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

Court: Bombay High Court

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.