(1942) 11 BOM CK 0010

Bombay High Court

Case No: Cross First Appeal No''s. 57 and 74 of 1941

The Gujarat Oil Mills and Manufacturing Co. Ltd.		APPELLANT
	Vs	
Shakarbhai Motilal Patel		RESPONDENT

Date of Decision: Nov. 20, 1942

Citation: AIR 1943 Bom 239 : (1943) 45 BOMLR 507

Hon'ble Judges: Sen, J; John Beaumont, J

Bench: Division Bench

Final Decision: Allowed

Judgement

John Beaumont, Kt., C.J.

This is an appeal from the First Class Subordinate-Judge of Ahmedabad. The plaintiffs sued to set aside an alienation made by their father on the ground that it was not for necessity or for the benefit of the estate. The learned Judge held that it was not for necessity or for the benefit of the estate. Curiously enough, his decree in terms does not set aside the alienation in question; but, I think, the effect of his judgment is to show that it ought in his view to be set aside, and the relief granted is based on that view.

2. In this Court the principal ground argued in appeal is that, assuming that the alienation was not for necessity, the respondent, plaintiff No. 2, who is the sole surviving plaintiff, is not entitled to maintain the suit, because he was not born at the time of the alienation which is challenged. The facts. are that the alienation in question, a permanent lease, was made in 1918 by the father of the plaintiffs in favour of defendant No. 1. At that date plaintiff No. 1 was alive, and was the only son of the grantor of the lease; plaintiff No. 2 was born to such grantor in 1921. This suit was filed in the year 1938 by the two plaintiffs to set aside the alienation, and the first plaintiff died on September 9, 1939, before the trial. The contention in this Court is that thereupon the suit abated, because plaintiff No. 2 had no cause of action in himself, and no cause of action survived to him from plaintiff No. 1.

3. There are a very large number of cases dealing with the right of a coparcener to set aside an alienation made by another coparcener, not for necessity, when the plaintiff coparcener was not born at the time of the alienation in question, but in none of the cases were the facts exactly similar to those in the present case. All the cases were collected and discussed in a casebefore a Full Bench of the High Court of Nagpur, Kashinath v. Bapurao [1940] Nag. 575 and it is not necessary to go through them in detail. It is impossible to reconcile all the cases; for example, two cases reported in ILR 33 All viz. Chuttan Lal v. Kallu ILR (1910) All. 283 and Tulshi Ram v. Babu ILR (1911) All. 654, seem to me to be quite irreconcilable.

4. The conclusions to which I have come, which agree with those of the majority of the Nagpur full bench, are :

1. The cause of action to set aside an alienation not for necessity arises at the time of the alienation, and no fresh cause of action arises on the birth of a further coparcener. This was decided by the Privy Council in Ranodip Singh v. Parmeshwar Prasad ILR (1924) All. 165

2. Only a coparcener born at the time of the alienation, or those conceived and subsequently born alive, and who did not assent to the alienation, can sue to set it aside. This is the question upon which opinions differ, but I think that this was the view taken by the Privy Council in Lal Bahadur v. Ambika Prasad ILR (1925) All. 795 and it has been accepted by most of the High Courts in India. The general rule is that a coparcener under the Mitakshara system takes only a share in the coparcenary property as existing at his birth or adoption.

3. If a coparcener, entitled to do so, successfully challenges the alienation, his action enures for the benefit of all the members of the joint family who did not assent to the alienation. This proposition has been recognized in many cases, and seems to me to depend upon the peculiar character of a Hindu joint family. But in my view it cannot be said to follow from this that the challenging coparcener is suing in a representative capacity, at any rate, so far as relates to members not in existence at the time of the alienation. I do not see how a plaintiff in a suit can represent persons who have no right in themselves to sue.

5. From the above propositions it follows that plaintiff No. 1 alone had a right to bring this suit, and plaintiff No. 2 had no such right. On the death of plaintiff No. 1, plaintiff No. 2 could not continue the suit in his own right, having no cause of action; nor could he claim that plaintiff No. 1 represented him, for the reasons above given; nor could he continue the suit as heir, or legal representative, of plaintiff No. 1, since the father, defendant No. 2, was alive, and the nearer heir.

6. In my opinion, therefore, on the death of plaintiff No. 1 the suit abated. The appeal must be allowed and the suit dismissed with costs throughout.

Sen, J.

7. I agree.