Ananthamathi and ors. Vs. Thochappa Shetty and anr.

Ananthamathi and ors. Vs. Thochappa Shetty and anr.

SooperKanoon Citation : sooperkanoon.com/375423

Court : Karnataka

Decided On : Jun-20-1960

Reported in : AIR1960Kant304; AIR1960Mys304; ILR1960KAR844

Judge : A.R. Somnath Iyer, J.

Acts : Limitation Act - Schedule - Articles 91, 126 and 144; Code of Civil Procedure (CPC), 1908 - Sections 43 - Order 2, Rule 2

Appeal No. : Second Appeal (N) No. 56 of 1956

Appellant : Ananthamathi and ors.

Respondent : Thochappa Shetty and anr.

Judgement :

(1) In the District of south Kanara, an Aliyasanthana family consisted of defendant 3, her two daughters and her grandchildren. One of her daughters was dead at the material point of time with which we are concerned. Plaintiff 1 was the elder daughter. Plaintiffs 5 to 10 are the children of plaintiff 1. Plaintiffs 2 to 4 are the children of the deceased daughter. Defendant 3 had also a son, defendant 2.

(2) Defendant 3 admittedly was the yejamanti of this Aliyasanthana family. On 10-10-1942, under a sale dead Exhibit A4, she sold the property described in scheduled B to the plaint in the suit out of which this second appeal arises, to one Nagara Ramanath Shenoy, for a sum of Rs. 1,000/-. On 6-11-1944, under Exhibit

A5, Ramanath Shenoy sold those properties in his turn to defendant 2, the son of defendant 3 for a sum of Rs. 3,000/-.

He also appears to have sold along with the B schedule properties, the property described in schedule A to the plaintiff with which we are not concerned in this case. Out of the consideration of the sum of Rs. 3,000/-, Shenoy appears to have been paid by defendant 2 only a sum of Rs. 1,000/-, the remaining Rs. 2,000/- having been left with defendant 2 to be paid to Shenoy on some subsequent date.

(3) On 3-12-1944, the right of Shenoy to recover this sum of Rs. 2,000/- from defendant 2 was transferred to one Bhavanishankar Rao. Bhavanishankar Rao in his turn, under the document Exhibit B1, executed on 8-9-1945, transferred the right to defendant 1.

(4) Thereafter on 4-11-1946, the plaintiffs brought a suit against defendant 3 and also against Nagar Ramanath Shenoy. There were also other defendants in that suit to whom it would be unnecessary to make any reference at this stage. That suit was brought in the Court of the Subordinate Judge, South Kanara. The properties described in schedule C to the plaint in that suit are the B schedule properties in this suit. The suit was brought in forma pauperis for the following reliefs:

(1) To depose defendant 3 from the yejamanthiship of her family; (2) to declare that the sale of the B schedule properties in this suit, on 10-10-1942, in favour of Shenoy was nominal transaction. There were other prayers also for which the plaintiffs prayed in that suit to which it would be unnecessary to make any reference. That suit ended in a decree which was made on 19-2-1948. Ex. A6 is the copy of the judgment of the Subordinate Judge of South Kanara. That decree was appealed against and the High Court of Judicature at Madras, by its judgment (Ex. A9) dismissed the appeal on 25-11-1952. Defendant 3 was, by the decree so made, deposed from her yejamanthiship. In regard to the B schedule properties in this suit, the sale of those properties to Shenoy was declared invalid and not binding on the plaintiffs and their family.

(5) During the pendency of this litigation for the deposition of defendant 3 from yejamanthiship, defendant 1 instituted a suit against defendant 2 in the Court of the District Munsiff, Puttur in O. S. 41/48 for the recovery of the sum of Rs. 2,000/- to which he became entitled under Ex. B1 which was executed in his favour by Bhavanishankar Rao. That suit was brought on 28-1-1948. While defendant 1 was not made a party to O. S. 33 of 1947 on the file of the Subordinate Judge, South Kanara, neither defendant 3 nor the plaintiffs were impleaded as parties to the suit brought by defendant 1 against defendant 2 for the recovery of the unpaid purchase-money. On 7-2-1949, in the suit brought by defendant 1 against defendant 2, a decree was made in his favour for payment of the sum of money claimed by him. This decree was made in favour of defendant 1 nearly a year after the decree was made against defendant 3 and Shenoy in O. S. 33 of 1947.

(6) On 18-12-1950, defendant 1, in execution of the decree obtained against defendant 2, purchased the schedule properties, as can be seen from Exhibit B4, the sale certificate issued in his favour on 22-1-1951. It was thereafter that the suit out of which this second appeal arises was brought by the plaintiffs on 10-2-1951, in the Court of the Munsiff of Puttur. The suit brought in the first instance was a suit merely for an injunction restraining defendant 1 from obtaining possession of the B schedule properties as the purchaser thereof in execution of the decree which he had obtained. But since during the pendency of the suit brought by the plaintiffs, defendant 1 did obtain possession of the B schedule properties through Court, the suit was converted into a suit for possession, with the result that when it had to be ultimately disposed of, the suit was one for possession of the B schedule properties by the plaintiffs.

(7) The challenge made against the purchase by defendant 1 of the B schedule properties was that he obtained no right to those properties, since the alienation of those properties, since the alienation of those properties by defendant 3 to Nagar Ramanath Shenoy was itself an invalid sale, not having been made for the purpose of the Aliyasantana family of which the plaintiffs were members. Several contentions were raised on behalf of defendant 1. The first of them was that the properties did not belong to the plaintiff's family.

The second was that the suit was barred by the provisions of Rule 2 of Order 2 and S. 11 of the Code of civil procedure. The third was that the alienation made by defendant 3 in favour of Shenoy was binding on the plaintiffs and the members of their family. Although the contention was not actually raised by the defendants, the District Munsiff in the course of his judgment considered the question whether the plaintiffs' suit for possession of the B schedule properties, without the plaintiffs asking for the cancellation of the sale deed Ex. A-4 executed by defendant 3 in favour of Shenoy, was maintainable.

(8) The Court of first instance dismissed the plaintiff's suit. It came to the conclusion that the B schedule properties did belong to the plaintiffs' family. It also found that the plaintiffs' suit as brought was not maintainable since it was necessary for the plaintiffs to ask for a cancellation of the transaction recorded in Exhibit A4, before they could bring a suit for possession of the B schedule properties.

In regard to the contention raised by defendant 1 that the suit was barred by the provisions of Rule 2 of Order II S. 11 of the Code of Civil Procedure, while the Court of first instance found that the suit was not barred by the provisions of S. 11 of the Code of Civil procedure, it was between two minds as its judgment discloses, as to whether the provisions of Order 2, Rule C.P.C. Did bar the institution of the suit. It will thus be seen that the dismissal of the suit. It will thus be seen that the dismissal of the suit by the Court of first instance was based entirely on its view that the plaintiffs were not entitled to bring the suit without in the first instance asking for a cancellation of the sale recorded in Exhibit A4.

(9) From that decree, the plaintiffs appealed to the Subordinate Judge of South Kanara. The learned Subordinate Judge recorded to finding on the question as to whether the transaction recorded in Ex. A-4 was or was not binding on the plaintiffs and the members of their family. He however expressed the view that the suit was not barred by the provisions of Rule 2 of Order II of the Code of Civil Procedure, although in para 13 of its judgment he made an observation that it was unnecessary to refer to the case law referred to on both sides in regard to the implication of order II, Rule 2 of the Code of Civil procedure.'

(10) It agreed, however, with the finding of the Court of first instance that so long as the sale under Exhibit A-4 stood 'uncancelled specifically', the plaintiffs' suit was incompetent. The plaintiffs suit was therefore dismissed.

(11) This second appeal is directed against those decrees made by the Munsiff and the Subordinate Judge.

(12) Although the only basis of the judgments of the Courts below is their view that the plaintiffs' suit for possession of the B schedule properties, without there being in the first instance, a decree cancelling the sale recorded in Ex. A-4, Mr. Raghunathan, the learned advocate appearing on behalf of defendant 1 has urged before me that the Courts below should have dismissed the plaintiffs' suit also on the ground that it was barred by Rule 2 of Order II of the Code of Civil Procedure. No argument has been presented before me, and in my opinion very rightly too, that the provisions of Section 11 of the Code of Civil procedure can have any relevance to the present case.

(13) Therefore, the only two questions to be decided in this second appeal are (a) whether the plaintiffs' suit was barred by the provisions of Order 11, R. 2 of the Code of Civil procedure and (b) whether the plaintiffs are bound to ask for a decree for cancellation of the sale made by defendant 3 to Shenoy under Ex. A-4, before they could ask for possession of the B schedule properties.

(14) In regard to the first question, I have no hesitation in coming to the conclusion that the contention of defendant 1 cannot succeed. Rule 2 of Order II of the C.P.C. reads :

'Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.'

Mr. Raghunathan strongly relied in support of his contention that these provisions were applicable to the present case, on the decision of the Privy Council in Md. Khalil Khan v. Mahbub Ali Mian . Mr. Raghunathan argued that as pointed out by their Lordships of the Privy Council in that case, the correct test to be applied in

such cases would be whether the claim in the new suit is in fact founded upon a cause of action distinct from that which was the foundation of the former suit. It is urged by him that there can be no doubt that the cause of action which formed the basis of the new suit of the plaintiffs was substantially the same as that which formed the foundation of the earlier suit.

(15) The contention urged on behalf of defendant 1 in the Courts below was that when the plaintiffs brought O. S. 33/47 in the Court of the Subordinate Judge, South Kanara in which they asked that defendant 3 be deposed from her yejamanthiship and that the alienation made by her of the B schedule properties in favour of Shenoy be declared invalid, they should have also impleaded defendant 1 to that suit and asked for a similar declaration in respect of the B schedule properties against him.

The against also included a contention that the plaintiffs should have asked for possession of the B schedule properties, which according to defendant 1 could not have been in the possession of the plaintiffs when that suit was brought. It was suggested that if defendant 1 was not impleaded as a party to that suit, although if he had been so impleaded the suit would have been tried on the same cause of action as that on which the suit against Shenoy had been based, it was not open to the plaintiffs to bring another suit on that cause of action against defendant 1 and ask for a trial of that suit and for a decree in it.

(16) Now it is clear that on November 4, 1946 when O. S. 33/47 was brought, the only right which defendant 1 possessed was to claim a sum of Rs. 2000/- which had not been paid to Shenoy by defendant 2 when Ex. A-5 was executed. It may be that defendant 1 could have been conveniently added as a party to O. S. 33/47 by the plaintiffs in order that their rights in respect of the B schedule properties may be finally adjudicated upon. But the question is whether, if the plaintiffs although they could have obtained a larger decree by so doing, elected only to get a decree against Shenoy and defendant 3 and a declaration that the sale transaction between them was not binding on the members of the plaintiffs' family, they were precluded from bringing another suit against defendant 1 who, by the time the other suit was brought had become the auction-purchaser of the B

schedule properties in execution of the decree which he had obtained for the recovery of the unpaid purchase-money to which he had become entitled under Ex. B-1. Mr. Raghunathan strenuously contended that they were to precluded. And in support of that contention he placed strong reliance, as I have mentioned on the Privy Council decision in .

(17) It seems to me that Mr. Raghunathan cannot draw much sustenance for his contention from that decision. That case proceeded on its own peculiar facts. The properties involved in that suit were properties belonging to one Rani Barkatunnisa. After her death the plaintiffs in that suit brought in the first instance a suit against the defendants who were described compendiously as Mahaboob brothers, for the recovery of some of the properties belonging to Rani Barkatunnisa.

Those properties were described by their Lordships of the Privy Council as the Oudh properties. After the failure of that suit and its dismissal, the plaintiffs brought another suit claiming possession of another property belonging to Rani Barkatunnisa which was referred to an Shahajahanpur property. The defendants in that suit were Mahaboob brothers and their wives to whom they had purported to transfer the property. The learned Judge of the High Court who dismissed that suit as being barred by the provisions of Order II, Rule 2 of the Code of Civil Procedure, expressed their opinion, as pointed out by their Lordships of the Privy Council in two places as follows at page 86:

'In the case before us the trespass on title or slander of title in the case so far as the Oudh suit was concerned was not distinct and different either in point of time or in point of character from the trespass on possession in the case of the Shahajahanpur property.....'

'Here in the present case we find that the two trespasses, one on the Shahajanpur property and the other on the Oudh Property were similar in character and formed part of the same transaction and the evidence to prove the facts which it was necessary for the plaintiffs to prove was the same and the bundle of essential facts was also the same.'

Their Lordships of the Privy Council stated that they were prepared to accept the above view of the High Court. The second suit brought by the plaintiffs, according to the judgment of their Lordships of the Privy Council was also bound to fail as being barred by the provisions of Rule 2 of Order II of the Code of Civil Procedure.

(18) Mr. Raghunathan he asked me to hold that the view expressed by their lordships of the Privy Council should also lead to the inevitable conclusion that the second suit brought by the plaintiffs in this case was equally barred by Rule 2 of Order II of the Code of Civil Procedure. The reason why Mr. Raghunathan asked me to take the view is that, as pointed out by him, the second suit brought by the plaintiffs in the Privy Council decision for the recovery of possession of the Shahajanpur properties was brought not only against Mahaboob brothers but also against their wives to whom Mahaboob brothers purported to have transferred the Shahajanpur properties. Mr. Raghunathan urged that similarly in this case also, while the first suit was brought against defendant 3 and defendant 1, and the mere fact that defendant I was only added to the second suit brought by the plaintiffs would not entitle the plaintiffs to overcome the bar incorporated in Rule 2 of Order II of the Code of Civil Procedure.

(19) I do not read the Privy Council decision on Which Mr. Raghunathan depends in the way in which he asks me to apply it. In the Privy Council case, the second suit brought by the plaintiffs for the recovery of the Shahajanpur properties failed not on the ground that the wives of Mahaboob brothers to whom those properties had been transferred should have been added as parties in the earlier suit, but on the ground that when the plaintiffs brought their first suit for the recovery of the Oudh properties they were also bound to make a claim for the recovery of possession of the Shahajanpur properties, since the cause of action on the basis of which they could claim the properties of Rani Barkatunnisa was substantially the same in respect of both these suits.

(20) Some useful analogy could have been drawn between the present case and the decision of their Lordships of the Privy Council if the plaintiff's first suit for the recovery of the Oudh properties had ended in a decree in their favour and if the plaintiffs had brought another suit for the recovery of possession of those very

properties from a transferee of those properties by Mahaboob brothers which had been made by them before the institution of the first suit. But that was not the position in that case.

(20a) It seems to me that in order that the provisions of Rule 2 of Order II could be applied, two ingredients have to be established. One of these ingredients is that the cause of action on which the two suits are founded should be the same and the second is that the parties to both the suits must also be the same. That is what was pointed out by Mukerji, J. (As he then was) in Phani Bhusan v. Rajendra Nandan, AIR 1947 Cal 11.

That was a case in which the plaintiff's predecessor had brought a suit against defendant 1, claiming the rent due in respect of durputni for the year 1342 B. S. although at the date of the suit rent for the years 1343 and 1344 B. S. had already become due. Subsequently the plaintiff sued defendants 1 and 2 for the recovery of arrears of rent in respect of the same durputni for the year 1343 and 1344 B. S. The contention urged on behalf of defendant 2 was that the second suit brought against him without having impleaded him in the first suit was barred by the provisions of Order Ii. Rule 2, of the Code of Civil Procedure. In dealing with that contention the learned Judge observed in para 7 of the report thus:

'if we hole that the liability of the two tenants in this case to pay rent to the plaintiff was a joint and several liability no difficulty arises at all, and we can say on the authority of the English decisions themselves that the rule in King v. Hoare, (1844) 13 M. and W. 494, is not applicable to such cases. But even if we hold that the liability of the defendants was joint and not joint and several, still then we are of the opinion that the rule in (1844) 13 M. and W. 494 and Kendall v. Hamilton, (1879) 4 AC 504 is that the cause of action in the case of joint contract being one, it is merged in the judgment, and no second suit against the other contractors can be brought upon it. Order 2, R. 2, C.P.C., is, however, not based upon the doctrine of merger. It enacts a special rule that if the plaintiff was able to claim a wider and much larger relief than that to which he limited his claim in the suit, and which arises out of the same cause of action he would not be entitled to recover the balance in a subsequent suit. The object of the rule is to prevent the splitting up of

the same cause of action and to prevent the same person or persons being versed twice. To make the rule applicable two things are essential: First, that the previous and the present suits must arise out of the same cause of action; and secondly, they must be between the same parties. (Vide Mt. Bindo Bibi v. Ram Chandra, ILR 41 All 583: (AIR 1919 All 270)'.

(21) I should at this stage refer to a decision of the High Court of Madras in Darnpanaboyina Gangi v. Addala Ramaswami, ILR 25 Mad 736. The facts of that case are as hereunder: V, who was possessed of different plots of land, namely, lands A and lands B. died leaving a widow and two daughters him surviving. The widow, who enjoyed all the lands during the remainder of her life, also died. The daughters then attempted to take possession of the lands B from a person who held possession of them and who wrongfully refused to relinquish that possession. They, as the heirs of their late father, thereupon, namely, in 1887, instituted a suit and obtained a decree against that person for the recovery of the lands B.

In 1896, the daughters attempted to take possession of the lands A, which were in the possession of another person, who also wrongfully refused to relinquish his possession. They thereupon instituted another suit against that other person, in which they also claimed as the heirs of their late father, to recover possession of the lands A. The persons who had withheld possession of the lands B and A respectively, were different and the High Court found as a fact that three had been no combination or privity between them in respect of the lands which they had severally withheld. Upon the objection being raised that the Second Suit was barred under S. 43 of the Code of Civil Procedure (which corresponded to Order II, Rule 2 of the new Code of Civil Procedure) by reason of the fact that the plaintiffs had omitted to include their present claim in the previous maintainable. The observations of Bhashyam Ayyangar, J. At page 739, of the report are of importance. This is what his Lordship had said:

'Though the ground of title on which both suits are founded is one and the same and the causes of action also arose at the same time, yet the properties comprised in the two suits are different and the persons who severally withheld the same are also different. A reference to S. 50, Civil Procedure Code, clearly shows that in

every suit the plaint must show that the defendant is or claims to be interested in the subject-matter and that he is liable to be called upon the answer the plaintiff's demand. This clearly shows that the cause of action is not an abstraction, something independent of the defendant, but that the plaint should disclose a cause of action against the defendant.

And Section 43 only provides that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action and that if a plaintiff omits to sue in respect of any portion of his claim arising from the cause of action for the enforcement of which the suit is brought, he shall not afterwards sue in respect of the portion so omitted. In the former suit the plaintiffs were entitled to call upon the defendant therein only to answer the demand in respect of the land comprised in Schedule B in which alone that defendant was and claimed to be interested. If the land in Schedule A had also been withheld by him from the plaintiffs, plaintiffs' claim to the same would be only a part of the claim which they were entitled to make against that defendant and S. 43, Civil Procedure Code (which corresponded to Order II, Rule 2 of the new Code of Civil Procedure) would be a bar to the present suit if he were the defendant herein or the defendant herein were a person claiming under him. In respect of the land in Schedule B the plaintiffs' cause of action was only against the defendant in the former suit, and in respect of the land in Schedule A their cause of action is only against the defendant herein, and in my opinion it is impossible to hold that the former suit did not include the whole of the claim which the plaintiffs were entitled to make in respect to the cause of action on which that suit was founded, and that the claim in the present case is a part of the claim which they were bound to make, in the former suit; in other words, that a cause of action against one person is a part of the cause of action against another though it is not a joint one against both'.

(22) Applying the above principles to the present case, if defendant 1 or Shenoy was a person against whom the plaintiffs had a cause of action and they omitted to claim all the reliefs which they and they omitted to claim all the reliefs which they were entitled to claim on the basis of that cause of action, the claim which they omitted to make in the first suit could not be made against Shenoy on the basis of the same cause of action in the second suit. But, that is not the same thing as

saying that if the plaintiffs were entitled to make a claim against Shenoy and also against defendant 1 when they brought O. S. 33/47, but they were content to claim the reliefs which they were entitled to claim against Shenoy, but desisted from claiming some other relief which they were entitled to claim against defendant 1, the provisions of Order II, Rule 2, could be pressed into service on behalf of defendant 1 in suppressed into service on behalf of defendant 1 in support of his contention that the second suit brought against him by the plaintiffs, although he had not been made a party to the previous suit, was barred.

Now, if defendant 1 was a person claiming under Shenoy in respect of the relief for possession which the plaintiffs claimed against him in the second suit brought by them, it may perhaps be that the suit for that relief could not have been properly the suit for that relief could not have been properly brought by the plaintiffs on a subsequent occasion. But, while Shenoy purchased the properties from defendant 3 under Ex. B1 was to recover the unpaid purchase-money of Rs. 2,000/- which was payable to Shenoy when he sold the property under Ex. A5 to defendant 2. It could not, in those circumstances, be said that the cause of action for the recovery of possession of the B schedule properties from defendant 1 who became entitled to those properties in Court sale in execution of the decree for the recovery of the amount to which he had become entitled, although as Mr. Raghunathan rightly pointed out, he was entitled to a charge on the B schedule properties for the unpaid purchase-money, was the same as the cause of action on which the first suit was instituted by the plaintiffs against defendant 3 and Shenoy in O. W. 33/47 for a declaration that the alienation of the B schedule properties was an invalid alienation.

(23) In my opinion, the view taken by the learned Subordinate Judge that plaintiffs' suit was not barred by the provisions of Rule 2, of Order II of the Code of Civil Procedure, is not liable to be disturbed.

(24) This disposes of the contention on the basis of which Mr. Raghunathan attempted to maintain the decision of the Subordinate Judge on the ground that his finding on the question of the maintainability of the suit was not justified.

(25) Now what remains to be considered is the view taken by the Courts below that the plaintiffs were not entitled to ask for possession of the B schedule properties without in the first instance obtaining a cancellation of the sale effected by defendant 3 in favour of Shenoy. Mr. Raghunathan very frankly conceded that the view taken by the High Court of Madras In Unni v. Kunchiamma, ILR 14 Mad 26 and in M. V. Chappan v. P. Ranu, ILR 37 Mad 420: (AIR 1914 Mad 445) was opposed to the view taken by the Courts below on this question.

In ILR 14 Mad 26, their Lordships of the High Court of Madras held that where a suit was filed on behalf of a Malabar tarwad by two of its members to recover property improperly alienated under a kanom instrument by the karnavan who had since been removed from office, since a prayer for the cancellation of the kanom instrument was not an essential part of the plaintiffs' relief, the suit was not barred by three years' rule in Art. 91 of the Limitation Act.

(26) In ILR 37 Mad 420: (AIR 1914 Mad 445) it was decided by their Lordships of the High Court of Madras that when a karanavan of a Malabar tarwad makes an alienation which is not binding on the other members, the latter need not sue to set it aside, but can recover possession on the strength of their title, in the absence of proof on the validity of the alienation. On page 422(of ILR Mad): (at p 446 of AIR) of the report, this is what their Lordships have said:

'But treating the case as that of a member of a tarwad seeking to recover possession of properties mortgaged by his karnavan, we do not think it is necessary for him to set aside the mortgage granted by the karnavan. The same contention was put forward and disallowed in Chandu v. Kombi, ILR 9 Mad 208 at p. 212 by Kernan and Muttusami Ayyar, JJ., Shephard and Weir, JJ., In ILR 14 mad 26 at p. 28, following the judgment in the earlier case Ramen v. Valia Amah, Second Appeal No. 270 of 1880(mad) by Turner, C. J., and Kernan, J.....

The property of the tarwad is vested in the members of the tarwad. The karnavan can alienate the property only when the interests of the tarwad require such alienation. When he makes therefore an alienation which is not binding on the other members, it is unnecessary for the other members to set it aside'.

(27) In Kanna Panikkar v. Nanchan, 46 Mad LJ 340: (AIR 1924 Mad 607) a suit was brought by the junior members of a Malbar tarwad to recover possession of immovable property improperly alienated by the Karnavathi. Their Lordships held that the suit was governed by Art. 144 and not by Art. 91 of the Limitation Act. Their Lordships further pointed out that the fact that the Karnavathi purported to execute the document not only as Karnavathi purported to execute the document not only as Karnavathi but also as guardian of the minor plaintiffs, will not make either Art. 91 or Art. 44 applicable to the suit.

(28) The principles by which a suit brought by the members of an Aliyasanthana family for the recovery of properties improperly alienated by the yejamanthi of that family is governed are the same as those enunciated in the above three cases decided by their Lordships of the High Court of Madras.

(29) That being so, the Courts below were not justified in taking the view that the plaintiffs were bound to get the sale by defendant 3 in favour of Shenoy cancelled in the first instance within the period of three years prescribed by Art. 91 of the Limitation Act before there could be recovery of possession of those properties.

(30) Mr. Raghunathan however submitted that I should take a view different from that taken by their Lordships of the High Court of Madras in the above three cases. His contention was that taken an alienation is made by the yejamanthi of an Aliyasantana family, all the members of the family must be regarded as parties to that transaction. There can be no doubt that a party to a transaction is bound to get the transaction impeached by him set aside before he could obtain any further relief. But it is I think difficult to sustain the contention urged by Mr. Raghunathan that the members of an Aliyasantana family must be regarded as parties to a transaction, however, unjustified entered into by the yejamanthi of that family.

(31) Nor can Mr. Raghunathan derve any support for his contention from the provisions of Art. 126 of the Limitation Act to which he made reference which prescribes the period of limitation within which a suit may be brought be a son to set aside the alienation made by his father, of the ancestral property belonging to a Hindu family governed by the Mitakshara school of Hindu Law. There is nothing so far as I can see in that Article which could support his contention that it was

necessary in this case for the plaintiffs to get set aside in the first instance the alienation made by the 3rd defendant.

(32) The findings of the Courts below that the plaintiffs' suit was not maintainable in the absence of any prayer for the cancellation of the sale effected by defendant 3 cannot therefore be sustained and are reversed.

(33) The conclusions I have reached would have justified ordinarily a decree in favour of the plaintiffs as prayed for by them. But Mr. Raghunathan has very rightly pointed out to me that the learned Subordinate Judge, in the appeal preferred by the plaintiffs, did not all discuss the 6th issue framed in the case. That issue reads:

'Whether the sale deed dated 10-10-1942 by the 3rd defendant is valid and binding on the plaintiffs and their family?'

(34) In O. S. 33/47, a finding was recorded that the sale under Exhibit A4 was invalid and not binding on the members of the plaintiffs' family But since defendant 1 was not a party to that suit he was not bound by that finding. It is unfortunate and regrettable that the Subordinate Judge who disposed of the appeal presented by the plaintiffs in this litigation did not record any finding on this issue, with the result that in reversal of the decrees of the Courts below, the appeal has now to be remitted to him in order that he might record his finding on that issue and dispose of the appeal according to law, and that will be the only question that has to be decided by him. It is so ordered. Costs of this appeal will be costs in the cause and will abide the eventual result.

(35) Appeal allowed:

Case remanded.