fact that the sale was supported by legal necessity is not by itself sufficient to hold that the sale was valid. It is also necessary to prove that it was a prudent transaction. The Supreme Court in Prasad v. V. Govindaswami Mudaliar : [1982]2SCR109 .

'63. There is, however, another condition which must be satisfied before the son could be held liable i.e., that the father or the manager acted like a prudent man and did not sacrifice the property for an inadequate consideration. In Dudh Nath v. Sat Narain Ram : AIR1966 All315 , a Full Bench of the Allahabad High Court observed at page 318:

'In order to uphold an alienation of a joint Hindu family property by the father or the manager, it is not only necessary to prove that there was legal necessity but also that the father or the manager acted like a prudent man and did not sacrifice the property for an inadequate consideration. A Hindu father or a Manager of a joint Hindu family is expected to act prudently. However great the necessity may be, if the joint family property is sacrificed for an inadequate consideration it would be highly imprudent transaction and it would be a case where, though for necessity, the father or the guardian has not acted for the benefit of the estate or the members of the joint Hindu family. The father or the manager is not the sole owner of the property. In fact until the partition takes place even his share does not stand demarcated. The ownership vests in all the coparceners taken together as a unit. The father and the manager, therefore, only represent the coparceners. Consequently the coparceners stand bound by the act of the father or the manager of the family only to the extent the act is prudent or for the benefit of . the coparceners or the estate.'

In the instant case on the finding arrived at that the consideration for the sale deed Ex. B-5 was thoroughly inadequate, the sale cannot be upheld.'

Therefore, it is necessary for the 1st defendant to prove that the 2nd defendant acted like a prudent man and did not sacrifice the property of the joint family for an inadequate consideration.

14. We may point out at this stage that Prasad's case : [1982]2SCR109 affirmed a Full Bench decision of the Allahabad High Court in Dudh Nath v. Sat Narain Ram : AIR1966 All315 which in turn had followed a Division Bench decision of this Court in Helava v. Sesigowda AIR 1960 Mys 231. In the light of the decision of the Supreme Court in Prasad's case : [1982]2SCR109 , we shall now consider whether the 2nd defendant acted as a prudent man or whether he sacrificed the property for inadequate consideration?

15. The specific case of the plaintiffs in this regard is that the suit item No, 1 had been sold for inadequate consideration. According to them, as on the date of the suit, it was worth more than Rs. one lakhs and suit item No. 2 was worth more than Rs. 75,000/-.

16. P.W. 1 in his evidence has stated that a nearly house bearing Door No. 73 was sold for a sum of Rs. 23,100/- in a Court auction in 1969. One Shanthilal Hirachal purchased that property in a Court auction. The sale certificate has been produced as Ex. P-3. P.W. 2 has stated that in 1973, the market value of the bigger house was about Rs.80 to 90 thousands and the smaller house was about Rs. 50 to 60 thousands. It is not in dispute that bigger house is referable to item No. 1 and smaller house is referable to item No. 2 of 'A' schedule. He has also stated that the suit house is not R.C.C. house. It is constructed with mud and stones and it is having the mud roof. There is also evidence to the effect that one Peeran Sab has purchased a property near the suit properties. Certified copy of the sale deed relating to the property purchased by Peeran sab has been produced as Ex. P-4. With reference to these two sale deeds, D.W. 1 has stated thus:

'The houses purchased by Peeran Sab and Shanthilal and the suit properties are almost equal in size. I did not enquire from Peeran Sab and Shanthilal for what price they purchased those houses.'

However, he denied the suggestion that item No. 1 of 'A' Schedule was worth Rs. one lakh and item No. 2 of 'A' Schedule was worth Rs.75,000/-. One thing that is established from the evidence on record is that the property purchased by Shanthilal in a Court auction on 10-3-1969 is more or less similar to item No. 1 of 'A' Schedule.

17. Sri Holla, learned counsel appearing for the 1st defendant very strenuously contended that there is no evidence adduced by the plaintiffs to prove that the property purchased by Shanthilal in a Court auction under Ex. P-3 was similar in all respects to the one sold under Ex. D-1 to the 1st defendant. It is relevant to notice that it is the specific case of the plaintiffs that the suit properties were sold for inadequate consideration and it was not for legal necessity. It is in this context the plaintiffs have also examined P.W. 2. The burden was upon the 1st defendant to prove that the 2nd defendant acted as a prudent man and he did not sacrifice the joint family properties for an inadequate price.

18. The 1st defendant has admitted that he did not enquire as to what was the market value of the suit properties. No doubt the trial Court has held that it is not proved that the price for which the suit properties were sold was inadequate. The property under Ex. P-3 was sold in a Court auction, as long back as on 10-2-1969 for a sum of Rs. 23,100/-. We can take judicial notice of the fact that the value of immoveable property from 1950 onwards has been appreciating steadily. From the year 1969 to 1973, the value of immoveable property appreciated considerably. Therefore, we have no hesitation in coming to the conclusion, in the light of the evidence of the 1st defendant and also that of P.Ws. 1 and 2 and Exhibits P-3 and P-4 and the property purchased by Shanthilal was similar to item No. 1 of 'A' Schedule, that item No. 1 of 'A' schedule could have fetched more than Rs. 15,000/- as on 29-1-1973. In all probability, it would have fetched a sum of Rs. 25,000/- as similar property was sold as long back as on 10-2-1969 under Ex. P-3 in a Court auction for a sum of Rs. 23,100/-. Therefore, we are of the view that the 2nd defendant did not act as a prudent man in selling suit item No. 1 for a sum of Rs. 15,000/-. It is to be remembered that item No. 1 of 'A' Schedule and the property covered under Ex. P-3 are situated in the same locality and they are close by, and the locality is known as Flower Bazar. Therefore item No. 1 of 'A' Schedule is situated in the market place. Hence the value of it must be taken to have appreciated considerably during the last four years from the date of sale of the other property evidenced by Ex. P-3. Of course, the contention of Sri Holla is that if the difference is not much, the same could not be made as a ground for setting aside the sale. But we are of the view that the difference is about Rs. 10,000/- in the light of the conclusion reached by us.

19. In addition to this, we may also point out that the family possessed only two items of properties which are the suit properties. Out of them he disposed of more valuable item and retained smaller item of property which was also sold in the same year. Apart from this, there was no other property to maintain the family. As such the act of the 2nd defendant in alienating item No. 1 of 'A' Schedule for a sum of Rs. 15,000/- cannot be considered to be a prudent act. Hence we are of the view that the transaction evidenced by Ex. P-1 clearly falls within the ambit of the rule laid down in para 63 of the judgment of the Supreme Court in Prasad's case, : [1982]2SCR109 . Therefore, we are of the view that the sale effected by defendant 2 in favour of defendant 1 under Exhibit D-1 is liable to be declared void, as such it is not binding upon the shares of the plaintiffs. Hence point No. 1 is answered as follows:

The sale of item No. 1 of 'A' Schedule was supported by legal necessity but it was not a prudent sale as it was sold for very inadequate price. The trial Court was not justified in holding that it was a prudent transaction.

POINT NO. 2

20. We now take up the sale of item No. 2 of 'A' Schedule for consideration:

According to the case of the plaintiffs this property had been sold without any legal necessity. According to the 1st defendant this property was sold by the 2nd defendant to him for the maintenance of the family and for the education of the children. The sale deed as such does not contain any recital as to the legal necessity. In the evidence, D.W. 1 has admitted that he did not make any enquiry as to whether Malkajappa was indebted at the time of the second sale. He has also further admitted that he did not ask Malkajappa as to why he did not sell item No. 2 at the time of sale of item No. 1. The time gap between the two sales is hardly seven months. We have held that item No. 1 was sold for discharging antecedent debt and for depositing the amount with the Bharath Beedi Works, Managlore, for carrying on the Beedi business. According to the evidence of P.W. 1 the 2nd defendant was maintaining the family with the rental income and also the income from the business. If that be so, there was no legal necessity whatsoever to sell item No. 2 of Schedule 'A'. There is no other evidence adduced

in the case to show that there was any pressure whatsoever on the estate for sale of the second item. It may be pointed out that by selling item No. 2 the 2nd defendant had sacrificed the entire property of the joint family and he had become the tenant of the property sold by him. The sale of both the properties was a very unwise thing to do because thereby the 2nd defendant completely deprived the family of its properties. Thus the second sale was not at all necessary and it was not supported by any legal necessity. In addition to this, evidence has been adduced to show that this property was sold for an inadequate sum. One Peeran Sab had purchased similar property under Exhibit P-4 on 10-3-1969 for a sum of Rs. 19,000/- whereas, the property under Ex. P-2 was sold on 20-8-1973 for a sum of Rs. 12,000/-. We need not dwell upon the inadequacy of the price in detail as it is apparent on the face of the record. Added to this it was basically not supported by legal necessity. Therefore it is not possible to sustain the sale. For the reasons stated above, we answer point No. 2 in the negative and hold that the 1st defendant has failed to prove that item No. 2 of 'A' schedule was sold by the 2nd defendant for legal necessity and that it was a prudent sale. As such this sale is not binding upon the share of the plaintiffs.

POINT NO. 3

21. As far as the sale of item No. 2 of 'A' schedule is concerned, we have held that apart from the fact that it was not a prudent sale, it was not supported by any legal necessity. That being so, the question of directing the plaintiffs to pay the amount of consideration proportionate to their share in item No. 2 of 'A' schedule to the 1st defendant does not arise. It is the 1st defendant who will be required to pay the mesne profits to the plaintiffs in respect of item No. 2 of 'A' schedule to the extent of 2/3rd share of the plaintiffs from the date of the suit till delivery of possession of 2/3rd share. As far as the sale of item No. 1 of 'A' schedule is concerned, we have held that it was supported by legal necessity. We have also held that the property was worth about Rs. 25,000/-, whereas it was sold for a sum of Rs. 15,000/-. It was bigger than item No. 2 of 'A' schedule. Therefore, the sale transaction was not a prudent transaction. In a case where the Court finds that the alienation made by a manager or Kartha of a Hindu family is supported by legal necessity, but it is otherwise required to be set aside or declared as not binding upon the shares of

the non-alienating coparceners, the consideration amount paid by the purchaser proportionate to the shares of the non-alienating coparceners is required to be refunded. In other words, a condition shall have to be imposed upon the non-alienating coparceners to pay the consideration amount proportionate to their shares. In the instant case, the consideration paid by the 1st defendant for the sale of the property under Ex. D-1 was Rs. 15,000/-. The 2nd defendant had 1/3rd share in this property. The alienation to the extent of 1/3rd share in item No. 1 of 'A' schedule has not been challenged. Therefore, to the extent of 1/3rd share of the 2nd defendant the alienation stands. We have also held that the property would have fetched a sum of Rs. 25,000/-. Therefore, the value of 1/3rd share of the 1st defendant would come to Rs. 8,333/-. On deducting this amount out of Rs. 15,000/- the balance will be Rs. 6,667/-. This amount the plaintiffs are liable to pay to the defendants. However, in this connection it is contended by Mr. Holla, learned counsel for the 1st defendant, that it is the 2/3rd share in the consideration amount of Rs. 15,000/- the plaintiffs have to deposit and not the amount remaining after deducting the value of the 1/3rd share of the property as determined by the Court. According to him, 2/3rd share of Rs. 15,000/- the plaintiffs are liable to pay. We find it difficult to accept this contention because we have already held that the property was sold for an inadequate sum. We have to proceed on the basis that value of 1/3rd share of the father of the plaintiffs was equivalent to 1/3rd of Rs. 25,000/-, which comes to Rs. 8,333/-. As the sale of 1/3rd portion of item No. 1 of Schedule A is not challenged, the non-alienating coparceners namely, the plaintiffs are liable to pay only the balance of the consideration as arrived at Rs. 6,667/-.

22. The next question for consideration is as to whether the 1st defendant is liable to account for the mesne profits of item No. 1 of 'A' Schedule from the date of repudiation of the sale by the non-alienating coparceners or from the date it is declared as not binding upon the shares of the non-alienating coparceners or whether from the date on which the proportionate amount of consideration is directed to be deposited or paid. As far as the date of repudiation of the sale is concerned, we can take it as the date of filing of the suit. In the instant case there is no evidence adduced to point out that earlier to the date of the suit, the plaintiffs had repudiated the sale as evidenced by Exhibit D-1. It was for the first time, on

the institution of the suit, they repudiated both the sales.

23. In *Subbe Goundan v. Krishnamachari*, AIR 1922 Mad 112 it has been held as follows at pages 118 and 119 :

'As regards the claim for mesne profits we do not see any reason for mesne profits being allowed before the suit. The alienation by the father to the extent of his share will be good. In the case of sales by a father or managing member of the joint family for alleged necessity, we think the sale will be good till avoided as it is open to the other coparceners to affirm the transaction. The position of such a purchaser cannot be worse than that of a purchaser from a widow without legal necessity in whose case it has been held that the sale is good till repudiated by the reversioners. We respectfully dissent from the view taken by Krishna Swami Ayyar, J. in *Kandasami Asari v. Somaskanda Fla Nidhi* that a sale without necessity is incapable of ratification by the other coparceners. Following the decision in *Bhirgu Nath Chaube v. Narsing Tivari* we think the claim for mesne profits should be limited to the period from the date of suit as there was no repudiation before the suit. There will be a declaration that the defendants are entitled to the half share of the vendor which they will be at liberty to work out by a suit for partition. The decree of the Subordinate Judge will be modified accordingly. Memorandum of objection is dismissed with costs.'

Thus, in *Subbe Goundan's* case mesne profits were directed to be paid from the date of the suit. That was a case in which the non-alienating coparcener sought for possession of the property alienated by the father. The Madras High Court held that the alienation was not binding on the plaintiffs to the extent of their share. Before the Madras High Court the following points were urged for consideration:

(1) That the Subordinate Judge was wrong in holding that the alienation was not binding on the plaintiffs;

(2) that, as the alienation was good to the extent of the father's share, the lower Court, instead of decreeing possession and leaving the defendants to a separate suit for partition, should, in this suit at their instance, have decreed a partition and put the plaintiffs in possession of half the share and the defendants in possession

of the remaining half, and

(3) that mesne profits ought not to have been awarded.

On the first point, it was held that the finding of the first appellate Court that there was no legal necessity for the alienation and that there were no bona fide enquiries made by the defendants was confirmed. On the second point it was held that the alienee has to file a separate suit for partition and possession of the share of the alienating coparceners and he was not entitled to seek partition in a suit filed by the non-alienating coparceners for setting aside the sale and for possession of the alienated property. Regarding the mesne profits, we have already extracted the relevant portion of the judgment, therefore, that was a case in which partition was not sought for by the alienating coparceners but possession of the entire suit property alienated by the father was sought for. Though the case of the plaintiffs was that the sale was not binding to the extent of their share, the Court declared that the defendants were entitled to half share of the vendor and reserved liberty to them to work out their right in a suit for partition. But this ease supports the proposition that the alienee is liable to pay the mesne profits from the date of repudiation of the sale by the non-alienating coparceners.

24. However, Sri Holla, learned Counsel appearing for the 1st defendant placed reliance on a decision of the High Court of Madras reported in *K. Premanayakam Pillai v. S. T. Sivaraman* : AIR1952 Mad419 decided by a Full Bench of five Judges. The majority view was as follows at pages 437, 438:

'It follows that whether the general principle of the right of an alienee to work out his rights in a partition suit or whether the principle in '*Vadivelam v. Natesam*', 37 Mad 435, is applied to the facts of this case, the third defendant is entitled to have a condition imposed that the plaintiff should not recover possession of his half share of the property without payment of a half share of the binding consideration, viz., Rs. 3511. The decree, therefore, of the Courts below must be modified by adding that before the plaintiff recovers possession of the property he must deposit into Court a sum of Rs. 3511 and the plaintiff would thereafter be entitled to recover possession of the property with mesne profits as from the date of deposit. The money so deposited shall be paid over to the 3rd defendant. The

appellant is entitled to his costs throughout.'

25. We are of the view that the case on hand involves special circumstance of equity falling within the scope of a decision of the Privy Council in *Ram Charan Lonia v. Bhagwan Das Maheshri*, ILR 48 (1926) All 443: (AIR 1926 SC 68). In this case, the Privy Council holding that the sale was not supported by legal necessity, set aside the sale, treated the vendee in possession of the property as mortgagee in possession because the property was, prior to the sale, subject to a mortgage and directed that the mortgage for that purpose be treated as usufructuary mortgage and the possession of the appellants as possession thereunder, with the result, that during their possession they will not be entitled to any interest and not accountable for profits. In the instant case, the sale of item No. 1 of 'A' schedule has not been challenged to the extent of the share of the father of the plaintiffs and also, as held by us, it was supported by legal necessity. However, as held by us, the sale is set aside only on the ground that it was not a prudent sale. In addition to this, we have directed the plaintiffs to pay a sum of Rs. 6,667/- being the part of consideration amount proportionate to the extent of their share to the 1st defendant. The 1st defendant will not be liable to pay mesne profits to the extent of the share of the plaintiffs until the said sum is paid to him. If there was no payment of such sum earlier to this day, there was no difficulty whatsoever for us in holding that from the date of payment of the amount or depositing of the amount in the trial Court, the 1st defendant would be liable to account for the mesne profits. In the instant case, the additional factor is that two items of properties were sold by the father of the plaintiffs namely items Nos. 1 and 2 of 'A' Schedule to the 2nd defendant. He was put in possession of both the properties and thereafter a portion of them was leased to the father of the plaintiffs and the remaining portion remained with the tenants. As already indicated, the 1st defendant is liable to account for the mesne profits in respect of 2/3rd portion of item No. 2 of 'A' Schedule from the date of the suit till delivery of possession to the plaintiffs. The rent was either recovered by the 1st defendant from the 2nd defendant or the plaintiffs and the other tenants or deposited by them in the Court. In this case, the 1st defendant has received the rental income from item No. 2 of 'A' Schedule during the pendency of the suit and the present appeal. The evidence before us is not clear as to how much amount the 1st defendant has received by way of rent

from item No. 2 of 'A' schedule during the pendency of the suit and the present appeal. We are of the view that during the pendency of the suit and the present appeal from the date on which the 1st defendant had received the entire sum of Rs.6,667/- out of 2/3rd portion of the rent paid for item No. 2 of 'A' Schedule by the plaintiffs or the 2nd defendant and other tenants, being the balance of consideration amount payable by the plaintiffs to the 1st defendant, he should be made liable to account for the mesne profits of item No. 1 of 'A' schedule to the extent of 2/3rd share in it. We direct that this be determined in a final decree proceedings. Point No. 3 is answered accordingly.

26. For the reasons stated above, this appeal is allowed, the judgment and decree of the trial Court are set aside and the suit of the plaintiffs for partition and separate possession of their 2/3rd share in items Nos. 1 and 2 of 'A' Schedule is decreed. It is declared that the alienations effected under Exhibits D-1 and D-2 by the 2nd defendant in favour of the 1st defendant are not binding upon the 2/3rd share of the plaintiffs. It is further directed that the 1st defendant is liable to account for the mesne profits of 2/3rd share in item No. 2 of 'A' Schedule from the date of the suit till the plaintiffs are put in actual or symbolic possession of their 2/3rd share. We have stated symbolic possession because item No. 2 of 'A' schedule is in possession of the tenants. The plaintiffs are directed to pay to the 1st defendant or deposit in Court a sum of Rs. 6,667/-. The date on which this amount is found to have been received by the 1st defendant, out of the mesne profits payable by him to the plaintiffs in respect of 2/3rd share in item No. 2 of 'A' Schedule, from that date he is liable to account for the mesne profits of item No. 1 of 'A' Schedule to the extent of 2/3rd share of the plaintiff till the plaintiffs are put in possession of the same. This has to be enquired into by the Court below during the course of final decree proceedings and has to be found out as to when this sum was received by the 1st defendant by reason of receipt of income by him from 2/3rd portion of item No. 2 of 'A' Schedule. Items Nos. 1 and 2 of 'A' Schedule shall be got partitioned through a Commissioner appointed by the Court below in this behalf and the plaintiffs be put in actual or symbolic possession, as the case may be, of their 2/3rd share in items Nos. 1 and 2 of 'A' Schedule, A preliminary decree be drawn up in the above terms.

27. In the facts and circumstances of the case, the parties are directed to bear their costs throughout.

28. Appeal allowed.

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