Srinivas Vs. Venkatappa

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Court : Karnataka

Decided On : Jul-15-1987

Reported in : ILR1988KAR748; 1988(1)KarLJ335

Judge : P.P. Bopanna and K.A. Swami, JJ.

Acts : Code of Civil Procedure (CPC) , 1908 - Order 8, Rule 5; Hindu Law

Appeal No. : R.F.A. No. 7 of 1977

Appellant : Srinivas

Respondent : Venkatappa

Advocate for Def. : S. Shekhar Shetty, Adv. for R-2 to R-4

Advocate for Pet/Ap. : G. Raghuramachar, Adv.

Disposition : Appeal allowed

Judgement :

K.A. Swami, J.

1. This appeal by the plaintiffs is preferred against the judgment and decree dated 19th June, 1976 passed by the learned Principal Civil Judge, Bangalore District, in Original Suit No. 42/73 dismissing the suit filed by the appellants for partition and separate possession of their shares in the suit-schedule properties. Parties in this

judgment will be referred to with reference to the ranking assigned to them in the trial Court.

2. The 1st defendant is the father of the plaintiffs. The 2nd defendant is the brother of the 1st defendant Defendants 3 and 4 are the alienees. The 5th defendant is a tenant of a portion in item No. 1 of the suit-schedule property. The trial Court, on the basis of the pleadings of the parties framed the following issues:

'(1) Whether plaintiffs are the legitimate children of 1st defendant?

(2) Whether plaintiffs 1 and 6 and defendants 1 and 2 are members of an undivided Hindu joint family?

(3) Whether the plaint schedule item No. 1 situated at Mandya and item No. 2 to 4 situated at Anekal Taluk are the joint family properties of plaintiffs and defendants 1 and 2 ?

(4) Whether there was prior partition of item No. 1 of the plaint schedule between defendants 1 and 2?

(5) Whether the 1st defendant alienated his share in item No. 1 to discharge the antecedent debt and if so, whether the sale is not binding on plaintiffs 1 and 6?

(6) Whether plaintiffs or any of. them are entitled to a share and if so, to what share they are entitled?

(7) Whether plaintiffs are entitled to the relief of perpetual injunction?

(8) Whether the Court-fee paid is not sufficient?

(9) Whether this Court has no jurisdiction?

(10) To what reliefs are the plaintiffs entitled?'

It answered the above issues as follows

'(1) The plaintiffs are the legitimate children of the first defendant.

(2) The plaintiffs 1 and 6 and defendant No. 1 are members of an undivided Hindu joint family, The 2nd defendant is not a member of joint Hindu family consisting of himself, plaintiffs 1 and 6 and defendant No. 1.

(3) A portion of item No. 1 of the plaint-schedule was the joint family property of plaintiffs 1 and 6 and first defendant. The plaintiffs have failed to prove that the family possessed items 2 to 4.

(4) There was prior partition of item No. 1 between defendants 1 and 2.

(5) The 1st defendant alienated his share in item No. 1 to discharge the antecedent debt and the sale is binding on plaintiffs 1 and 6.

(6) The plaintiffs are not entitled to any share in item No. 1.

(7) The plaintiffs are not entitled to perpetual injunction against defendants 3 and 4.

(8) The Court-fee paid is sufficient.

(9) The Court has jurisdiction.

(10) The plaintiffs are not entitled to any reliefs.'

Thus the trial Court held that items 2 and 4 are not proved to be joint family properties; that in view of the prior partition effected between defendants 1 and 2 the plaintiffs are not entitled to seek partition ; that the alienation made by defendant No. 1 was for discharge of the antecedent debts and as such it was binding on the plaintiffs. It also came to the conclusion that as items 2 to 4 are claimed to have been joint family properties, which are situated within the territorial jurisdiction of the Court, the Court has got jurisdiction to entertain the suit. Accordingly, it dismissed the suit.

3. Having regard to the contentions urged before us, the following points arise for consideration :

(1) Whether suit item Nos.2 to 4 are the joint family properties?

(2) Whether the partition effected by defendants 1 and 2 is fair?

(3) Whether the alienation made by Defendant No. 1 evidenced by Exhibit P-3 is binding on the shares of the plaintiffs? If so, whether the alienation evidenced by Exhibit P-8 effected by Defendant-3 in favour of Defendant-4 is binding on the plaintiffs?

(4) Whether the Court had jurisdiction to entertain the suit?

(5) What relief?

POINT No. (1) :

4. The relationship of the parties is not disputed. The trial Court has held that items 2 to 4 are not the joint-family properties. On going through the pleadings of the parties, it is noticed that the plaintiffs in paragraph-3 of the plaint have specifically averred that the suit-schedule properties are the ancestral and joint family properties of the 1st plaintiff and defendants 1 and 2. It is already pointed out. defendants 1 and 2 are brothers and defendant No. 1 is the father of the plaintiffs. In the Written Statement filed by the defendant-3 there is denial of the averment made by the plaintiffs that the suit-schedule properties are the joint-family properties. In the schedule to the plaint, the plaintiffs have given sufficient description of the suit-schedule properties. Items 2 to 4 are situated in Anekal Taluk. Of course, the 3rd defendant has taken a stand that items 2 to 4 are not joint-family properties and the Court at Bangalore Rural district has no jurisdiction to entertain the suit. Defendants 1 and 2 who are the persons concerned with the properties have not denied that items 2 to 4 are the joint family properties. The 3rd defendant except asserting that items 2 to 4 are not joint-family properties has not been able to produce any evidence to show that items 2 to 4 belong to other persons and they do not belong to the joint-family of the defendants 1 and 2 and plaintiffs. Under rule (5) of Order VIII of Civil Procedure Code, every allegation of fact in the plaint if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability. Of course, there is a proviso to that stating that the Court may in its discretion require any fact so admitted to be

proved otherwise than by such admission. When the persons concerned have not chosen to deny that items 2 to 4 of the suit-schedule properties are the joint family properties, the mere assertion of Defendant No. 3 who is not concerned whatsoever with items 2 to 4 that those properties are not joint-family properties will not be sufficient to hold that plaintiffs have not proved that items 2 to 4 are the joint-family properties. However, the trial Court for the purpose of holding that it has jurisdiction, to try the suit has taken into account that items 2 to 4 are claimed to be joint-family properties. But, nevertheless, while deciding the issue as to whether these properties are joint-family properties, it has failed to notice the fact that defendants 1 and 2 have not denied that they are joint family properties. Hence, we hold that the trial Court is not correct in holding that items 2 to 4 of the suit-schedule properties are not joint-family properties. Accordingly, Point No. 1 is answered in the affirmative. It is held that items 2 to 4 are joint-family properties. As far as item No. 1 of the suit-schedule properties is concerned, there is no dispute that it is joint-family property.

POINT No. (4) :

5. In view of the finding recorded on point No. (1), the point relating to the jurisdiction will have to be answered in the affirmative as items 2 to 4 are situated within the territorial limits of the trial Court. As such it had jurisdiction to entertain the suit even if the other property, namely, item No. 1 is situated outside its territorial jurisdiction. Accordingly, point No. 4 is answered in the affirmative.

POINT No. (2) :

6. The recitals contained in the partition deed themselves speak that the partitions effected is not fair. The 1st defendant has taken over the liability of debts and at the same time the property allotted is not equal to the one allotted to Defendant No. 2. In addition to this, items 2 to 4 which are the joint-family properties are left out and they are not made the subject-matter of the partition. If items 2 to 4 also had been taken into consideration while effecting the partition, whether the share allotted, in item No. 1 to defendant-2 would have been the same cannot now be presumed. Therefore, we are clearly of the view that the partition effected under Exhibit P-2 is not fair and it is prejudicial to the interests of the minor coparcener

plaintiff No. 1 who had a share. Accordingly, we hold that the partition effected under Exhibit P-2 is not fair. Hence, it is not binding on plaintiff No. 1 and he is entitled to reopen it. Accordingly, point No. 2 is answered in the negative and in favour of the plaintiffs.

POINT No. 3 :

7. The case of the plaintiffs is that there was no legal necessity whatsoever for alienating item No. 1 of the suit schedule properties; that there was no pressure on the family to discharge the alleged debt if any, and added to it the 1st defendant was given to bad habits namely drinking and gambling. Therefore, only to satisfy his gambling and drinking habits, he incurred debts and sold the property for that purpose. In paragraph-6 of the plaint, the manner in which the 1st defendant had gone on incurring debts has been stated as follows:

'The plaintiffs learnt as submitted above that the 1st defendant sold the portion of the property which has allegedly come to his share on 21-4-1972 in the 1st item of the suit schedule property to the 3rd defendant on 22-4-1972 itself through a registered sale deed of even date. Certified copy of the sale is submitted. The sale deed recites that the 1st defendant sold the property to the 3rd defendant for Rs. 40,000/- in order to discharge three mortgage debts dated 9-11-70, 6-1-1972 and 19-2-1972 of the vendee totalling to a sum of Rs. 36,000/- and for household purposes. The plaintiffs took certified copy of the above mortgage deeds as also another mortgage deed dated 15-3-1969 which is purported to have been discharged by the transaction dated 9-11-70. Certified copies of all the above mortgage deeds are submitted. The plaintiffs submit that the alleged debts were not borrowed by the 1st defendant either for family necessity or benefit or for any purposes binding on the family. A sum of Rs.5000/- is purported to have been borrowed through the mortgage transaction dated 15-3-69 for Court litigation and for discharging handloans. The 1st defendant purports to have agreed to pay the taxes himself, effect the repairs himself and put the entire 1st item of the suit schedule property in possession of the mortgagees which is mortgaged to them and fixed a period of five years for redemption. One of the mortgagees was no other than the third defendant himself. There was absolutely no necessity to

borrow any money muchless Rs.5000/- that too on the basis of an usufructuary mortgage deed and by agreeing to the terms stated therein. It is learnt that there was no hand loans and no money needed for Court litigation. Again long prior to the expiry of the redemption period of the above mortgage and within about 1 and 1/2 years of the mortgage transaction the 1st defendant purports to have borrowed Rs.20,000/- through another mortgage deed dated 9-11-1970 for the purpose of discharging the mortgage debt of 15-3-1969 for paying rents to the mortgagees of the said debt who are the lessors-mortgagees and for discharging three On demand pronote debts of those persons. Admittedly Rs.9,000/- out of Rs.20,000/- was alleged to have been borrowed without any necessity. The submission made in respect of the mortgage transaction dated 15-3-1969 holds good even in this respect of this transaction. The On demand debts are learnt to be false and concocted. Again the mortgage transactions dated 6-1-72 and 19-2-72 purport to have been entered into to pay the On demand pronote debts of the 3rd defendant and hand loans and for house-hold expenses. The plaintiffs are appending a table below indicating the recitals made in all the above four mortgage transactions which clearly go to show that the 1st defendant purporting to become indebted to the 3rd defendant to a tune of Rs.36,000/- is highly artificial, false and concocted affair. The plaintiffs submit that none of the above transactions are binding on them since there was absolutely no need or necessity to borrow them. The family had sufficient income at all material points of time and there was no need to incur any debts much less to the extent in any event. The alleged consideration was not meant to be used for family benefits and necessities and as a matter of fact so utilised. The 3rd defendant indulged in getting false recitals and in any event in reckless lending with an eye on the valuable property of the family. It is significant to note that the 1st defendant did not borrow any money as a manager. He also did not represent any of the plaintiffs. His acts are anything but prudent and reasonable. The 3rd defendant took full advantage of the fact that the 1st defendant was a horrible drunkard and a gambler who is not caring for the family to any extent. The 3rd defendant knew or atleast he could have known that the money which he was giving to the 1st defendant if found to be true was being used by the latter for the aforesaid illegal and immoral purposes.'

The evidence in the case also discloses that the 1st defendant was given to drinking and gambling. Many a times he was found lying on the road drunk and was brought home. P.W. 1 Yellappa has stated that the 1st defendant drinks and gambles and rarely comes to the house. In the cross-examination, he has further stated thus:

'I have seen Venkatappa gambling. I go to the clubs to spend some time. I cannot say in which club Venkatappa was gambling.'

He has also stated that he has seen Venkatappa playing cards in Recreation Club and that he (defendant-1) was playing the game 'Rummy'. P.W.2 Gubbi Julappa has stated that Venkatappa is a 'Poll.' He is a drunkard and gambler and he is not maintaining the family. In the cross-examination, it has been elicited that he had taken Venkatappa several times to his house as he was found lying on the roads drunk. P.W.3 Mangamma, the wife of defendant No. 1 has also deposed that her husband is a drunkard and a gambler; that at no time he gave money for the maintenance of the family; and that he spends whatever he earns for his habits; that the 1st defendant had not borrowed money for the maintenance of the family. In the cross-examination it has been further elicited that there was no necessity to borrow any money. Defendants 3 and 4 have not adduced any evidence to show that defendant No. 1 was not given to bad habits and that there was legal necessity and pressure on the family for alienating the suit-schedule property - Item No. 1.

We have also to remember that defendants 2 to 4 have even gone to the extent of denying the marriage of Mangamma, the mother of the plaintiffs, with the 1st deferent. There is evidence adduced on that point also. The trial Court has recorded a finding that Mangamma was the legally wedded wife of the 1st defendant and plaintiffs were the children born put of that wed-lock. However, Sri Shekhar Shetty, learned Counsel for Respondents 2 to 4, discreetly has not challenged that finding. We have referred to this only to show the type of persons defendants 2 to 4 on whom the minor plaintiffs had to face. Thus, the evidence on record clearly establishes that the 1st defendant was a drunkard and a gambler and that he was not maintaining the family and there was no necessity for him to

incur debts nor he spent any money for maintaining the family. In addition to this, it is also pertinent to notice that the 3rd defendant has, according to his case and as per the recitals contained in Exhibits P-4 to P-7 gone on advancing the money to the 1st defendant either for his necessity or for discharging the alleged antecedent debts or earlier debts recited in those documents.

8. Sri Shekhar Shetty, learned Counsel appearing for defendants 2 to 4 contends that as the sale deed is dated 22-4-1972 and by that time the debts were existing as evidenced by Exhibits P-4 to P-7, the alienation was for the discharge of antecedent debts. Therefore, it is binding upon the sons - of defendant No. 1. This submission proceeds on the assumption that the recitals contained in Exs.P-4 to P-7 must be acted as proof of the facts stated therein because the documents have been marked in the evidence and as such they reflect the correct state of affairs. The plaintiffs have, as already pointed out, challenged the very necessity of raising the loans and it is their specific case that the alleged loans were incurred for immoral purposes. Paragraph-6 of the plaint clearly brings about this aspect of the case. As the documents in question are all of recent origin in as much as they have come into existence within three years anterior to the date of the suit and the same have also been challenged, the recitals contained therein as to the necessity for raising the loans cannot be accepted as proof of the facts stated therein in the absence of evidence to prove the same. Ex.P.5 recites about the On Demand Promissory Note executed by the 1st defendant and also the amount payable towards the lease and other reasons for executing the document. No evidence is adduced to prove that there was anon demand pronote executed by the 1st defendant in favour of the 3rd defendant. There was no difficulty whatsoever for the 3rd defendant to produce the On demand pronote. Similarly, if there was any lease executed by the 1st defendant in respect of item No. 1 of the suit schedule property, to evidence the lease back, the same ought to have been produced ; but no such document is produced. Similarly the recitals in Exhibit P-6 refer to several matters for which that mortgage was executed. But no evidence is adduced to prove the same. What is stated about Exhibit P-5 equally applies to and holds good in respect of Exhibits P-6 and P-7. Therefore, it is a case in which though several mortgage deeds are produced to show that there were antecedent debts, those debts themselves have not been proved. Therefore, it is not possible to hold

that at the time of sale there was any antecedent debt existing. As to what value should be attached to the recitals contained in the documents of recent origin and as to whether the recitals in such documents should be accepted as proof of the facts stated therein, the Privy Council had occasion to state the law in the case of BANGA CHANDRA DHUR BISWAS AND ANOTHER v. JAGAT KISHORE ACHARJYA CHOW-DHURI AND OTHERS, 1916 P.C. 110, 1967 (1) Mys. L.J. 557 thus :

'If the deeds were challenged at the time or near the date of their execution, so that independent evidence would be available, the recitals would deserve but slight consideration, and certainly should not be accepted as proof of the facts.'

Therefore, defendants 3 and 4 ought to have adduced evidence to prove the facts mentioned in those documents independently of the recitals contained in those documents.

9. Sri Shekhar Shetty, learned Counsel for defendants 2 to 4 has placed reliance on a Division Bench decision of this Court in Vishwanath Malakappa and Ors. v. Vishwanatha and Ors. in support of his contention that as the debt is incurred by the father, it is binding upon the sons as the sons are under pious obligation to discharge the debts incurred by the father and that obligation arises out of the religious need. Hence the alienation made for discharging the debts is binding upon the sons. It appears to us that the aforesaid decision is of no assistance to the case on hand. We are not concerned with the payment of debt as such. We are concerned with the alienation made by the father, of the joint family property in which the minor plaintiffs have a share. That was a case in which the father incurred debts for the purpose of the family that is for the purpose of trade which was the Kulachara of the family. That as the trade itself was the Kulachara of the family and the debts were incurred for the purpose of the trade, they were binding on the members of the family. Therefore, the said decision is of no assistance.

10. Learned Counsel Sri Shekhar Shetty has further placed reliance on another decision of this Court in the case of A. CHINNA SWAMY v. S. CHANDRA SEKHARA SHARMA, 1966 (2) Mys. L.J. 575. That was a case in which the father received the amount which he was entitled to receive but subsequently he

misappropriated. The Court held that as the initial receipt of the amount was legal, the subsequent act of misappropriation would not affect the liability of the sons because since the inception it was lawful. Therefore, it was held that it was not an Avyavaharika debt. Thus it is clear that this decision is also not helpful to decide the point with which we are concerned in this case.

11. Learned Counsel for defendants 3 and 4 has further placed reliance on another decision of this Court in the case of FAKIRAPPA AND OTHERS v. VENKATESH AND ANOTHER, 1976(2) KLJ 186. That was a case in which a sale deed of 1942 which was executed for discharging the antecedent mortgage debts was challenged in the year 1961. The mortgage deed was dated 27-3-1924. Having regard to the fact that the debt was incurred long back, this Court followed the law laid down in Banga Chandra v. Jagat Kishore referred to above, by their Lordships of the Privy Council in respect of the recitals contained in the old documents. The Privy Council stated the law thus :-

'If the deeds were challenged at the time or near the date of their execution, so that independent evidence would be available, the recitals would deserve but slight consideration, and certainly should not be accepted as proof of the facts. But, as the time goes by, ail the original parties to the transaction and all those could have given evidence on the relevant points have grown old or passed away, a recital consistent with the probability and circumstances of the case assumes greater importance, and cannot lightly be set-aside; for it should be remembered that the actual proof of the necessity which justified the deed is not essential to establish its validity. It is only necessary that a representation should have been made to the purchaser that such necessity existed, and that he should have acted honestly and made proper enquiry to satisfy himself of its truth. The recital is clear evidence of the representation. and, if the circumstances are such as to justify a reasonable belief that an enquiry would have confirmed its truth then when proof of actual enquiry has become impossible, the recital, coupled with such circumstances, would be sufficient evidence to support the deed. To hold otherwise would result in deciding that a title becomes weaker as it grows older, so that a transaction perfectly honest and legitimate when it took place-would ultimately be incapable of justification merely owing to the passage of time.'

Such a situation does not exist in the instant case. Therefore, the decision in the aforesaid Fakirappa's case, 1976(2) KLJ 186 is also not on the point.

12. Sri Shekhar Shetty, learned Counsel, has also further urged that the plaintiffs have not been able to connect the immoral conduct of the 1st defendant with the debts incurred and therefore, the mere general allegations of immoral conduct of the 1st defendant is not sufficient to hold that the debts incurred by the 1st defendant were 'Avyavaharika'. We have already held that the plaintiffs have established that the 1st defendant was given to drinking and gambling and he never maintained the family. In addition to this, the manner in which the 3rd defendant had gone on advancing the money to the 1st defendant also goes to show that the 1st defendant was only spending the monies to indulge in his vices. In this case, it is very pertinent to notice that from the year 1969, it was the 3rd defendant who was advancing the money to the 1st defendant after taking one mortgage after other in respect of the same property and discharging the earlier mortgage as consideration for the latter mortgage deed, in addition to this, it is already held that the recitals as to antecedent debts contained in the documents marked as Exs. P-4 to P-7 are not proved. Therefore the very basis of the alienation is knocked down. Further it is also very pertinent to note that there is no evidence whatsoever adduced by the 3rd defendant that he made any enquiry about the legal necessity for alienating item No. 1 of the suit schedule property. The law on the point is very well settled since the decision of the Privy Council in Hanoomanpersaud's case as stated in Mayne's Hindu Law & Usage, 12th Edition at page No. 385, thus :

'The rule as to bona fide inquiry laid down in Hanoomanpersaud's case has been embodied in Section 38 of the Transfer of Property Act. That Section since the Amending Act 20 of 1929 has become applicable to Hindus, It runs thus : 'Where any person, authorised only under circumstances in their nature variable to dispose of immovable property transfers such property for consideration, alleging the existence of such circumstances, they shall, as between the transferee on the one part and the transfer or and other persons (if any) affected by the transfer on the other part, be deemed to have existed, if the transferee, after using reasonable care to ascertain the existence of such circumstances, has acted in good faith.'

The rule laid down in Hanoomanpersaud's case as to sufficiency of a reasonable inquiry by the transferee of the existence of a necessity to support an alienation applies as well in the case of simple loans or other transactions which are not transfers of property.'

13. On 15-3-1969 the first mortgage came to be executed for Rs.5,000/-. The reasons for the same mentioned therein' are the Court litigation in respect of the properties situated at Anekal and house-hold expenses. On the contrary, it is the case of the plaintiffs, that there was no litigation whatsoever pending in respect of the Anekal property. Defendants 2 to 4 have also not produced any evidence to show that there was a litigation and therefore the 1st defendant incurred expenses and it was necessary to incur such expenses. The second mortgage is executed immediately within a period of 'one and half years, on 9-11-1970 for Rs.20,000/-. The reasons for the same are, as mentioned in the document, to pay mortgage debt of Rs.5,000/-, to pay rent arrears of Rs. 1,600/-, On demand pronote dated 26-5-1970 of Rs.2,500/- to the 3rd defendant, On demand pronote dated 2-9-1970 for Rs.300/- to the 3rd defendant and On demand pronote executed in favour of Chikka Kariyappa for Rs. 1,000/-. He has taken Rs.4,440/- before the Witnesses and the remaining sum of Rs.5,000/- to be paid before the Sub-Registrar. There is no evidence with regard to the payment of arrears of rent of Rs. 1,600/- and discharge of debt under the promotes in favour of Defendant-3 and Chikka Kariyappa and there is no evidence to show that a sum of Rs.4,440/- was paid before the witnesses. Similarly, another mortgage deed came into existence on 6-1-1982 for a sum of Rs. 10,000/-. The reasons for execution of this mortgage deed, as stated in the document, are to pay to the 3rd defendant, under On demand pronote dated 22-9-1971 for Rs.2,000/- to pay the debt under the On demand Pronote dated 1-11-1971 to the 3rd defendant for Rs.3,000/- he had taken Rs.3,880/- before the witnesses and the remaining amount of Rs. 1,000/- to be paid before the Sub-Registrar. The first three amounts are not proved as no other evidence is adduced in this regard. Thereafter another mortgage dated 19-2-1972 was executed by the 1st defendant in favour of the 3rd defendant. The reason for the same, as stated in the document is to discharge the earlier loans and for house-hold expenses and he received Rs.4,000/- before the witnesses and Rs.2,000/-before the Sub-Registrar. It is also not proved whether the amount of

Rs.4,000/- was paid before the witnesses. Thus, the major portion of the consideration amount mentioned in the aforesaid various mortgage deeds has not been proved. As it is already pointed out the validity of these documents and truth of the recitals contained therein have been challenged. The documents being of recent origin the recitals contained therein cannot be accepted as proof of the facts stated therein. Hence we are of the view that defendants 3 and 4 were required to prove the antecedent debts and they have failed to establish the antecedent debts as averred by them. They have also not adduced any evidence to prove that they acted as prudent persons and enquired about the existence of legal necessity for alienating the suit property under Ex.P.3.

Here, it may also be noticed that the partition took place under Exhibit P-2 on 21-4-1972 and the sale as per Exhibit P-3 has taken place on 22-4-1972. These circumstances clinch the issue and we are left with no doubt that the alienation effected by the 1st defendant was neither for legal necessity nor for the benefit of the family. This is sufficient to hold that the alienation in question is not binding upon the plaintiffs. In addition to this, the immoral conduct of the 1st defendant is also established. Hence we hold that the alienation effected by defendant-1 in favour of defendant-3 under Exhibit-P.3 is not binding on the shares of the plaintiffs. In view of the fact that Exhibit P-3 is not binding on the shares of the minor plaintiffs, the further alienation effected 'by defendant-3 in favour of defendant-4 to the extent of their share cannot be held to be binding on the plaintiffs. Accordingly, point No. 3 is answered in the negative and in favour of the plaintiffs.

14. It is contended that plaintiff Nos. 5 and 6 were not born either on the date of the suit or on the date of the alienation and therefore, they are not entitled to challenge the alienation and are also not entitled to a share in the suit schedule properties. Had the suit been filed by them alone, possibly there would have been something to consider in this contention. As long as plaintiffs 2 to 4 are entitled to seek the re-opening of the partition and challenge the alienation made by defendant No. 1, the same enures to the benefit of plaintiffs 5 and 6 because the partition effected earlier has been held to be unfair and as such, it is liable to be reopened and a fresh partition has to take place. That being the position even

though the plaintiffs 5 and 6 were born subsequent to the filing of the suit but as on to-day when the partition takes place, they are entitled to a share as per law.

15. It is also further contended by Sri Shekhar Shetty, learned Counsel, that the plaintiffs have not sought for either setting aside the partition or of the alienations and therefore, they are not entitled to seek partition in respect of the property sold under Exhibit P-3 and re-open the partition effected under Exhibit P-2. We are afraid, this contention proceeds on the wrong assumption of the legal position. The relief of partition is a larger relief. The plaintiffs have specifically prayed for partition by metes and bounds ignoring the partition deed dated 21-4-1972 and the sale transactions dated 22-4-1972 and 26-4-1972 and to put them in separate possession of their share.

The suit is filed by the minors within a year from the date of the partition and the date of alienation. There is no bar of limitation. In the case of C.R. RAMASWAMI AYYANGAR v. C.S. RANGACHARIAR AND OTHERS AIR 1940 Madras 113, the Full Bench of five Judges of the High Court of Madras has held thus:

'In respect of alienations by father to which the minor was not eo nomine a party and which are challenged by him in the suit for partition against his father, the plaint need not contain a prayer for a declaration or cancellation, as the prayer is for a purely incidental but unnecessary relief.'

A Division Bench of this Court in the case of GANAPATI SANTARAM BHOSALE v. RAMACHANDRA SUBBA RAO, ILR 1985 KAR 1115 has held that in a 'suit for partition by a Hindu coparcener, it is not necessary to seek a declaration for setting aside the alienation but it is sufficient to seek a share and possession thereof complying with a declaration that he is not bound by alienations or interest of others created in such properties which fall to his share.

In the plaint, as already pointed out, the prayer of the plaintiffs is to ignore the partition and the alienation and to award the share to which they are entitled to which in effect amounts to seeking a declaration that they are not bound by the said alienations. Hence, the contention of learned Counsel for defendants 3 and 4 cannot be accepted and it is rejected.

16. The next question for consideration is as to what would be the shares of the plaintiffs. Learned Counsel for defendants 2 to 4 fairly concedes that Defendants 1 and 2 are brothers and the plaintiffs are the children of defendant-1. Defendants 1 and 2 being brothers, and the properties being joint family properties each one is entitled to one-half share. In the one-half share of defendant No. 1, the plaintiffs are entitled to their respective shares. As the parties are from, and the suit properties are situated in the old Mysore area they are governed by the Hindu Law Womens Right to Property Act (Mysore Act 10/33). As per Section 8 of that Act, un-married daughters are entitled to a share in a partition between the father and sons. In this regard, Sri Shekhar Shetty, learned Counsel for defendants 2 to 4 submits that as this is a partition between two brothers, Section 8 of the said Act is not attracted and therefore, the unmarried daughters are not entitled to a share. It is not possible to accept this contention having regard to sub-clause (3) of Sub-section (1) of Section 8 of the Act and the interpretation placed by the Supreme Court on the entire Section 8 in the case of NAGENDRA PRASAD AND ANOTHER v. KEMPANANJAMMA, : [1968]1SCR124 thus:

'The scheme of Section 8(1). thus, is that if there is a partition as envisaged in clause (a), the females mentioned in that clause only get a right to the share in the property. If there is a partition between male members mentioned in clause (b), then the right to the share accrues to the females mentioned in that clause. Clause (c) is wider, because it does not specifically enumerate the females who are to get a share. Clause (c) only lays down that clauses (a) and (b) are to apply mutatis mutandis to a partition among other coparceners in a joint family. This language itself means that, even though under clause (c) a partition will be between members of a joint family who are not related to each other in the manner given in clauses (a) and (b), yet the females who are to receive a share are to be ascertained with reference to clauses (a) and (b). Under clause (a), a partition envisaged is between a person and his son or sons, and the females who are to receive a share and his mother, his unmarried daughters and the widows are unmarried daughters of his predeceased undivided sons and brothers who have left no male issue. The question arises how the females entitled to a share in Clause (c) are to be ascertained with reference to this clause when the partition is not between a person and his son or sons. Clause (c) clearly applies only to a

case where the partition is between members of the family not related in the manner laid down in clause (a), and yet the ascertainment of the females who are to receive a share at that partition is to be by reference to clause (a) The same applies when the partition under clause (c) is between persons not related in the manner, envisaged in clause (b) and yet the females mentioned in clause (b) are to be ascertained for the purpose of being granted the share mentioned in clause (c). An example may be taken. Supposing there is a partition between a person and his brother's son. In such a case clause (c) lays down that the females entitled to a share are to be ascertained by reference to clauses (a) and (b). The result is that in such a case, by applying clause (a), the females entitled would be the mother, the unmarried daughters, the widows and unmarried daughters of predeceased undivided sons and brothers of both the uncle as welt as the nephew. Similarly, in ascertaining the females by reference to clause (b) in such a partition, the females included will be the mothers, the unmarried sisters, the widows and the unmarried daughters of the pre-deceased undivided brothers of both the uncle and the nephew.'

Therefore, the minor unmarried daughters who are plaintiffs 2, 3, 4 and 5 are also entitled to a share. The quantum of share of minor plaintiffs 2 to 5 is also ascertainable as per the provisions contained in Sub-section (2) of Section 8 of the said Act. According to that, each one is entitled to 1/4th share of what their brother is entitled to. In order to determine the share of each of the plaintiffs the entire suit property is divided into 32 parts. In this, the 2nd defendant is entitled to 16 parts and the 1st defendant is entitled to 4 parts, two minor sons each are entitled to 4 parts and the four minor daughters together are entitled to 4 parts. Thus, the minor daughters, plaintiffs 2 to 5 together will be entitled to 4/32 equivalent to 1/8th share. Each of the plaintiffs 1 and 6 will be entitled to 4/32 (1/8th share), and their father, defendant No. 1 is entitled to 4/32 (1/8th share). Defendant No. 2 will be entitled to half in the entire suit-schedule properties descried as items 1 to 4.

17. For the reasons stated above, this appeal is entitled to succeed. It is accordingly allowed. The judgment and decree of the trial Court are set aside. There shall be a preliminary decree in the following terms :

(i) The partition effected as per Exhibit P-2 being unfair is not binding upon the plaintiffs.

(ii) The alienations evidenced by Exhibits P-3 and P-8 are not binding on the shares of the plaintiffs.

(iii) Defendant-2 will be entitled to half share. Defendant-1 will be entitled to 1/8th share, plaintiffs 1 and 6 will be entitled to 1/8th share each, and each of the plaintiffs 2 to 5 is entitled to 1/32 share. The partition of agricultural lands shall be got effected through the Deputy Commissioner under Section 54 of Civil Procedure Code. The preliminary decree be transmitted to him. In respect of other properties the same shall be effected through a Court Commissioner.

(iv) The plaintiffs will also be entitled to mesne profits in respect of their shares from defendants 3 and 4 in respect of item No. 1 of the suit-schedule properties and in respect of other properties from those who are in possession from the date of the suit. There shall be an enquiry into the mesne profits under Order 20 Rule 12 of Civil Procedure Code.

(v) Since the plaintiffs are minors, they are entitled to costs throughout from defendants 3 and 4.