
Chango and Others Vs Gangutai and Others

RSA 1289/74

Court: Karnataka High Court

Date of Decision: July 2, 1982

Acts Referred:

Limitation Act, 1963 & Article 59

Citation: (1983) 1 KarLJ 200

Hon'ble Judges: N. D. Venkatesh, J

Judgement

1. The appellants, who were plaintiffs in OS No. 27 of 1971 on the file of the Munsiff, Khanapur, have preferred this second appeal against the

judgment and decree dt. 26-6-1974 of the Prl. Civil Judge, Belgaum, in RA No. 27 of 1973 on his file. By that judgment the Civil Judge has

dismissed these appellants' appeal thereby confirming the judgment and decree of the Munsiff dt. 15-1-73 by which he had dismissed the suit with

costs.

2. Parties in this appeal will be referred to as the plaintiffs and the defendants in the rank in which they stood in the trial Court.

3. Plaintiffs 1, 2 and 3 are the two sons and the widow, respectively, of one Krishna. Defendants 4 and 5 are brothers of that Krishna. Of these

three brothers, the 4th defendant, Ganu Nagappa, Tahsildar, was the eldest; the 5th defendant, Honnappa Nagappa Tahsildar, was the 2nd and

the aforesaid Krishna, the 3rd. Their father was one Nagappa. He had purchased two lands (fully described in para 1 of the plaint) sometime prior

to 1965 and the plaintiffs and defendants 4 and 5 are in possession of the same. In 1965 defendants 1 and 2 filed a suit in RCS No. 119 of 1965

in the Court of the Munsiff, Khanapur, against the 4th defendant, Ganu, for a declaration that the sale of the plaint two items in favour of Nagappa

does not bind their shares and interest in the said lands and that their share, being 2/3rds in the said lands, be partitioned and separate possession

of the same be given to them. The suit came to be decreed and the decree-holders were making attempts to execute the decree It is at that stage

the present suit came to be filed by the plaintiffs for a declaration that the decree obtained by defendants 1 and 2 in RCS No. 119 of 1965 does

not bind them for the reasons stated by them in their plaint, and for a consequential relief of permanent injunction restraining them from taking

possession of the suit property or any portion thereof in execution of the said decree.

4. The main grounds on which the plaintiffs in this proceeding-OS No. 27 of 1971 sought for setting aside of the decree obtained in RCS No.

119/65 on the file of the Munsiff, Khanapur, was that the same was the result of collusion between the plaintiffs and the defendants in the said suit

(defendants 1 to 3 and 4, respectively, in this suit); that they together had committed fraud on these plaintiffs; and that it was void in so far as the

plaintiffs and the 5th defendant were concerned as the plaintiffs" predecessor-in-interest and the 5th defendant had not been made parties to the

suit though they were necessary parties. These allegations were denied by the defendants in the present suit and they further pleaded that the suit

was barred by time. The learned Munsiff answered all the relevant issues against the plaintiffs. He also held that the suit was barred by time.

5. In the trial Court the plaintiffs examined on their behalf the 5th defendant in the case as their sole witness (PW 1). On behalf of the contesting

defendants the 1st defendant got himself examined. Both sides have also produced some documents. Both the Courts below have concurrently

held that the plaintiffs had miserably failed to prove that the decree in the previous suit was either the result of collusion or fraud. They have also

held that the suit was barred by time.

6. Under Art. 59 of the Limitation Act, 1963, a suit to set aside or cancel a decree has to be filed within three years from the time ""when the facts

entitling the plaintiff to have.....the decree cancelled or set aside.....first became known to"" the plaintiffs. The decree in the previous suit was as

on 16-11-1967. The present suit has been filed more than three years thereafter 29-7-1971. The plaintiffs have stated in para 7 of their plaint that

they had come to know of the decree in the previous suit only when the plaintiffs in that suit (OS No. 119/65) made attempts to obtain actual

possession of the property in execution of the same. They should have established as to when exactly they had come to know about the decree.

They have not stepped into the witness box and there is practically no evidence in this respect. The Courts below have rightly held that the plaintiffs

had failed to show that the suit in question was within time. Also, as already stated, their concurrent findings are that the plaintiffs had miserably

failed to establish that the said decree was the result of collusion or fraud. These concurrent findings are not liable to be disturbed.

7. Now, the learned counsel for the appellants puts forward another ground of attack. According to him, that that Ganu Nagappa Tahsildar

(Nagappa), the 4th defendant herein, who was the 2nd defendant in RCS No. 119 of 1965, could not have, in the circumstances of that case,

represented his clients in the said suit and, therefore, the decree in RCS No. 119 of 1965, in so far as they (the present plaintiffs) are concerned, is

a nullity and does not bind them.

8. On the other hand, learned counsel for the contesting respondents, drawing my attention to Ext. P 2, the judgment in RCS No. 119 of 1965,

submitted that that Ganu Nagappa, who was the 2nd defendant in the said suit, had been arrayed as the defendant as manager of the joint family

consisting of himself and his brothers and that as such he represented the entire family including the predecessor-in-interest of the plaintiffs and,

therefore, the decree obtained in the said suit binds them.

9. It may be noted that in the cause-title to that suit Ganu Nagappa, who was the 2nd defendant, is described as follows:

Ganu Nagappa Tahsildar, Age 30, Agriculturist, (Topinakatti) as Manager of the joint Hindu family"". Ganu Nagappa in the said suit had, no

doubt, taken the plea that besides him, his deceased father had left other sons, daughters, and that since they have not been impleaded as parties to

the suit, the suit was bad for non joinder of parties. In view of this contention one of the issues framed by the trial Court was whether the suit was

bad for non-joinder of parties, and the answer of both the Courts below is that it was not.

10. The only question that survives for consideration in this second appeal is as to whether the decree in RCS No. 119 of 1965 is not binding on

these plaintiffs for the reason that their predecessor-in-interest, Krishna, had not been made a party defendant to the said suit.

11. Now, it is not in dispute that of the three brothers, Ganu Nagappa Tahsildar, Krishna (father of plaintiffs 1 and 2, and husband of 3rd

defendant), and Honappa Nagappa Tahsildar, the 5th defendant in this suit, who constituted a co-parcenary, Ganu Nagappa Tahsildar was the

eldest and also the manager of the family. It is also not in dispute that as manager of that family, in the normal course, he could have represented

the entire family in that litigation. In this connection I may usefully refer to a Full Bench decision of the Madras High Court in Vadlamanati

Venkatanarayana Rao v. Gottu-Mukkule Venkata Somaraju, AIR 1937 Mad. 610, FB. Venkataramana Rao, J., (as he then was), following a

decision of the Privy Council, observes as follows in regard to the power of the manager to represent the family in a suit involving joint family

property:

In 6 IA, 233-5 CLR 477 (Bissassur Lull Sahoo v. Luchmesur Singh) one Mosahab was sued as the heir of his grand father Nath Dass for

recovery of about Rs. 39,000 on account of the rents of a certain Mouzah Ramnugger and it is stated that Nath Dass had taken a lease of that

from 1847-1854, and a decree was passed to be recoverable from the property left by the deceased Nath Dass. In execution of the said decree,

Mouzah Muddunpore which belonged to the joint family was sold. In the suit Chooman, an undivided brother of Mosahab, was not joined. The

question arose as to the validity of the execution sale and how far it was binding on both the brothers or either of them. Their Lordships of the

Judicial Committee held the sale to be valid and binding against both, and observed thus:

"Acting on the principle which follows from their finding that this family was joint, it must be assumed that Mosahab Dass is sued as a

representative of the family and that it must further be assumed that Nath Dass in taking the lease of the Mouzah here referred to, Ramnugger, in

respect of which the rent was due, must be assumed to have taken it on behalf of the family, and that the debt must be deemed to be a debt from

the family.....Looking to the substance of the case, this decree is a decree against the representative of the family in respect of a family debt and

that it is one which could be properly executed against the joint property of the family, and that Muddunpore was a part of that joint property".

This decision clearly lays down that where a decree has been obtained against the manager as representative of the joint family in respect of a joint

family liability, it will be binding on his undivided brothers and the entire joint family property can be taken in execution though the undivided

brother was not made a party to the suit. This principle would a fortiori apply to the case of a father and son. I think it is unnecessary to refer to the

other Privy Council decisions as they have been already dealt with at length by my learned brother Venkatasubba Rao, J., in his judgment.

Therefore, where a father or other manager is sued as a representative of a family, the other members of the family must be held to be substantially

parties to the suit through such manager. The fact that they are not parties eo nomine will not render them any the less parties to the suit. It was on

this principle held where a manager dies during the pendency of the suit or after decree, the person who succeeds him as manager can be brought

on the record and the other members of the family need not be made parties. A judgment against a person sued in a representative character is a

judgment against every individual member covered by the representation and therefore the bar of res judicata is held to apply to a member of a

family not a party eo nomine to a litigation represented by its manager. Once the liability is declared a family liability, every item of the joint family

property is bound to satisfy that liability; the question of division or non-division hardly arises". (extracted from page 617).

12. In regard to the power of the manager to represent the joint family in a litigation involving joint family property or interest, that is the law.

13. But then, the contention of the counsel for the appellants is that in the instant case the manager himself has stated that the other members of the

coparcenary were necessary parties and should be brought on record, and this shows that Ganu Nagappa did not have power or authority to

represent the other members and, therefore, the decree cannot bind them or their interests in the joint family property involved in that suit. Drawing

my attention to the following passage in Mulla's "Hindu Law" (14th Edh.) at sub-para (5) of para 251 at page 315, he further argued that such an

authority in the manager to represent the entire family "will be implied if they do not come and apply to be joined as parties to the suit, but not if

they applied to be made parties in order to contest the manager's action". According to him this observation has to be taken note of with a slight

modification and held that since the manager himself had stated that the other members of the coparcenary be brought on record as party

respondents, he should be deemed to have had no power to represent them and that the others ought to have been brought on record so that the

decree binds them also. Since that has not been done, he says, the decree does not bind them, Sub-para (5), referred to above, reads as follows:

(5) It seems that the manager of a joint Hindu family may sue or be sued as representing the family in respect of a transaction entered into by him

as manager of the family or in respect of joint family property, and that a decree passed against him in such a suit would bind all other members of

the family if, as regards minors, he acted in the litigation in their interest, and, as regards adults, with their consent. The consent need not be

express; it will be implied if they do not come and apply to be joined as parties to the suit, but not if they applied to be made parties in order to

contest the manager's action.

14. The observations in the passage at sub-para (5) (extracted above) that the consent will be implied "if they do not come and apply to be joined

as parties to the suit, but not if they applied to be made parties in order to contest the manager's action", is based on two decisions: Guruvayya

Gouda v. Dattatraya Anant, (1904) ILR 28 Bom. 11 and Motiram Motharam v. Lalchand Gulabchand, AIR 1937 Nag. 121.

15. What the said two decisions lay down and what the learned Author, in effect, observes is that if the manager is a party to the proceeding his

authority to represent the family is implied, but if the other members of the family come forward and say that they must come on record to defend

themselves, then such consent cannot be assumed by implication. One cannot quarrel with that proposition because if the other members desire to

get themselves impleaded in the proceedings to contest the claim, that may be because of an apprehension that that manager, assuming that he was

still the manager, may not effectively represent them. If that is their apprehension and they come forward to defend themselves, it is clear that there

was no consent on their part for the manager defending their cause also.

16. In the instant case the brothers of Ganu Nagappa Tahsildar had not come forward to get themselves impleaded. Ganu Nagappa also did not

say that he could not represent the coparcenary or the family or that the other members lacked confidence in him and therefore all of them should

be made parties. What he merely stated in his statement was that that joint family consisted of other members and that they were necessary parties,

and, since they had not been impleaded in the suit the same was bad for non-joinder of necessary parties. From this we cannot infer that Ganu

Nagappa had no authority to represent the other brothers. In the circumstances of the case, applying the ratio enunciated by Venkataramana Rao,

J., in Venkatanarayanarao's case (supra) (extracted above at para 11), it has to be stated that the decree obtained by the plaintiffs in RCS No.

119 of 1965 binds the other members and their interests in the joint family property involved therein.

17. For the reasons aforesaid there is no merit in this appeal and accordingly it is dismissed with costs.