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SooperKanoon Citation : sooperkanoon.com/377025

Court : Karnataka

Decided On : Mar-27-1961

Reported in : AIR1962Kant98; AIR1962Mys98

Judge : A.R. Somnath Iyer, J.

Acts : [Transfer of Property Act, 1882](#) - Sections 13 and 20; [Code of Civil Procedure \(CPC\), 1908](#) - Order 20, Rule 12

Appeal No. : Second Appeal No. 636 of 1957

Appellant : Konabally Vasanthappa

Respondent : Konabally Channabassappa and ors.

Advocate for Def. : K.R. Gopivallabha Iyengar, Adv.

Advocate for Pet/Ap. : V. Tarakarama, Adv. for ;V. Krishna Murthy, Adv.

Judgement :

(1) This second appeal has its origin in a suit brought by the appellant who was plaintiff 1, for partition and possession of his half share in a property which at one stage belonged to his maternal grand father. That maternal grand father executed on November 12, 1919, Exhibit B-3, gift deed in favour of his two daughters Bandevva and Siddavva. Bandevva is the mother of plaintiff 1 and defendant 2, in this litigation. Siddavva died unmarried.

(2) On September 28, 1935 that maternal grand father cancelled Exhibit B-3 and executed another gift deed, Exhibit B-2 . By the document, he made somewhat inconsistent dispositions. By the first part of that gift deed, he purported to make a gift of the suit properly in favour of defendant 2. He directed that the property should be under the management of the mother of defendant 2 attained the age of majority. But, by another part of Exhibit B-2 what the donor did was to direct the property which was the subject- matter of the gift to be enjoyed not only by defendant 2 but also by the other sons of Bandevva who might be born before the attainment of majority by defendant 2.

(3) Plaintiff 1 was not born on September 28, 1935 and therefore , was not in existence on the date of the gift. But before defendant 2 attained majority Bandevva gave birth to him. Before the institution of the present suit by plaintiff 1 for the recovery of his half share which he claimed in the properties of his maternal grand- father, defendant 2 alienated that entire property to defendant 1 under the sale deed Exhibit B-1 executed on July 21, 1949. In the suit brought by the plaintiff of whom plaintiff 1 is the brother of defendant 2 and plaintiff 2 and 3 are the tenants, the plaintiffs claim that the suit property should be partitioned and that a half share therein should be delivered to the possession of plaintiff 1. The source of the title of plaintiff 1 as disclosed in the plaint was Exhibit B-2 under which what plaintiff 1 claimed was that interest had also been created in his favour.

(4) It is not disputed before make that Exhibit B-2 is a genuine document. Indeed, the Courts below also proceeded to decide the issues arising before them on that footing. But what the Courts below did was to hold that the creation of the interest in favour of plaintiff under Exhibit B-2 was one which was forbidden by the provisions of S. 13 of the Transfer of Property Act. Having reached that conclusion they found that plaintiff 1 acquired no title under Exhibit B-2 to any portion of the suit property. Plaintiff's suit was accordingly dismissed.

(5) In this second appeal Mr. Tarakaram appearing on behalf of plaintiff 1 contends that the view taken by the Courts below overlooks the provisions of S. 20 of the Transfer of Property Act and that their view, in so far as it rests on S. 13 of the Transfer of Property Act cannot be supported.

(6) On the facts established in this case what emerges is this. The maternal grandfather of plaintiff 1 and defendant 2 made a transfer of property under Exhibit B-2. That transfer purported to be a transfer in the first instance in favour of defendant 2. But the maternal grandfather did not merely content himself with making a transfer of his property in favour of defendant 2. What he did was to proceed further to create an interest for the benefit of plaintiff 1 and that, in my opinion, is the meaning to be given to the disposition contained in the second part of Exhibit B-2. But the mere fact that plaintiff 1 had not been born then, was no impediment in the creation of an interest in his favour, provided, the creation of such interest was on the transfer of property to someone else. In that situation, the relevant provision of the Transfer of Property Act which made the creation of interest in favour of plaintiff 1 permissible, clothing plaintiff 1 with the right to claim that interest is, Section 20 of the Transfer of Property Act. That Section reads :

20 'Where, on a transfer of property, an interest therein is created for the benefit of a person not then living, he acquires upon his birth, unless a contrary intention appears from the terms of the transfer, a vested interest, although he may not be entitled to the enjoyment thereof immediately on his birth.'

Now, in this case all the ingredients envisaged by this section are established. There was a transfer of property by the maternal grandfather of plaintiff 1 and the transfer was in favour of defendant 2. That maternal grandfather also created an interest for the benefit of a person who was not then living and that person is plaintiff 1. Upon his birth, plaintiff 1 did, as provided by S. 20 of the Transfer of Property Act, acquire a vested interest, since from Exhibit B-2 no contrary intention appears. What is of even greater importance is that Exhibit B-2 makes it clear that plaintiff 1 became entitled to the enjoyment of the interest created under it immediately on his birth.

(7) Although Mr. Gopivallabha Iyengar contended to the contrary, I find it difficult to understand how the interest created in favour of plaintiff 1 in this case does not confer on the plaintiff the right to sue for partition of his half share in the property which belonged to his maternal grandfather.

(8) It is true that the Courts below proceeded to dispose of the suit on the basis of Section 13 of the Transfer of Property Act and that section reads:

13 'Where on a transfer of property, an interest therein is created for the benefit of a person not in existence at the date of the transfer subject to a prior interest created by the same transfer, the interest created for the benefit of such person shall not take effect unless it extends to the whole of the remaining interest of the transferor in the property.'

It seems to me that Section 13 of the Act has no relevance whatsoever to the present case. What that Section provides is that when an interest is created in favour of an unborn person, creation of such interest must in every case, be preceded by a prior interest and that the interest created in favour of the unborn person must be the whole remainder making it impossible to confer an estate for life on an unborn person.

(9) It will thus be seen that the interest created in favour of an unborn person such as what is referred to under Section 13 is dissimilar to the interest envisaged by section 20. Section 20 refers to the creation of a limited interest by the transferor in favour of someone in the first instance and the creation of a successive interest in some else thereafter. In a case like that , what Section 13 forbids is the creation of an interest in favour of the second person unless that interest is the entire interest possessed by the transferor after the creation of the interest on the first occasion. Section 13 therefore, has application only cases where the interest created on the first occasion is a limited interest and such transfer is followed up by the creation of another interest.

(10) But that is not what the maternal grand--- father did in this case. What he did not was not to create a limited interest in favour of defendant 2, in the first instance but, to transfer a property belonging which he made in favour of defendant 2, he created an interest for the benefit of the unborn sons of Bandevva. A case like that it is plain, is governed not by the provisions Section 13 of the Transfer of Property Act, but by the provisions of Section 20.

(11) I am not impressed by the argument addressed by Mr. Gopivallabnha Iyengar that Section 13 controls Section 20. It does not appear from the Section 20 that the provisions of it are subject to the provisions of Section 13. Had that been the Legislative intent Section 20 would have contained indication to that effect and there is nothing in the language of Section 20 justifying the view that Section 20 is controlled by the provisions of Section 13. It could not have been the intention of the Legislature that anything contained in Section 13 should control the provisions of Section 20, since those sections refers to the creation of interests of an entirely different character.

(12) In my opinion, the creation of the interest in favour of plaintiff 1 who had not been born at the time of Exhibit B-2 was a valid disposition the creation of which was permissible under the provisions of Section 20 of the Transfer of Property Act. Under the terms of Exhibit B-2 the moment plaintiff 1 was born, he became entitled to a moiety of the property of his grand father and it was that moiety which plaintiff 1 sought to recover possession of in the suit which he brought.

(13) I, therefore, allow this appeal and reverse the decrees of the Courts below and in substitution thereof I make a decree in favour of plaintiff 1 declaring that he is entitled to partition and possession of a half share in the suit property . Such partition shall now be made by and bounds and the half share in the suit property will, after such partition, be delivered to the possession of plaintiff 1.

(14) There was an issue in the Courts below in regard to mense profits. But, the Courts below did not record any finding on that issue became unnecessary in view of the finding recorded that plaintiff 1 was not entitled to any share in the suit property. The direction that I should give therefore is, that the determination of the mense profits to which plaintiff 1 is entitled shall be under the provisions of order XX, Rule 12 of the Code of Civil Procedure. In regard to costs, I take the view that this is a case in which each party must bear his own costs in each of the three Courts and I order accordingly.

(15) Appeal allowed.

