1951 INSC 38

SUPREME COURT OF INDIA

Mummareddi Nagi Reddi

Vs.

Pitti Durairaja Naidu

C.A.No.51 of 1950

(B.K.Mukherjea,J., M.C.Mahajan and Vivian Bose, JJ.,)

08.05.1951

JUDGMENT

B.K.Mukherjea,J.,

1. This appeal is directed against an appellate judgment of a Division Bench of the Madras High Court dated the 12th January, 1948, reversing in part, a decision of the Subordinate Judge of Nellore passed in O.S. No. 3 of 1940.

2. To appreciate the material facts of the case and the controversy that now centres between the parties, it would be convenient to refer to a short genealogy which is given below :-

> "Udatha Narayanappa - Chanchamma (d. 1933) | | Venkata Narasamma (d. 1926) - Pitti Rangayya (d. 1914) | | Venkatadri-Rajakantamma | | --- | | | |Durairaja Rajavathi Balakrishna KrishnababuluPlff.1. Plff.2. Plff.3. Plff.4."

3. The properties in dispute which are described in schedule A to the plaint admittedly belonged to one Narayanappa who was the father of the paternal grandmother of the plaintiffs. Narayanappa died interstate sometime before 1884 leaving him surviving his wife Chanchamma and a daughter named Venkata Narasamma. Narasamma was married to one Pitti Rangayya and they had a son named Venkatadri, who was the father of the plaintiffs. Chanchamma died in March, 1933, and the plaintiffs aver that they being the heritable bandhus of Narayanappa as the daughter's son's sons of the latter and there being no nearer heir in existence, they became entitled to all the properties left by Narayanappa on the death of his widow. It appears that on 22nd February, 1894, Chanchamma executed, what has been described as a deed of release, in favour of her daughter Narasamma and her son-in-law Pitti Rangayya, under which the entire estate of Narayanappa came into the possession of the latter. After the execution of this document, the daughter and son-in-law of Chanchamma began to deal with the properties left by Narayanappa as their own and entered into various transactions on that footing. Pitti Rangayya died in 1914 and Narasamma followed him in 1926. There are six items of property comprised in schedule A to the plaint. Of these items, 4

and 5 were sold by Venkata Narasamma along with her son, the father of the plaintiffs, on July 9, 1922, to the 5th defendant and the father of defendants 6 to 9 for a sum of Rs. 6,500. Again, on October 26, 1929, when both Narasamma and the plaintiffs' father were dead, item 1 of schedule A was sold by the mother of the plaintiffs as their guardian to the 1st defendant for a consideration of Rs. 33,000. Defendants 2 and 3 are the undivided sons of the 1st defendant. There are other transfers in favour of other defendants in the suit but they are not the subject-matter of the appeal before us.

4. The plaintiffs' allegations in substance are that these alienations are not binding on them as the so-called deed of release executed by the widow could not and did not operate as a deed of surrender and any transfer effected on the strength of this deed by Venkata Narasamma or her son, Venkatadri, or even on behalf of the plaintiffs by their mother as guardian, could not be operative after the death of the widow. As these transfers were made during the lifetime of Chanchamma and without any legal necessity, the plaintiffs as actual reversioners were not bound by them and they are entitled to recover possession of the properties by evicting the transferees. It was for the recovery of possession of these properties that the present suit was brought and there was a claim for mesne profits as well from the date of the widow's death to the date of delivery of possession.

5. The defence of the defendants who are interested in the properties mentioned above, were really of a three-fold character. It was contended in the first place that the plaintiffs were not the next reversionary heirs of Narayanappa and consequently were not entitled to succeed to the estate of the latter on the death of the widow. The second contention was that the deed of release operated as a surrender of the widow's estate in favour of the daughter who was the next reversioner and although by such a surrender the daughter could get only a limited estate which she would have been entitled to on the death of the widow, yet as the daughter died in 1926, the present suit which was instituted more than 12 years after the date of death, was barred by limitation. The third plea was that in any event, these alienations could not be set aside as they were justified by legal necessity.

6. The learned Subordinate Judge who heard the suit decided it adversely to the plaintiffs. It was held first of all that though the plaintiffs were the heritable bandhus of Narayanappa, the evidence adduced by them fell short of establishing that there were no agnatic relations or nearer heir in existence. As regards the document of release (Exhibit P. 6) executed by the widow in favour of her daughter and son-in-law, the Subordinate Judge came to the conclusion that the deed operated as a surrender of the widow's estate and as the daughter died in 1926, the plaintiffs' suit was barred by limitation. On the question of legal necessity, the finding recorded by the Subordinate Judge was that the sale deed (Exhibit D-1) executed in favour of the 1st defendant was supported by legal necessity to the extent of Rs. 5,061 and odd annas and that the other document under which defendants 5 to 9 claimed title was not binding on the estate at all. In the result, the plaintiffs' suit was dismissed in its entirety.
Against this decision, the plaintiffs took an appeal to the High Court of Madras and the appeal was heard by a Division Bench consisting of Gentle C.J. and Satyanarayana Rao J. The learned Judges allowed the appeal in regard to the items of property mentioned above and reversed the decision of the trial Judge to that extent. It was held that the plaintiffs were

the nearest revesionary heirs of Narayanappa and that the deed of release did not operate as a surrender of the widow's estate. The plaintiffs were given a decree for possession in respect of item 1 of the schedule properties as against defendants 2 and 3 on condition of their depositing into court the sum of Rs. 5,061, and odd annas, that being the amount of debt legally binding on the estate which was discharged out of the sale proceeds of the transfer, and there was a further direction to pay interest upon this amount at the rate of six per cent per annum from certain specified dates up to the date of making the deposit. It may be noted here that the 1st defendant died after the trial Court's decree and his interest passed by survivorship to defendants 2 and 3, who are his undivided sons. As against defendants 5 to 9, there was an unconditional decree for recovery of possession in respect of items 4 and 5 of schedule A. The plaintiffs were further given a decree for mesne profits, both past and future, commencing from the date of the widow's death down to the date of delivery of possession, and the amount of mesne profits was directed to be ascertained in a separate proceeding under Order XX, rule 12 of the Code of Civil Procedure. It is against this decision that the present appeal has been preferred by defendants 2, 3 and 5 to 9.

7. Mr. Rajah Aiyar, appearing for the appellants, did not seriously challenge the finding of the High Court as to the plaintiffs being the nearest reversioners at the time of Chanchamma's death. He has assailed the propriety of the High Court's decision substantially on two points. His first contention is that the deed of release (Exhibit P-6) executed by Chanchamma had the effect of a surrender of the widow's estate in favour of her daughter and son-in-law and the daughter having died in 1926, the plaintiffs' suit was barred by limitation. The second ground urged is that the High Court should not have given the plaintiffs a decree for mesne profits from the date of the widow's death. Mesne profits could at best have been allowed from the date of the institution of the suit and so far as defendants 2 and 3 are concerned against whom a conditional decree was given, mesne profits could be allowed only from the time when the condition was fulfilled by the plaintiffs' depositing the specified amount in court.

8. The first point taken by the learned counsel for the appellants raises the question as to the legal effect of the document (Exhibit P-6), upon which the defendants mainly base their contention. The document is more than 50 years old and the language of it is not very clear or definite. It begins and ends by saying that it is a deed of release. It says that as the executant is a woman unable to look after her worldly affairs and as the persons in whose favour the document is executed are the son-in-law and daughter of the executant, she has put the latter in possession of all her properties, movable and immovable. Then comes a description of the properties and after that the provisions run as follows :-

> "Therefore you shall yourself pay the quit rent, etc., payable herefor every year to the Government and enjoy the same permanently from your son to grandson and so on hereditarily. For my lifetime you shall pay for our maintenance expenses Rs. 360 per year every year, before the month of Palguna of the respective years."

9. The remaining clauses of the deed enjoin upon the recipients thereof the duty of realizing all debts due to the executant by other people and also of paying all just debts due by her. It

is stated finally that the lands are under an izara lease executed by the widow in favour of one Narasimha Naidu which is due to expire by the end of 1346 Fasli and it would be for the daughter and son-in-law to consider what they would do with regard to the lease.

10. There are no words of transfer used in the deed, though the widow purports to endow her son-in-law and daughter with hereditary rights of enjoyment in the property. The document is described as a release and is stamped as such. Apparently it comprises all the properties which the widow had, and in a sense the document indicates an intention on the part of the lady to give up all connection with business affairs. Prima facie, these facts lend support to the story of surrender. It is not and cannot be disputed that there can be a surrender even when the next reversioner is a female heir herself who takes a limited interest in the property, though such surrender cannot give her a larger interest than she would get as an heir under the law of inheritance. The whole difficulty in this case, however, is created by the fact that the widow purports to exercise her right of relinquishment of her husband's estate in favour of two persons, one of whom is a next heir, but the other, though related to her as son-in-law, is a complete stranger so far as rights of inheritance are concerned; and there can be no doubt that she intended that her husband's estate should go to the son-in-law jointly with her own daughter.

11. The doctrine of surrender or relinquishment by the widow of her interest in the husband's estate which has the effect of accelerating the inheritance in favour of the next heir of her husband is now a well-settled doctrine of Hindu law which has been established by a long series of judicial decisions. Though the judicial pronouncements cannot be said to be altogether uniform or consistent, yet there can be no doubt as regards the basic principle upon which the doctrine rests, namely, that it is the self-effacement by the widow or the withdrawal of her life estate which opens the estate of the deceased husband to his next heirs at that date."It must be remembered" thus observed the Judicial Committee in Vytla Sitanna v. Mariwada [L.R. 61 I.A. 200 at 207] "that the basis of the doctrine is the effacement of the widow's estate and not the ex facie transfer by which such effacement is brought about. The result merely is that the next heir of the husband steps into the succession in the widow's place". This effacement may be effected by any process and it is not necessary that any particular form should be employed. All that is required is that there should be a bona fide and total renunciation of the widow's right to hold the property and the surrender should not be a mere device to divide the estate with the reversioners : vide Rangasami Goundan v. Nachiappa Goundan [L.R. 41 I.A. 72]. It would be clear from the principle underlying the doctrine of surrender that no surrender and consequent acceleration of estate can possibly be made in favour of anybody except the next heir of the husband. It is true that no acceptance or act of consent on the part of the reversioner is necessary in order that the estate might vest in him; vesting takes place under operation of law. But it is not possible for the widow to say that she is withdrawing herself from her husband's estate in order that it might vest in somebody other than the next heir of the husband. In favour of a stranger there can be an act of transfer but not one of renunciation. The position is not materially altered if, as has happened in the present case, the surrender is made in favour of the next heir with whom a stranger is associated and the widow purports to relinquish the estate in order that it might vest in both of them. So far as the next heir is concerned, there cannot be in such a case a

surrender of the totality of interest which the widow had, for she actually directs that a portion of it should be held or enjoyed by somebody else other than the husband's heir. As regards the stranger, there can be no question of renunciation; the transaction at the most may be evidence of an intention to confer a bounty on him, though such intention is not clothed in proper legal form.

12. Mr. Rajah Aiyar made a strenuous attempt to induce us to hold that the document is a composite document combining really two separate transactions, one, an act of surrender by the widow of the entire estate in favour of her daughter and the other a transfer of a portion of the interest which thus vested in the daughter in favour of her husband. If the document could be read and interpreted that way, obviously the decision should be in favour of the appellants; but, in our opinion, there seem to be difficulties and those of an insuperable character in the way of the document being interpreted as such. Neither in form nor in substance does the document purport to be a relinquishment of the entire widow's estate in favour of the daughter alone, nor is there any indication that the interest intended to be given to the son-in-law was being received by him by way of transfer from the daughter. The document is not one executed by the widow and her daughter jointly in favour of the son-in-law containing a recital of relinquishment of the estate by the widow in favour of the daughter and transferring a portion of the same to the son-in-law. The daughter does not figure as an executant of the deed nor even as an attesting witness. She is the recipient of the deed along with her husband and it is impossible to spell out of the document either that she received the entire estate on renunciation by her mother or transferred or even consented to transfer a portion of it to her husband.

13. Mr. Aiyar in support of this contention placed great reliance upon the principle enunciated in the Full Bench decision of the Calcutta High Court in *Nobokishore v. Harinath*[1] which was impliedly accepted by the Judicial Committee *in Rangaswami Goundan v. Nachiappa Goundan*[2] It was held by the Calcutta High Court in a number of cases which were reviewed and affirmed in *Nobokishore v. Harinath*[1] that a widow is entitled to sell or transfer the entire estate of her husband without any necessity but with the consent of the next reversioner so as to bar the rights of the actual reversioner at the time of her death. This was explained by the Judicial Committee as an extension of the principle of surrender in *Rangasami Goundan v. Nachiappa Goundan(supra*)]. "The surrender, once exercised", observed their Lordships, "in favour of the nearest reversioner or reversioners, the estate became his or theirs, and it was an obvious extension of the doctrine to hold that inasmuch as he or they were in title to convey to a third party, it came to the same thing if the conveyance was made by the widow with his or their consent. This was decided to be possible by Nobokishore's case already cited. The judgment went upon the principle of surrender, and it might do so for the surrender there was of the whole estate : but it is worthy of the notice that the order of reference showed that the alienation was ostensibly on the ground of necessity, so that it might have been supported on the grounds to be mentioned under the second head above set forth."

14. It would be quite consistent with established principles of law if the widow relinquishes her interest in the husband's estate and the reversioner in whom the estate vests transfers the

estate either in whole or in part to another person. If the transfer is of the entire estate, the two transactions may be combined in one document and the widow and the reversioner might jointly transfer the whole estate to a stranger but the implication in such cases must always be that the alienee derives his title from the reversioner and not the widow. The extension of this doctrine in the class of cases of which Nobokishore v. Harinath [I.L.R. 10 Cal. 1102] may be taken as the type seems to be rather far-fetched and somewhat anomalous. In these cases the effect of the immediate reversioner's giving consent to the alienation of the whole estate by the widow to astranger has been held to import a double fiction : the first is the fiction of a surrender by the widow in favour of the consenting reversioner and the second is the fiction of a transfer by the latter to the alienee, although both fictions are contrary to the actual facts. It is difficult to say in the first place why a surrender should be presumed at all when the widow gives the property directly to the stranger and not to the reversioner. Even if this position is assumed, then also the question arises as to how the consent of a party can take the place of a conveyance which is requisite for the purpose of vesting title in a transferee. A consent merely binds the consenting party or anybody else who derives his title from him. If the actual reversioner at the date of the widow's death is the same person who gave his consent, obviously he can be precluded from challenging the transfer; but in the actual reversioner is a different person, there seems to be no justification for holding that he would be bound by the consent expressed by a person who had nothing but a chance of succession at that time and which chance did not materialize at all. (See observations of Mahajan J. in *Ali Mohamad v. Mst. Nughlani*[4] Sir Richard Garth C.J. in his judgment in Nobokishore v. Harinath (Supra) expressed considerable doubt as to the propriety of the view which would make a sale by the widow with the consent of her reversioner stand on the same footing as an actual renunciation. But in view of a series of previous decisions of the court he was constrained to accept that view as correct.

15. It may be necessary or this court at some time or other to reconsider the whole law on this subject. It seems probable that the Privy Council did not subject the decision in Nobokishore's case to a critical examination from the point of view of the doctrine of surrender, as the transfer in that case was upheld on the ground of legal necessity as well. For the purpose of the present case we will proceed on the assumption that the law laid down in Nobokishore's case is correct. But the doctrine should certainly not be extended any further. As was felicitously expressed by Sir Lawrence Jenkins, "The road to the decision in Nobokishore's case was not without its difficulties but the learned Judges felt it had to be travelled that titles might be quited. But it is settled that there should be no extention of this Bengal doctrine" : Per Jenkins C.J. in D*ebiprosad v. Gola Bhagat* [5]The present case obviously does not come within the purview of the doctrine laid down in *Nobokishore v. Harinath* which presupposes an alienation of the entire property in favour of a stranger to which the immediate reversioner was a consenting party. Here it cannot be said that the entire interest was transferred to the son-in-law of the widow with the consent of her daughter. The interest transferred was a fraction of the interest held by the widow and strictly speaking, there was no consent expressed by the daughter. She was a sort of a co-assignee with her husband. Mr. Aiyar contends that her consent was implied by her accepting the deed and joining in several subsequent transactions on the basis of the same, and once this consent is established we can import the fiction of surrender in her favour of the entire estate, and if

that fiction could be invoked it would be only a logical extension of the principle in Nobokishore's case to hold that a part transfer in favour of stranger could also be validated on the theory of surrender. We are unable to accept this chain of reasoning as sound. As stated above, it would be most improper to extend the doctrine in Nobokishore's case which is not itself based on sound legal principles to what Mr. Aiyar calls, it logical consequence. We cannot invoke the fiction of surrender in a case like this when the renunciation, if any, was of a part of the estate; and the attempt to validate a part alienation by the widow in favour of a stranger on the basis of the doctrine of surrender, simply because the reversioner has impliedly assented to it, is in our opinion, absolutely unwarranted.

16. It remains to notice a few decisions of the Calcutta and Bombay High Courts upon which Mr. Rajah Aiyar relies in support of his contention. The case of *Abhay Padha v. Ramkinkar*[7] decided by a Division Bench of the Calcutta High Court, seems to be very similar in its facts to the present case, and prima facie it is in favour of the appellants. There a Hindu widow executed a nadabi patra or deed of release in favour of her husband's brother who was the nearest reversioner and three sons of a predeceased brother of her husband. After the death of the widow the husband's brother instituted a suit or recovery of possession of the entire property denying the rights of his nephews under the deed executed by the widow. The suit was dismissed by both the courts below and this decision was affirmed in second appeal by the High Court. The point was definitely raised before the High Court that the transaction could not be upheld on the footing of surrender as it was partly a surrender in favour of the next heir and partly an alienation in favour of certain remoter heirs. This point was disposed of by Cumming J., who delivered the judgment, in the following manner :-

> "I do not think that there is much substance in this contention. It is a question more of form than of substance. If the widow had surrendered the whole estate to the reversioner and the reversioner had at the same moment made a transfer of his estate to his nephews nothing could be said against the transaction, and this is what in effect has been done by the present document."

17. We do not know what the contents of the document in the case actually were, nor whether the husband's brother joined in the execution of the document. Be that what it may, we cannot for the reasons already discussed accept the view that a transfer made by a widow of her entire estate in favour of the nearest reversioner and an outsider jointly would operate as a surrender of the whole estate to the immediate reversioner and a transfer of a half share in it to the stranger. This, of course, is subject to any rule of estoppel that may on proper materials be urged against the presumptive reversioner. This is precisely the view that has been taken by the Allahabad High Court in Mt. Jagrani v. Gaya [A.I.R. 1933 All. 856] and, in our opinion, this is the correct view to take.

18. The learned counsel for the appellants has in this connection referred us to two decided authorities of the Bombay High Court. The first is the case of Yashwanta v. Antu [I.L.R. 58 Bom. 521], where the widow together with her daughter who has the immediate heir executed a deed of gift of the entire estate in favour of a stranger who was the husband of a predeceased daughter. It was held that the transaction was valid on the basis of the doctrine

of surrender. It is quite clear that this case comes directly within the purview of the principle enunciated in Nobobkishore's case, and there are two material facts which distinguish it from the case before us. In the first place, the reversioner joined with the widow in making the transfer in favour of a stranger and secondly, the transfer to the stranger was of the entire estate. There can be no difficulty in construing such a transaction as a valid act of surrender.
Of the other case which is to be found reported in Bala Dhondi v. Baya [I.L.R. 60 Bom. 211] the facts are somewhat similar to those in the present case, but the actual decision does not assist the appellants. There a Hindu widow made a gift of the entire estate of her husband in favour of her daughter and her husband jointly, the daughter being the next heir at that time. The lower appellate court held that the gift was a valid surrender, but this decision was reversed by the High Court on appeal and it was held that the transaction was not valid in law inasmuch as it was not a gift in favour of the daughter alone but in favour of her son-in-law as well who was to take jointly with the daughter. It was further held that the daughter being a minor, was not competent to consent to the gift in favour of her husband. It is true that there is no question of minority in the present case, but the decision certainly is no authority on the point which we are called upon to decide. In our opinion, the view taken by the High Court in regard to the legal effect of the document (Exhibit P-6) is the correct one and the first contention raised by Mr. Rajah Aiyar should therefore fail.

19. We now come to the other point which relates to the question of mesne profits. Mr. Aiyar's main contention under this head is that as an alienation by the widow is not void but only voidable and the reversioner can avoid it by choosing to institute a suit, the possession of the alienee could not be held to be unlawful before that date and consequently no mesne profits should have been allowed for the period prior to the institution of the suit. The other branch of his contention is that in respect of property No. 1 of the schedule there was only a conditional decree passed against defendants 2 and 3 and so long as the condition is not fulfilled by the plaintiffs depositing the required amount in court, the plaintiffs' right to take possession does not accrue and consequently no mesne profits can be allowed to them. In support of this contention, reliance has been placed upon the decision of the Allahabad High Court in Banwarilal v. Mahesh [I.L.R. 41 All. 63].

20. As regards the first branch of the contention, it may be pointed out that prior to the decision of the Judicial Committee in Bijoya Gopal v. Krishna Mahishi [I.L.R. 34 Cal. 329] there was some misconception regarding the legal position of an alienee of a property from a Hindu widow vis a vis the reversioner, upon the death of the widow. It was held in an earlier case by the Judicial Committee that an alienation by the widow was not void but voidable and the reversioner might elect to assent to it and treat it as valid. It did not absolutely come to an end at the death of the widow. On the strength of this decision, it was held by the Calcutta High Court in Bijoya Gopal v. Krishna Mahishi [I.L.R. 34 Cal. 329] (supra) that it was necessary for a reversioner to have the alienation set aside before he could recover possession of the widow's property and the period of limitation for a suit to set aside such an alienation was that prescribed by article 91 of the Indian Limitation Act. On appeal to the Privy Council, it was pointed out by their Lordships that this view was based on a misconception and they explained in what sense a transfer by a Hindu widow was not void but voidable. It was said that the alienation by a Hindu widow does not become ipso facto

void as soon as the widow dies; for, if that were so it could not have been ratified by the reversioners at all. The alienation, though not absolutely void, is prima facie voidable at the election of the reversionary heir. He may, if he thinks fit, affirm it or he may at his pleasure treat it as a nullity without the intervention of any court and he can show his election to do the latter by commencing an action to recover possession of the property. There is in fact nothing for the court either to set aside or cancel as a condition precedent to the right of action of the reversionary heir. A reversioner's suit for recovery of possession of the property alienated by a widow, it is well settled, is governed by article 141 of the Limitation Act, and as it is not necessary that the transfer should be set aside before any decree for possession is made, all that is necessary is that the reversioner should file a suit for possession within 12 years from the death of the widow and a decree passed in such a suit must be on the basis that the possession of the transferee was unlawful ever since the widow died. This being the position, we think that it is quite proper to allow the reversioner mesne profits against the alienee from the date of the widow's death. There is no rule of law that no mesne profits can be allowed in a case where the alienation cannot be described as absolutely void. The decisions of the Judicial Committee in Bhagwat Dayal v. Debi Dayal [L.R. 35 I.A. 48] and Satgur Prasad v. Harnarain Singh [L.R. 59 I.A. 147] may be cited as illustrations where mesne profits were allowed in transactions which were only voidable. We think further that there is a difference between the alienee of a widow and the transferee of joint property from a Mitakshara father. A son of a Mitakshara father is bound to set aside an alienation made by the father within the period laid down in Article 125 of the Indian Limitation Act and it is only on the alienation being set aside that he is entitled to recover possession of the property. The High Court, in our opinion, was perfectly right in holding that the decision in Banwarilal v. Mahesh [L.R. 35 L.A. 48] which related to a suit instituted by a son against an alienee of the father under the Mitakshara law does not apply to the facts of the present case. It is true that as regards defendants 2 and 3 the decree is a conditional decree and the plaintiff cannot recover possession unless he pays a certain amount of money to the extent of which the widow's estate has been held to be benefitted, but the High Court has very properly allowed interest upon this amount to the alianee while making the latter liable for the mesne profits.
The result is that, in our opinion, the decision of the High Court cannot be assailed on either of these two points and the appeal therefore fails and is dismissed with costs.

21. Appeal dismissed.

Judgment Referred.

[1] *I.L.R. 10 Cal. 1102*
[2] *IL.R. 46 I.A. 72*
[3] *.IL.R. 10 Cal. 1102*
[4] *A.I.R. 1946 Lah. 180 at 188*
[5] *I.L.R. 40 Cal. 721 at 751*
[6] *AIR. 1926 Cal. 228*